YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1953

Volume I

Summary records of the fifth session

1 June - 14 August 1953

UNITED NATIONS

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NOTE

The present volume contains the summary records of the fifth session of the Commission (184th to 240th meetings); in accordance with General Assembly resolution 987 (X) of 3 December 1955, they are printed in English only; they include the corrections to the provisional summary records which were requested by members of the Commission and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session were incorporated in the summary records.

Volume II contains the studies, special reports and principal draft resolutions presented to the Commission for or during its fifth session. In accordance with resolution 987 (X), they are printed in their original language only.

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIFTH SESSION

184th MEETING

Monday, 1 June 1953, at 3.45 p.m.

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Chairman: Mr. Ricardo J. ALFARO; later: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Gilberto AMADO, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Opening of the session

1. The CHAIRMAN said that it fell to him, as Chairman of the fourth session of the International Law Commission, to declare open the fifth session and welcome the members.

Election of officers

2. The CHAIRMAN invited the Commission to proceed to the election of its officers for the fifth session.

3. Mr. SCELLE proposed Mr. J. P. A. François as Chairman.

4. Mr. YEPES seconded the proposal.

Mr. J. P. A. François was elected Chairman by acclamation, and took the Chair.

5. The CHAIRMAN expressed his appreciation of the honour which had been done him, and said that he would do his best to fulfil a task which was made the more difficult by the high standards set by his predecessors in the Chair.

6. Furthermore, he was responsible for three reports[1] that were before the Commission. He hoped members would agree that, when those reports were being considered, the First Vice-Chairman should take the Chair.

7. He invited members to submit nominations for the offices of First Vice-Chairman, Second Vice-Chairman and Rapporteur.

8. Mr. SCELLE proposed Mr. G. Amado as First Vice-Chairman, Mr. F. I. Kozhevnikov as Second Vice-Chairman and Mr. H. Lauterpacht as Rapporteur.

9. Mr. YEPES seconded the proposal.

10. Mr. SANDSTRÖM wholeheartedly supported the nomination of Mr. G. Amado as First Vice-Chairman. The Commission was well aware of his qualities, and had had occasion to appreciate the value of his services as Rapporteur.

Mr. G. Amado was elected First Vice-Chairman by acclamation.

11. Mr. AMADO thanked the Commission for the confidence it had placed in him, which he would do his best to justify.

12. Mr. ZOUREK supported the nomination of Mr. F. I. Kozhevnikov as Second Vice-Chairman. Mr. Kozhevnikov had made positive contributions to the Commission's work at the last session, which had been the first he had attended.

Mr. F. I. Kozhevnikov was elected Second Vice-Chairman by acclamation.

13. Mr. KOZHEVNIKOV expressed his gratitude to the Commission and said that he would endeavour to help it in its tasks, particularly in achieving a progressive development of international law and the codification thereof in accordance with those principles which reflected the aims, purposes and awareness of progressive humanity.

14. Mr. AMADO seconded the nomination of Mr. H. Lauterpacht as General Rapporteur. His election would be particularly auspicious in view of the Commission's heavy agenda.

Mr. H. Lauterpacht was elected General Rapporteur by acclamation.

15. Mr. LAUTERPACHT thanked the Commission, and said that he would serve it to the best of his ability.

Motion by Mr. Kozhevnikov

16. Mr. KOZHEVNIKOV said he wished to make the following statement. Article 8 of the Statute of the International Law Commission laid down that, in the

[1] Documents A/CN.4/60, A/CN.4/61 and A/CN.4/69.

Commission as a whole, representation of the main forms of civilization and of the principal legal systems of the world should be assured. One of the main forms of civilization and one of the principal legal systems of the world were represented by the People's Republic of China, which was not, however, represented in the Commission. The presence therein of a representative of the Kuomintang must necessarily provoke surprise and protest. He would therefore formally move that Mr. Hsu be excluded from the Commission, and that in accordance with article 11, a representative of the People's Republic of China be invited to fill the vacancy in order that the provisions of article 8 might be fully inplemented.

17. The CHAIRMAN recalled that a similar motion had been submitted to the Commission on an earlier occasion, when it had been ruled out of order. The Commission was not competent to exclude a member on the basis of article 8. Its members did not represent their countries, but had been elected in their personal capacity for a period of three years, subsequently prolonged by a further two years.

18. Unless Mr. Kozhevnikov was prepared to withdraw his motion, he would have to follow the precedent set by the Chairman of the Commission at its second session, and rule the motion out of order.[2]

19. Mr. KOZHEVNIKOV was unable to agree with the Chairman's interpretation, and maintained his motion.

20. Mr. Lauterpacht supported the Chairman's interpretation, and considered that the motion should be ruled out of order.

21. The CHAIRMAN ruled Mr. Kozhevnikov's motion out of order.

22. Mr. KOZHEVNIKOV challenged the Chairman's ruling on the ground that a Kuomintang man could not represent the legal system of China.

23. Mr. ALFARO and Mr. SANDSTRÖM requested that a vote be taken by show of hands on the challenge to the Chairman's ruling.

24. A vote having been taken by show of hands, *the Chairman's ruling was upheld by 7 votes to 2.*

Consideration of the provisional agenda for the fifth session (A/CN.4/62)

25. The CHAIRMAN invited the Secretary to the Commission to make a statement on the documents available in relation to each item of the provisional agenda (A/CN.4/62).[3]

26. Mr. LIANG (Secretary to the Commission) said that all documents were available both in English and in French for item 5 (nationality, including statelessness). The documents relating to items 2 and 3 (régime of the high seas and régime of the territorial sea respectively) were nearly complete. Several days must elapse before the report on item 4 (law of treaties) was available in French.

27. If the Commission felt that the order in which the items of the agenda were taken should be based on the availability of documents, he would suggest that a start be made with item 5.

28. Faris Bey el-KHOURI considered that, before starting on its agenda, the Commission should take cognizance of the action and decisions taken by the General Assembly on the Commission's report on its fourth session (A/2163).[4] He noted that the relevant General Assembly resolution had not been included in the documents distributed to members.

29. Mr. LIANG (Secretary to the Commission) replied that the General Assembly had not discussed the Commission's report on its fourth session, since it mainly consisted of a draft on arbitral procedure which was being circulated to governments for their comment, while the rest was merely a progress report. The General Assembly had discussed certain items arising out of the Commission's report on previous sessions, such as the question of an international criminal court and the question of defining aggression.

30. The CHAIRMAN, noting the Secretary's suggestion that the Commission begin with item 5, pointed out that the special rapporteur for that item, Mr. Córdova, had not yet arrived. He was expected to reach Geneva in two or three days' time.

31. Mr. LIANG (Secretary to the Commission) suggested that the Commission might devote its next meeting to certain administrative matters. The present session was the last that the Commission would hold with its existing membership. The question arose of the date of termination of the offices of the members and special rapporteurs. Should they cease work at the end of 1953 or continue until the opening of the sixth session?

32. Furthermore, the Commission would have to examine the situation with regard to the date and place of its sixth session. The General Assembly had at its

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[2] See *Yearbook of the International Law Commission, 1950*, vol. I, 39th meeting, paras. 2-20.

[3] Document A/CN.4/62 read as follows:

"1. Arbitral procedure.

"2. Régime of the high seas.

"3. Régime of the territorial sea.

"4. Law of treaties.

"5. Nationality, including statelessness.

"6. Draft code of offences against the peace and security of mankind.

"7. Request of the General Assembly concerning the codification of the topic 'diplomatic intercourse and immunities'.

"8. Date and place of the sixth session.

"9. Other business."

[4] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163). Also in *Yearbook of the International Law Commission, 1952*, vol. II.

last session drawn up a four-year programme of conferences (resolution 694 (VII)), the purpose of which was to ensure a better distribution of work between Headquarters and the European Office at Geneva. The International Law Commission had been scheduled to meet in Geneva in 1954, but the General Assembly had recommended that its session should not overlap with that of the Economic and Social Council. Since the latter would be meeting in Geneva in July and August, the International Law Commission would be able to start its sixth session on 15 August and continue until the beginning of October. It was for the Commission to decide whether the present members should take a decision affecting future members. Should the Commission decide on that ground to refrain from taking a decision, the Secretary-General would exercise his discretion in fixing the time and place of the next session.

33. The CHAIRMAN requested the Secretary to set out the topics he had mentioned as items for discussion at a private meeting on administrative questions the following day.

34. Mr. ZOUREK wished to propose the inclusion in the provisional agenda of another item — namely, consideration of means of ensuring that dissenting opinions were recorded in the Commission's report. The question of the presentation of dissenting opinions had long since been solved by the International Court of Justice: in the Commission's case, however, with one or two exceptions, the reports submitted to the General Assembly did not give a complete picture of the various opinions expressed by members. He considered it advisable that a decision should be taken once and for all, in order to eliminate unnecessary discussions in the future, and to facilitate the work of governments and the General Assembly in studying the Commission's reports.

35. He would make a formal proposal in that sense in due course.

36. Mr. YEPES supported Mr. Zourek's suggestion, and added that, as he had consistently maintained at previous sessions, the Commission's report to the General Assembly ought to reflect accurately, faithfully and impartially the course of its debates throughout the session. He regretted to note that, in his opinion, some of the Commission's reports transmitted to the General Assembly, in particular the report covering the work of its third session which contained a chapter on reservations to multilateral conventions, did not fulfil the necessary conditions.[5]

37. Mr. SCELLE also supported the suggestion, adding that the eventual inclusion of that item in the Commission's agenda should not be interpreted as reflecting any lack of confidence in the Rapporteur.

38. Mr. KOZHEVNIKOV also supported the suggestion.

39. Mr. ALFARO said that the Commission had already heard his views about dissenting opinions on previous occasions. He would not oppose Mr. Zourek's suggestion, since it was limited to proposing that that particular item be placed on the agenda. In point of fact, the Commission had recorded its views on the subject by a majority vote, and it might be found expedient to confine the discussion on the present occasion to the kind of dissenting opinions which should be accepted for inclusion in the Commission's final reports. Interpreting the suggestion in that sense, he was prepared to support the inclusion of the proposed item in the agenda.

40. Mr. SANDSTRÖM was also prepared to accept Mr. Zourek's suggestion, although he felt that, since the Commission had already taken a decision on the matter,[6] it ought really to fall to the newly elected members at the Commission's next session to consider the issue afresh.

41. The CHAIRMAN stated that the consensus of opinion was clearly in favour of the inclusion in the agenda of the item suggested by Mr. Zourek, and invited the latter to put his proposal in writing, together with a statement of the reasons therefor.[7]

42. He would draw the Commission's attention to the fact that it had a very full ageda to dispose of during a ten weeks' session, so that there would barely be time to study new items thoroughly.

43. Mr. LAUTERPACHT drew attention to the fact that the Commission had not yet examined the provisional agenda, which, in his view, should be adopted as soon as possible. He would have some comments to make on the agenda in relation to the preparation of documents by the Secretariat.

44. Mr. LIANG (Secretary to the Commission), replying to a further question from Faris Bey el-KHOURI as to the action taken by the General Assembly on the Commission's report on its fourth session, read out General Assembly resolution 683 (VII) of 6 November 1952 on the Commission's report on the work of its fourth session; it ran as follows:

"*The General Assembly,*

"*Pending* its consideration in due course of the questions dealt with in the report of the International Law Commission covering the work of its fourth session;

"*Takes note* of the report."

45. Faris Bey el-KHOURI assumed that the Commission would take note of that resolution.

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[5] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). Also in *Yearbook of the International Law Commission, 1951*, vol. II.

[6] See *Yearbook of the International Law Commission, 1949*, vol. I, 36th meeting, paras. 14-20, and 37th meeting, paras. 42-59; *Yearbook of the International Law Commission, 1951*, vol. I, 128th meeting, paras. 1-57.

[7] See *infra*, 195th meeting, para. 1.

46. Mr. LIANG (Secretary to the Commission), reverting to the question of the provisional agenda, recalled that at previous sessions the Commission had at an early stage of its work adopted the provisional agenda in so far as its contents were concerned, but without taking a decision on the order of the items listed therein. It was inexpedient to lay down a hard and fast order for the consideration of the items.

47. Answering Mr. Lauterpacht, he stated that the Commission would be able to consider item 1 on arbitral procedure at the beginning of the session, since the documents were nearly ready. The documents for item 4 would be ready the following week.

48. Mr. LAUTERPACHT said he thought it desirable not only to adopt an agenda, but to decide the order in which the items should be taken. He would propose that the Commission should adopt the following order: nationality, including statelessness (item 5); arbitral procedure (item 1), of which subject the Commission should dispose at that session; régime of the high seas, including the question of the continental shelf (item 2); the law of treaties (item 4), which had been on the agenda for some years; draft code of offences against the peace and security of mankind (item 6); régime of the territorial sea (item 3); the question of taking up the subject of diplomatic intercourse and immunities (item 7); and, lastly, the question of dissenting statements raised by Mr. Zourek.

49. Mr. SCELLE said that, in view of the work already done on arbitral procedure and of the suggestions received from governments, some of which, those from the United States, United Kingdom and Netherlands Governments, for example,[8] were most useful, it should be possible to dispose of that item quickly. He supported the Secretary's proposal that the administrative points mentioned by the latter should be discussed at the next meeting.

50. Mr. AMADO, agreeing with the previous speaker, said that the item on arbitral procedure should certainly be taken early. The subject had already been fully examined, and the Commission should formulate its conclusions as rapidly as possible.

51. After Mr. SANDSTRÖM and Mr. YEPES had signified their agreement with the proposal that the subject of arbitral procedure be taken up with the minimum of delay, Mr. KOZHEVNIKOV observed that the procedural problems the Commission was encountering sprang from the inability of the Secretariat to provide the necessary documents, the lack of which inevitably hindered the Commission's work. Nevertheless, once the documents had been distributed, the order of items on the provisional agenda should not raise any difficulties. As to the immediate programme, he thought that Mr. Zourek's motion should be discussed first, after which the Commission could follow the Secretary's suggestion.

[8] Document A/CN.4/68.

52. The CHAIRMAN said that the next private meeting could be devoted to administrative questions, and that the Commission could consider the question of nationality, including statelessness, on Wednesday, provided Mr. Córdova had arrived. If, however, Mr. Córdova was then still absent, he would suggest that Mr. Zourek's proposal be discussed. The following week should see the documents on arbitral procedure completed, and the Commission would be free to take up that item then.

53. He thought that it would be helpful if the Secretariat, after consultation with him and the special rapporteurs, were to produce a time-table to which the Commission could work.

54. Mr. LAUTERPACHT suggested that, in view of the heavy agenda, it might be advisable to study a few items thoroughly rather than to give only superficial attention to all.

55. The CHAIRMAN observed that, in the last year of the present members' term of office, with the consequent uncertainly about the future, it would be a pity if the Commission were to leave in abeyance subjects upon which it had already worked.

56. He then welcomed Mr. Radhabinod Pal, who had succeeded Sir Benegal Rau as a member of the Commission.

57. Mr. LIANG (Secretary to the Commission) said he had every hope that Mr. Córdova would arrive in Geneva within 48 hours, which would permit a speedy discussion of the subject of nationality, including statelessness.

58. In reply to the Chairman, he said that Mr. Hudson had written expressing his regret at his inability to attend the opening of the session, but stating that, if his recovery was maintained, he hoped to re-join the Commission at the beginning of July.

59. The CHAIRMAN suggested that a telegram be sent to Mr. Hudson expressing the Commission's regret at his absence and its warmest wishes for his speedy restoration to health.

It was so agreed.

The meeting rose at 5.30 p.m.

185th MEETING

Wednesday, 3 June 1953, at 9.45 a.m.

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Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radbahinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the provisional agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40)

1. The CHAIRMAN said that, as the text of Mr. Zourek's proposal concerning the inclusion of dissenting opinions in the Commission's reports had not yet been distributed, the Commission would take up item 1 on its agenda. He proposed that it confine itself to considering whether the comments from ten governments (A/CN.4/68 and Add.1) on the draft on arbitral procedure circulated to governments the previous year (A/CN.4/59)[1] called for any modifications to the text of the draft. The most appropriate procedure would be to examine *seriatim* those articles on which governments had made observations. The numerous complex and controversial issues dealt with at the previous session should not be re-opened.

2. Mr. KOZHEVNIKOV asked why the Commission was to take up item 1 before disposing of the administrative matters raised at the private meeting held the previous day.

3. The CHAIRMAN explained that discussion of those matters would be resumed after members had had time to reflect on the provisional decisions taken at the private meeting.

4. Mr. KOZHEVNIKOV doubted whether it would be appropriate for the Commission to embark upon item 1, since replies had so far been received from only ten governments.

5. Mr. SCELLE (Special Rapporteur), referring to a point raised by Faris Bey el-Khouri at the private meeting, said that the Commission might have to consider what was a reasonable time-limit for governments to submit their observations. In the present instance, however, he did not think that the fact that only ten governments had replied should preclude the Commission from finally disposing of the draft on arbitral procedure at the present session.

6. The CHAIRMAN said that, admittedly, not many governments had commented on the draft, but that was not unusual. Much the same thing had occurred in the case of the report on the régime of the high seas — even though the time-limit had been extended — and that of the territorial sea. As members' term of office would expire at the end of 1953, it would be impossible to submit to the General Assembly a final report on arbitral procedure if the Commission waited for more replies to come in from governments. He therefore believed it imperative to take up item 1 without delay.

7. Mr. SCELLE agreed with the Chairman.

8. Mr. SANDSTRÖM also agreed with the Chairman, and pointed out that any further replies from governments that might be received during the session could be examined then.

9. Faris Bey el-KHOURI proposed that, when transmitting its report to governments for comment, the Commission should in the future fix a time-limit consistent with the requirements of each particular case.

10. He did not feel that any more replies on arbitral procedure were to be expected; the Commission could therefore formally declare that a "reasonable time" had elapsed, and take up the subject immediately.

11. Mr. LIANG (Secretary to the Commission) said that although the Commission itself had not stipulated any time-limit for the submission of comments by governments, the Secretary-General, in transmitting its report to governments, had asked for replies by 1 March 1953, on the assumption that consideration of arbitral procedure was to be completed at the present session. Replies had in fact been included in document A/CN.4/68 after 1 March 1953.

12. Mr. LAUTERPACHT said that the Commission had implicitly indicated in paragraph 14 of its report on the fourth session, where it was clearly stated that a final draft on arbitral procedure would be drawn up at the fifth session, what it meant by a "reasonable time" for the submission of comments in the case in point.[2]

13. Faris Bey el-KHOURI said that, in the light of the Secretary's explanation, he would not press his proposal that the Commission formally declare that in that case a "reasonable time" had elapsed.

14. Mr. KOZHEVNIKOV said that such replies as had already been received from governments reflected the importance and complexity of the draft on arbitral procedure. He doubted whether there were good grounds for assuming that equally weighty comments would not be submitted later.

15. Mr. ZOUREK observed that, if the Commission were to examine the draft in the light of the comments of ten governments only, the General Assembly might well refer it back for further review.

16. The CHAIRMAN said that, although the number of States which had replied was not great, any which considered the time-limit unduly stringent would pre-

[1] The draft contained in document A/CN.4/59 is identical to that contained in document A/2163. See *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, or *Yearbook of the International Law Commission, 1952*, vol. II.

[2] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), para. 14. Also in *Yearbook of the International Law Commission, 1952*, vol. II.

sumably have so informed the Secretary-General. He did not feel that the possibility mentioned by Mr. Zourek ought to deter the Commission from proceeding with its work. The General Assembly was unlikely to give less weight to the results simply because the comments from ten governments only had been taken into account.

17. Mr. SCELLE said that silence might justifiably be interpreted as agreement. As Politis had argued in his book *La Justice internationale*,[3] where arbitration was concerned governments fell into two categories: the democracies, which were very interested in it; and the autocracies, which were not in the least interested because they were unwilling to submit to procedures of that kind. The replies received demonstrated the truth of that view, and he felt that the very interesting comments, notably those of the Netherlands, United Kingdom and United States Governments, would reinforce the whole structure of the draft, and justified the Commission in embarking forthwith on item 1. There was no need, of course, to re-open the discussion on any article on which no observations had been submitted. It should be remembered that the draft had already been given several readings.

18. Mr. ALFARO considered that the Commission should not allow its work to be held up by the dilatoriness of those governments which had neglected to comment on the draft, either because they had no objections to it, or out of indifference. The draft represented real and effective progess in international law. If any government was not prepared to accept such a system of arbitral procedure, or feared that it went too far along the road to the reign of law and justice, it could state its position in the General Assembly. In the meantime, the Commission, which had already given long and careful consideration to the draft on arbitral procedure, should complete its work on the subject without delay.

19. Mr. KOZHEVNIKOV said that he would confine himself to the practical problem facing the Commission and would not touch upon the dubious, arbitrary or irrelevant observations as to the qualifications of states, which certain members of the Commission had permitted themselves. It seemed to him hardly realistic for the Secretary-General to have fixed 1 March 1953 as the time-limit for the submission by governments of comments on the draft. Even the few replies so far received reflected serious misgivings on the part of governments. He therefore moved that the Commission declare it impossible to start examining the comments by governments on arbitral procedure at a time when only ten replies had been received.

20. Mr. YEPES believed that governments had been given plenty of time in which to comment. In the absence of observations, their tacit acceptance of the draft must be assumed. The Commission had already discussed in great detail the drafts submitted by the special rapporteur, and it would be entirely contrary to the aspirations of peoples, and of all who wished to see arbitral procedure scientifically regulated, further to defer consideration of the comments so far received.

21. Mr. HSU agreed that the Commission should proceed forthwith to consider the comments by governments. His experience in the Sixth Committee of the General Assembly led him to the conclusion that ten replies was a reasonable figure. At any rate those replies represented a cross-section of the views of members of the United Nations as a whole, and could therefore be profitably discussed.

22. The CHAIRMAN put Mr. Kozhevnikov's motion to the vote.

Mr. Kozhevnikov's motion was rejected by 10 votes to 2.

23. Mr. LAUTERPACHT proposed that the Commission proceed immediately to examine the draft on arbitral procedure article by article, in the light of the comments submitted by governments.

24. Mr. ZOUREK pointed out that, since certain governments (A/CN.4/68) had touched upon basic questions of principle affecting the concept underlying the draft and its structure, a preliminary general discussion was necessary.

25. Mr. SCELLE said that his examination of the comments had led him to the opposite conclusion. Only one reply out of the ten — that of Belgium — touched upon the general principles underlying the draft. Indeed, the reply of the Belgian Government appeared to him a little odd, inasmuch as it seemed to him to take no account of the existence of the Hague Convention for the Pacific Settlement of International Disputes of 1907 or of the General Act for the Pacific Settlement of International Disputes of 1928, revised in 1949.

26. The Belgian Government appeared to be in favour of making a clean sweep and of reverting to a concept of arbitration which had prevailed over half a century earlier. It was true that the Indian Government had made certain reservations, but in principle it was in agreement with the draft. The United States and United Kingdom Governments had not only accepted the Commission's concept of arbitration, but had also sought to reinforce it in certain respects. The replies had therefore been, on the whole, favourable.

27. Before proceeding to the examination of each individual article, however, one point should be elucidated, namely, what was to be done with the draft. It was, of course, open to the Commission under article 23 of its Statute to recommend to the General Assembly that the draft be cast in the form of a draft convention. If that were to be done, States might legitimately ask whether they would be allowed to enter reservations to such a convention, particularly if they had already entered into an obligation to arbitrate under existing international instruments. He would like to make it clear that, in his view, States were entirely free to adopt such a new convention with reservations. The Commission would be proposing a model convention similar

[3] N. Politis, *La Justice internationale* (Paris, Hachette, 1924).

to that prepared by the League of Nations and adopted as the General Act.

28. Mr. KOZHEVNIKOV observed that, as the Commission had not been deterred by the small number of replies from governments, it should not burke a general discussion on the grounds that only one government had raised objections of principle.

29. Mr. SCELLE, speaking as the Special Rapporteur responsible for the draft, said that he was obliged to repudiate Mr. Kozhevnikov's argument. The basic principles of the draft had already been the subject of exhaustive discussion on three separate occasions.

30. The CHAIRMAN observed that general problems would inevitably be discussed as each article was taken up.

31. Mr. ZOUREK said that Mr. Scelle himself had admitted that some of the replies from governments touched upon general questions which required further eludication, and might give rise to differences of opinion. The Indian Government, for instance, had expressed reservations about article 2, which was of crucial importance inasmuch as it would transform the traditional concept of arbitration. He therefore reiterated his conviction that time should be allowed for a general discussion.

32. Mr. AMADO said that he had already at previous sessions expounded his views on the draft, which bore so clearly the imprint of its author. He paid a tribute to Mr. Scelle for the sincere and candid way in which he admitted how far he had departed from the traditional theory of arbitration. However, since his (Mr. Amado's) personal view that Mr. Scelle's draft struck a mortal blow at arbitral procedure as hitherto understood had not been accepted, he would defer to the will of the majority, and accordingly remain silent during the general discussion.

33. Mr. SCELLE observed that Mr. Amado's general criticism that the draft was too juridical in character, and failed to take into account certain political factors, had been taken up by the Brazilian Government.

34. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the Commission proceed immediately with the consideration of the draft on arbitral procedure, article by article, in the light of the comments presented by governments.

Mr. Lauterpacht's proposal was adopted by 10 votes to 2.

ARTICLE 1

35. Mr. SCELLE said that the only observation on article 1 was a minor one by the Chilean Government, concerning the translation of the word "différends" ("disputes").

36. Mr. PAL asked whether article 1 would apply to existing undertakings to arbitrate.

37. Mr. SCELLE explained that States accepting the arbitral procedure proposed would be free to apply it to their prior undertakings or not.

38. Mr. PAL said that, if the system was to be retrospective, provision would have to be made to enable States to make reservations concerning any previous undertakings to arbitrate.

39. Mr. ALFARO thought that article 1, paragraph 1, which was optional and not mandatory, was sufficiently clear and required no modification.

40. Mr. SANDSTRÖM said that Mr. Pal was taking up a point raised by the Norwegian Government when it stated that: "... it is not clear from the present draft whether the convention resulting from the draft would replace older bilateral or multilateral treaties on international arbitral procedure... or whether it would be supplementary to such treaties as between States parties to them."

41. Mr. LAUTERPACHT observed that Mr. Pal and Mr. Sandström had raised two separate issues. The former had asked whether an undertaking to arbitrate already entered into should be governed by a convention on arbitral procedure, such as proposed in the present draft, after that convention had been accepted by a State. The latter had asked whether such a convention would replace previous conventions on arbitral procedure existing between the contracting parties. With regard to the first issue, he considered that it would be useful to insert a provision stating that, in acceding to the convention, the contracting parties would be at liberty to stipulate whether or not it applied to previous specific undertakings to arbitrate into which they might have entered. The answer to the second question was to be found in the general principle that a subsequent treaty abrogated any previous treaty inconsistent with it.

42. Mr. SCELLE observed that any procedural rules always had retrospective effect. If, therefore, States were to adopt a new convention on arbitral procedure without reservation as to its application, it would govern all previous undertakings to arbitrate affecting them. If the retrospective principle were admitted, the only problem which could arise would be when a case was already being heard under the procedure laid down in a previous agreement.

43. He did not consider that there was any need for a special provision dealing with retrospective effect.

44. Mr. SANDSTRÖM said that there was an essential difference between ordinary legal procedure under municipal law, which was imposed upon the parties, and arbitral procedure, which was freely accepted by mutual agreement between the States parties to a dispute. Since the latter derived from the will of the parties, it was for them to decide whether a convention on the matter should operate retrospectively or not.

45. Mr. PAL pointed out that the draft was not entirely confined to procedural matters. A scrutiny of the rules showed that they dealt with such substantive issues as

the rights of the parties. He therefore re-affirmed his opinion that some clarification was necessary as to whether the rules were to apply to earlier undertakings to arbitrate.

46. The CHAIRMAN said that it followed from Mr. Lauterpacht's interpretation that the new convention would replace all previous conventions on arbitral procedure, and that States which acceded to it would be free to enter reservations in respect of their antecedent undertakings. Did the Commission agree?

47. Mr. SCELLE assumed that the appropriate place for a reference to that point would be in a final article on reservations.

48. Mr. LAUTERPACHT, speaking as Rapporteur, suggested that since the Commission appeared to be generally agreed on the issue of substance and since it was desirable that an appropriate article should be added as one of the final clauses of the convention, he would in due course submit a text, on which the Commission could take a formal decision.

It was so agreed.

49. Mr. SANDSTRÖM drew attention to the Chilean Government's comment on article 1, paragraph 3. It considered that the last clause reading "whatever the nature of the agreement from which it results" obscured the meaning which the text was intended to convey. In his opinion, too, the phrase was unnecessary, and should be deleted.

50. Mr. ALFARO pointed out that the last clause of paragraph 3 was really consequent upon paragraph 2, but the words "nature of the agreement" related to substance and not to form. Paragraph 2, on the contrary, dealt with form, since it referred to a written instrument.

51. Mr. LAUTERPACHT recalled that that clause had been discussed at great length at the fourth session, and had been adopted by the Commission for the reasons stated in paragraph 2 of the comment thereon, the relevant part of which read:

> "The paragraph does not mean, however, that the undertaking to arbitrate requires the conclusion of a convention or international treaty in the strict sense of those terms. For instance, it would be sufficient for the parties concerned to accept the resolution of the Security Council recommending them to have recourse to arbitration for the settlement of a specific dispute. In such a case the official records of the United Nations would provide the authentic text of the undertaking."

52. Mr. SCELLE concurred with Mr. Lauterpacht. Paragraph 2 had been included in article 1 since it was essential that an undertaking should be supported by a written text such as, for instance, a resolution of the Security Council.

53. The word "agreement" was ambiguous, since it might be interpreted as relating to an oral agreement — hence the necessity of the reference to a written instrument.

54. Mr. ALFARO considered that if the word "nature" were interpreted as meaning "form" (as Mr. Lauterpacht implicitly suggested) the Chilean Government's objection was well founded, and there was a contradiction between paragraphs 2 and 3. He supported Mr. Sandström's proposal that the final clause of paragraph 3 be deleted.

55. Mr. LIANG (Secretary to the Commission) said that, when preparing its commentary on the draft on arbitral procedure (A/CN.4/L.40), the Secretariat had also been struck by the fact that the phrase in question was somewhat obscure. In the light of the interpretation given in the comment, it should really be inserted in parargraph 2 of article 1, assuming always that the word "nature" was interpreted as meaning form.

56. He would therefore suggest that article 1 be amended by the deletion of the last clause of paragraph 3, and the insertion of the following words "in whatever form it may be" after the words "written instrument" in paragraph 2.

57. Mr. YEPES also favoured the deletion of the final clause, which added nothing to the article. He would suggest that paragraph 3 be deleted in its entirety and paragraph 2 amended to read:

> "The undertaking shall result from a written instrument. It constitutes a legal obligation which must be carried out in good faith."

58. Mr. SCELLE was opposed to the deletion of the last clause from paragraph 3 which should be amended to read "whatever the form of the instrument may be". That clause should, however, be inserted at the end of paragraph 2. Paragraph 3 would then read:

> "The undertaking constitutes a legal obligation which must be carried out in good faith."

59. A reference to a "written instrument" without further qualification was bound to be interpreted as meaning a treaty or an agreement, although as the comment stated, the document might be an official record of the United Nations. The Commission could not assume that its comments would necessarily be read by persons interpreting the text.

60. It followed that he preferred the word "form" to the word "nature", and the word "document" to the word "agreement" (*accord*).

61. Mr. LIANG (Secretary to the Commission) read out the relevant passage from the Secretariat's Commentary on the Draft on Arbitral Procedure (A/CN.4/L.40, p. 14), as follows:

> "The 'undertaking' or 'agreement' from which the 'legal obligation' to arbitrate results is one that may arise in a variety of circumstances and take various forms. The undertaking may be found in bilateral or multilateral treaties, in general arbitration treaties or in comprimissory clauses (*clauses compromissoires*) providing for the arbitration of disputes arising under particular treaties in which such a clause appears, or in some one of the numerous forms found

listed in Stuyt (*supra*). Paragraph 3 accordingly provided that the obligation to arbitrate is one 'which must be carried out in good faith, whatever the nature of the agreement from which it results'."

62. Mr. ALFARO considered that Mr. Scelle's solution was correct, and would rule out any possibility of misinterpretation. Paragraph 3 would then give the right kind of emphasis to the general rule laid down in paragraph 2.

63. Mr. SANDSTRÖM did not consider that that drafting change invalidated his point.

64. Mr. LAUTERPACHT agreed with Mr. Sandström that the final clause of paragraph 3 added nothing to paragraph 2, but would submit that it clarified the latter, since it referred to situations which might arise outside the framework of international treaties in the strict sense of that term.

65. The clause should therefore be retained.

66. Mr. AMADO also supported Mr. Scelle's proposal.

67. Mr. KOZHEVNIKOV maintained that there was a contradiction between paragraphs 2 and 3. Paragraph 2 referred to a written instrument; the term "nature" in paragraph 3 had a wider connotation.

68. Mr. SCELLE explained that it was precisely in order to remove the contradiction and to clarify the text that he had proposed his amendment.

69. Mr. SANDSTRÖM considered that if the last clause of paragraph 3 were appended to paragraph 2, the word "nature" would be preferable to the word "form". He interpreted the word "nature" as covering a treaty, an agreement, a protocol or an official record.

70. Mr. SCELLE held that the term "nature" inferred a substantive element. That was why he had chosen the word "form".

71. Mr. SANDSTRÖM accepted Mr. Scelle's interpretation and withdrew his proposal that the last clause of paragraph 3 be deleted.

72. Mr. AMADO reminded the Commission of the implications in law of the word "form". An overscrupulous interpreter might well consider that it excluded resolutions of the Security Council.

73. Mr. SCELLE disagreed, holding that such an interpretation would affect a point of substance. In the present instance, the word "form" was used with strict reference to the form of the document.

74. Mr. KOZHEVNIKOV, on a point of order, asked that the constituent paragraphs of each article be put to the vote before the articles were voted on as a whole.

Paragraph 1 of article 1 was adopted unanimously.

Paragraph 2 of article 1, as amended, was adopted by 10 votes to none, with 2 abstentions.

75. Mr. HSU explained that he had abstained from voting on paragraph 2 because he did not consider the formula "written instrument" satisfactory. He regretted that he was unable to suggest a substitute off-hand.

Paragraph 3, as amended, was adopted unanimously.

ARTICLE 2

76. Mr. SCELLE observed that the Indian Government had stated (A/CN.4/68, page 10) that in its present form article 2 was unacceptable. The United States Government suggested the inclusion in the article of a reference to the provisions of paragraph 2 of Article 35 of the Statute of the International Court of Justice (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10). The United Kingdom Government's comments showed approval by implication.

77. The Commission could not accept the Indian objection, since its decision had been firm on a point where the draft did make an innovation. The United States proposal was acceptable, since it would make the text more precise.

78. Mr. ALFARO and Mr. SANDSTRÖM supported the United States proposal.

79. Mr. KOZHEVNIKOV wished to state his general conclusions not only on article 2, but on the whole draft on arbitral procedure. In a number of respects, the draft was based on generally accepted rules of arbitral procedure; it reflected the character of arbitration as commonly understood, recording the essential features that distinguished it from judicial procedure and affirming a number of indisputable judicial principles and judicial practices. From that point of view, no exception could be taken to the draft since, generally speaking, it followed the usual conception of a code for arbitral procedure. Articles 1, 4 and several others afforded examples of that, and he had voted in favour of article 1.

80. As a whole, however, the draft was unacceptable, since it violated the principle of voluntary arbitration and took no account of the sovereignty of States parties to an undertaking to arbitrate. In other words it deviated markedly from traditional arbitral procedure.

81. Articles 2, 28, 29, 31 and several others clearly illustrated that point. They provided for interference by the International Court of Justice or by its President in the initiation of arbitral procedure as well as in the rendering of an award. Articles 6 and 16, for instance, provided for the right of the tribunal to decide the extent of its own competence and to give a broad interpretation to arbitrate, thus unduly extending the rights of the tribunal and transforming it into a kind of supranational court.

82. The fact that the word "tribunal" was used in the draft was significant. In the English and French texts the word "arbitral" was often omitted, the word "tribunal" being used alone.

83. It was impossible to expect that States which might later be asked to accept the draft would agree to provisions which radically changed the very nature of arbitration.

84. A study of the comments submitted by governments led to the same conclusion. A number of those governments had been impelled to raise serious objections both on general matters of principle and in respect of specific articles. The Belgian Government (A/CN.4/68, No. 1 or A/2456, Annex I, No. 2) had made abundantly clear its doubts whether the majority of States would accept the draft, based as it was on a so-called concept of "judicial arbitration"; it considered the Commission's proposal unacceptable since it conflicted with the traditional concept of arbitration, by which the parties to the dispute had themselves the right to decide the susceptibility of the dispute to settlement by arbitration, to select the arbitrators and to fix the limits of the *compromis*. The Belgian Government consequently drew the conclusion that the draft should be amended. A similar, and in general unfavourable, view of the principles on which the draft was based was taken by the Indian Government (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5).

85. Individual articles too had provoked fundamental objections from governments. Thus, the Indian Government pointed out that it was unable to accept articles 2, 16, 28, 30, 31 and 32. The United States Government considered that article 16, relating to the competence of the tribunal, went too far. The comments of the Netherlands Government (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) showed that it feared that acceptance of the draft would hinder the practical application of arbitral procedure.

86. In the light of what he had said, he believed that the Commission should proceed with the greatest caution, and seriously consider the possibility of reviewing the draft.

87. Mr. SCELLE said that the Commission could not abandon an article which provided the foundation for the whole structure of the draft. It was clear from the United Kingdom Government's comment (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9) that it accepted article 9 by implication. As to article 2, he was prepared to follow the United States proposal and include a reference to paragraph 2 of article 35 of the Statute of the International Court of Justice.

88. Mr. ZOUREK recalled that he had expressed his views on article 2 at the fourth session,[4] and merely wished to reiterate, in the light of the comments submitted by governments, the main premise of his argument.

89. He, too, was opposed to article 2, on the grounds that international arbitration rested on the will of the parties to a dispute, and that an arbitral tribunal could in no sense be a court; it merely provided the basis for an agreement expressed in an undertaking or a *compromis*. He was convinced that the draft rules sought to change the very nature of arbitral procedure, and that they would make States reluctant to proceed to arbitration. Indeed, article 2 was the article the farthest removed from the traditional conception, and its provisions were not procedural, but tended to impose substantive obligations. In general, when two States concluded an arbitral undertaking they reserved the right to judge of the arbitrability of a dispute and of the appropriateness of setting up a tribunal, should a dispute occur. Article 2 deprived States of that prerogative, and awarded it to an international organ, and hence, he feared, would prove to be the main obstacle to the acceptance of the draft. Indeed, to follow the argument of article 2 to its logical conclusion, it would seem that if States were prepared to accept so new and so different a procedure there was no reason why they should not take disputes straight to the International Court of Justice.

90. For those reasons he proposed that article 2 be deleted.

91. Mr. KOZHEVNIKOV supported Mr. Zourek's point about article 2. As to the whole project, he considered that it was not in accordance with the tasks assigned to the Commission, inasmuch as the latter had merely been entrusted with the codification of international law and its progressive development, which did not authorize it to make radical changes in existing standards. He held, therefore, that it was essential to redraft several articles, in particular those he had mentioned previously, because as they stood they were contrary to existing international law. The Commission should decide to make such changes in the present draft on arbitral procedure as would make it conform to the juridical concept of arbitration.

92. Mr. SANDSTRÖM did not share the views expressed by Mr. Kozhevnikov and Mr. Zourek. Had the Commission been simply entrusted with the task of codifying existing practice, there would have been no need for it to undertake a thorough study of arbitral procedure. But the Commission had also to endeavour to contribute to the development of international law, and article 2 expressed such progress. He was therefore in favour of retaining it.

93. Mr. ALFARO said that article 2 raised the issue whether in future arbitral procedure would be a reality, or just a polite fiction. The whole system would be pointless if governments retained the right to determine the arbitrability of a dispute. He, too, was in favour of retaining the article.

94. Mr. YEPES, supporting Mr. Scelle and Mr. Alfaro, conceded Mr. Zourek's point that arbitral procedure rested on the will of States. But the factor of free will came into play only at the initial stage. Once two States had agreed to arbitrate, they were no longer free to withdraw from their undertakings. It was really too easy for States to invoke the argument of the non-arbitrability of a dispute. The Commission had done well to accept article 2 at the fourth session. It should be maintained and the United States proposal added on to it.

95. Mr. HSU considered that article 2 filled an important gap in arbitral procedure.

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 138th meeting, para. 61.

96. Faris Bey el-KHOURI said that, according to Moslem law, arbitration depended on the free will of States or persons. Article 2, however, placed responsibility on the International Court of Justice, and was consequently unacceptable. For it followed from that article that the Court would be able to oblige a State to accept a certain interpretation. He was therefore unable to agree to its retention.

97. Mr. LAUTERPACHT said that the very purpose of the article — and, indeed, of the whole draft — was to give effect to the will of the parties and to ensure that, once the parties had agreed to arbitrate, neither would be able to frustrate the process. That was the central aspect of the draft now before the Commission. If. Mr. Kozhevnikov's view were accepted, the undertaking would be no better than a scrap of paper. That was exactly what the Commission wished to prevent.

98. He would vote in favour of article 2.

99. Mr. Scelle said that, carrying Mr. Lauterpacht's argument a stage further, it was clear that in adopting article 2 the Commission had given practical expression to the principle laid down in article 1, namely, that the undertaking constituted a legal obligation that had to be carried out in good faith. That was where the free will of States was circumscribed. Otherwise it would be too easy for States to claim exceptions. In that connexion, he would draw attention to the United Kingdom Government's general comments. That government strongly supported the conception that judicial arbitration was based on the necessity of provision being made for safeguarding the efficacy of the obligation to submit the case to arbitration in all cases in which it might happen that, after the conclusion of the arbitration agreement, the attitude of the parties threatened to render nugatory the original undertaking.

100. Mr. AMADO said that he would either maintain his original vote on the article, or abstain on the basis of the Netherlands Government's position concerning the need to include a clause providing for an opportunity to accept the convention with reservations. He was unable to accept Mr. Lauterpacht's view. There was no getting away from the fact that article 2 brought the International Court of Justice into play. But arbitration was not a judicial procedure. The comments of the Netherlands Government were insipred by very sound sense. If arbitral procedure were to die out, that would also be a stage in the development of international law, and why then should the Commission endeavour to arrest a natural development? He remained unconvinced by Mr. Scelle's arguments and, believing that arbitration should in no way be linked with the procedures of the International Court, he would abstain from voting on the article.

101. Mr. SCELLE drew Mr. Amado's attention to the fact that the logical outcome of his view of the sovereignty of States (as previously expressed) would be entirely to vitiate the provisions of paragraph 2 of Article 36 of the Statute of the Court. But that paragraph existed, and its provisions constituted an essential element of positive law today. The Commission was proposing a step forward in respect of arbitral procedure. States which did not approve it would be free to enter an appropriate reservation.

102. Mr. AMADO replied that the applicability of paragraph 2 of Article 36 related to the Statute of the International Court of Justice.

103. Mr. ZOUREK said that no one contended that States which had entered into a firm undertaking could try to withdraw from it. But there were cases when States had concluded an undertaking only in principle. It was precisely there that the crucial difficulty of article 2 lay.

104. Mr. PAL considered that article 2 was very bold in its conception, and that to maintain it in its present form might lead to the fears of the Netherlands Government being justified.

105. Mr. KOZHEVNIKOV noted that the majority of members considered that article 2 represented progress. He maintained, however, that it was really a step backwards. Progress must be judged in terms of practical results, and he was convinced that if article 2 were adopted it would make States extremely reluctant to embark on arbitral procedure, with the result that the development of arbitration would be smothered. He earnestly counselled caution, since it would be highly regrettable if the Commission did the cause of international law a disservice.

106. The CHAIRMAN said that after the full discussion which had been held, he would put article 2 to the vote.

Paragraph 1 was adopted by 7 votes to 4, with 1 abstention.

Paragraph 2 was adopted by 7 votes to 4, with 1 abstention.

107. Mr. SANDSTRÖM proposed that the United States amendment (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) to article 2 form paragraph 2, the existing paragraph 2 being re-numbered 3.

108. Mr. SCELLE agreed.

109. Mr. YEPES considered that reference should be made not only to paragraph 2 of Article 35 of the Statute but to paragraph 3 also, because both paragraphs related to States which were neither Members of the United Nations nor parties to the Statute of the International Court.

110. Mr. SCELLE, replying to Mr. KOZHEVNIKOV, said that he would propose that the amendment be worded as follows: "Paragraphs 2 and 3 of Article 35 of the Statute of the International Court of Justice shall be applicable to the case in point."

111. Mr. LIANG (Secretary to the Commission) thought that paragraphs 2 and 3 of Article 35 of the Statute were applicable not only to article 2 of the draft, but to other articles also and wondered whether the

appropriate place for the reference should not be in the final clauses.

112. It might therefore be best if the proposed addition were examined after the Commission had concluded its study of the main articles of the draft.

113. Mr. SANDSTRÖM and Mr. SCELLE agreed.

It was so decided.

The meeting rose at 1.05 p.m.

186th MEETING

Thursday, 4 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the provisional agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

ARTICLE 3

1. Mr. SCELLE (Special Rapporteur) noted that the United States Government considered the procedure contemplated in article 3 for the selection of arbitrators to be unnecessarily complex (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10). The three-month periods referred to in paragraphs 1, 3 and 4 were cumulative, and a period of nine months might indeed elapse before the tribunal was constituted. However, the United States proprosal that paragraphs 2 and 3 be deleted was somewhat radical, since it would bring the provisions of paragraph 4 into operation within three months if States were unable to agree on the constitution of the tribunal. None of the general instruments on arbitration examined by the Commission while preparing the draft had envisaged so short a time-limit. He would, however, be prepared to delete paragraph 2 and to modify paragraph 4 by extending the period therein mentioned to four months.

2. Mr. SANDSTRÖM considered that a radical change in the procedure was needed. In his opinion, paragraph 3 was superfluous.

3. Mr. LAUTERPACHT expressed the hope that the Special Rapporteur might yet see his way to accept the United States proposal since it would greatly simplify article 3 and eliminate the danger of the parties being unable to agree on the selection of the third State under the provisions of paragraph 3.

4. Mr. SCELLE said that, in the light of the observations made by Mr. Sandström and Mr. Lauterpacht, he would be prepared to accept the United States proposal that paragraphs 2 and 3 be eliminated, provided that his own amendment to paragraph 4 (the substitution of the word "four" for the word "three" after the words "preceding paragraph within") were accepted. Paragraph 4 would also require the consequential amendment of the deletion of the words "or if the governments of the two States designated fail to reach an agreement within three months".

5. Mr. SANDSTRÖM, Mr. ALFARO and Mr. YEPES all expressed agreement with the amendments to article 3 proposed by the Special Rapporteur.

6. Mr. KOZHEVNIKOV could not agree with the principle underlying article 3 for reasons he had already given during the discussion on article 2 at the previous meeting. Furthermore, article 3 provided for direct intervention by the International Court of Justice without stipulating the agreement of the parties. He would therefore vote against it.

7. Mr. ZOUREK said that article 3 was incompatible with the traditional notion of arbitration, inasmuch as it might result in the tribunal being constituted by a third party. The argument that a parallel provision existed in the Revised General Act for the Pacific Settlement of International Disputes of 1949 carried very little weight, since that convention had been ratified by very few States. Nor was the system laid down in the Hague Convention of 1907 a happy solution. With those considerations in mind he had at the previous session proposed[1] an alternative system for the constitution of the tribunal in the event of the parties failing to reach agreement. As his proposal had been rejected, he would be obliged to vote against article 3.

8. The CHAIRMAN put to the vote the Special Rapporteur's proposal that paragraphs 2 and 3 of article 3 be deleted, and the consequential amendments to paragraph 4 of that article.

The amendments were adopted by 7 votes to 1, with 4 abstentions.

9. Mr. SCELLE, drawing attention to the comment of the Netherlands Government on article 3 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6), said that its substance had already been discussed at the previous meeting in connexion with retrospective effect. He would

[1] See *Yearbook of the International Law Commission, 1952*, vol. I, 173rd meeting, para. 28.

suggest that further consideration of the matter be deferred until his draft of the new article on retrospective effect had been circulated.

10. Mr. SANDSTRÖM was uncertain whether retrospective effect and the issue raised by the Netherlands Government were one and the same. In his view, the new convention could only have retrospective effect on general instruments on arbitration; it could not abrogate the provisions of any specific arbitral agreement containing provisions governing the setting-up of the tribunal.

11. Mr. LAUTERPACHT said that the Netherlands' comment was not entirely germane to the question of retrospective effect but was virtually identical with the United States Government's observation that article 3 contained no provision for the contingency wherein States were already under the obligation to pursue, or had previously invoked, other procedures. That question should be discussed forthwith.

12. The CHAIRMAN had understood the Commission to have reached general agreement at the previous meeting that a new convention would supersede existing instruments on arbitration, it being understood that signatory States would be free to enter reservations regarding its application to existing treaties.

13. Mr. SCELLE said that, as a convinced partisan of the theory of automatic abrogation in the absence of reservations, he could not subscribe to Mr. Sandström's thesis. Any new convention must replace existing ones, particularly in matters of procedure, unless the parties made express reservations about the maintenance of certain prior treaty obligations. That was why he had prepared a text for an article dealing with retrospective effect in general.

14. As he had indicated at the previous meeting, however, there was one exception to his general view, namely: that provisions of a new convention could not apply to a case already *sub judice*.

15. Mr. SANDSTRÖM observed that the French text of paragraph 1 of article 3 was unsatisfactory, because it suggested that there was a difference between an arbitral tribunal and a single arbitrator; it should be amended to indicate that an arbitral tribunal could consist of one or several members.

16. Mr. LAUTERPACHT recalled that it was stated in paragraph (2) of the comment on article 4, that the expression "tribunal" when used in the draft meant either a single arbitrator or a body of several arbitrators.

17. Mr. SANDSTRÖM said that Mr. Lauterpacht's remarks strengthened his contention that the French text of paragraph 1 required revision.

18. Mr. ALFARO felt that, as the general public did not seem to have any very clear idea of what was meant by a tribunal, some clarification in the body of the text was perhaps called for. Mr. Sandström's fear of misunderstanding would thereby be allayed.

19. Mr. PAL considered that paragraph 1 of article 4 defined with sufficient precision and clarity what was meant by an arbitral tribunal. Nothing more was required.

20. Mr. LIANG (Secretary to the Commission) said that no change was necessary in the English text of article 3, which was perfectly consistent with article 4, paragraph 1. Mr. Sandström's point would be met by the deletion from the French text of the words "*ou instituer un arbitre unique*".

The Secretary's suggestion was adopted.

21. Mr. LAUTERPACHT observed that it was necessary to clarify what the "necessary appointments" would be which were to be made by the President of the International Court of Justice under the terms of paragraph 4, if no stipulation had been made in the *compromis* about the size of the tribunal.

22. Mr. SCELLE said that Mr. Lauterpacht had raised an important point. If the parties failed to reach agreement on the constitution of the tribunal, and were bound by no prior undertaking regulating the number of arbitrators, the President of the International Court would be placed in an extremely awkward position. The problem was closely linked with that raised by the United Kingdom Government in its comment on article 9 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9), where it was pointed out that cases were frequently submitted to arbitration without the conclusion of any *compromis*.

23. Perhaps it would be well to add a new paragraph to article 3, stating that without any *compromis* being necessary, a case could be submitted to an arbitral tribunal according to a procedure similar to that laid down in Article 36, paragraph 2, of the Statute of the International Court of Justice.

24. He had been particularly struck by the United Kingdom comment, which conformed closely with the approach he had followed in his first draft on arbitral procedure. He had always favoured the immediate constitution of a tribunal, precisely in order to avoid the kind of difficulties likely to arise during the conclusion of a *compromis*.

25. Mr. LAUTERPACHT said that as he had raised a new question, the special rapporteur might be invited, in consultation with other members of the Commission, to prepare a text.

26. Mr. PAL said that, in the absence of any general provision in article 9, it might be wise to stipulate that if the parties failed to indicate the size of the tribunal, each should appoint one arbitrator, who would then together nominate a third.

27. Mr. LIANG (Secretary to the Commission) said that in its commentary on the draft (A/CN.4/L.40), the Secretariat had enumerated the precedents which had inspired article 3, including article 45 of the Pact of Bogotá of 1948. The procedure laid down in that article might perhaps provide a solution to the problem raised by Mr. Lauterpacht.

28. Mr. ALFARO said that Mr. Lauterpacht's point was an important one, and deserved immediate attention. The President of the Court would be greatly embarrassed if called upon to fix the size of the tribunal. A tribunal of five would perhaps prove cumbersome, whereas the appointment of a single arbitrator might provoke serious objection. The Commission, therefore, should consider inserting a provision to the effect that if the *compromis* contained no stipulation about the size of the tribunal, the latter should consist of three members, one from each party's national group in the Permanent Court of Arbitration, and one umpire of any other nationality.

29. Mr. SCELLE observed that a distinction must be made between the parties failing to agree upon the persons to be appointed, and their failing to agree upon their number. In the latter case, the President of the Court would find himself in great difficulty, because the nature of the case would of necessity largely determine the size of the tribunal. If the decision were to be left to the President of the Court, he would be indirectly influencing the proceedings. He (Mr. Scelle) had originally recommended that arbitral tribunals in the strict sense of the term (as distinct from conciliation commissions) should be composed of five members because in a tribunal of three the umpire's role tended to predominate — the more so inasmuch as States tended to select as arbitrators lawyers rather than judges. If, in the absence of prior agreement between the parties, the President of the Court were asked to decide whether the tribunal were to consist of five members or a sole arbitrator, he would be endowed with considerable latitude. The whole matter, on which a provision was undoubtedly necessary, therefore required further reflection.

30. The CHAIRMAN suggested that further consideration of the point raised by Mr. Lauterpacht be deferred until the Special Rapporteur had submitted a text. The final vote on paragraphs 1 and 4 of article 3 should also be deferred.

It was so agreed.

31. Mr. SCELLE, reverting to the United Kingdom Government's observations on article 9, said that he had been struck by the analogy drawn therein between arbitral procedure and the procedure in disputes brought before the International Court of Justice under Article 36, paragraph 2, of its Statute. He had particular sympathy for the whole trend of that comment, because of his conviction that the *compromis* was frequently a major obstacle to arbitration. For that reason he had drafted a new paragraph for inclusion in article 3, providing that where an arbitral tribunal already existed, either party to a dispute could submit the case to it by application.

32. Mr. KOZHEVNIKOV said that such a text would obviously require very careful examination. His immediate impression was that it would be unacceptable, since it implied total rejection of the traditional principles of arbitration, and would, indeed, constitute their death warrant.

33. Mr. ZOUREK pointed out that if the *compromis* contained no provision about the size of the tribunal, its validity and the competence of the tribunal would be impaired. Before he could express a final opinion he must have an explanation of what Mr. Scelle meant when he stated that if a tribunal existed either party would be able to bring a case before it direct. Surely an arbitral tribunal could only exist by virtue of a multilateral or bilateral treaty. A new convention, according to Mr. Scelle's argument, would abrogate all earlier treaties. It was therefore a contradiction to refer to existing arbitral tribunals.

34. Mr. SCELLE said that his thesis had perhaps been slightly distorted by Mr. Zourek. The point he had wished to bring out was that, by refusing to submit to adjudication by a tribunal without the preliminary conclusion of a *compromis,* one party could engineer a deadlock, and thus prevent the tribunal even from deciding whether it was competent to deal with the dispute.

35. Mr. LAUTERPACHT urged the Commission not to proceed with the discussion until it had Mr. Scelle's text before it. Perhaps the Special Rapporteur had attributed too much importance to the United Kingdom Government's observation on article 9. That observation was based on the assumption that article 9 demanded the conclusion of a *compromis* in every case. They did not perhaps take sufficiently into account the opening words of article 9, namely: "Unless there are prior provisions on arbitration which suffice for the purpose...". The Special Rapporteur might therefore reconsider the text of his proposed new paragraph, which in any event would find its proper place, not in Chapter II, which dealt with the constitution of the tribunal, but in Chapter IV, which dealt with the powers of a tribunal.

36. Mr. LIANG (Secretary to the Commission) said that the opening words of article 9 might obviate any need for a special provision of the kind envisaged by the Special Rapporteur. However, if any doubt subsisted they might be replaced by the following: "Unless there are previous agreements on arbitration between the parties which are sufficient for the purpose..."

37. If a previous undertaking to resort to arbitration accompanied by certain procedural provisions existed, there would be no need for a separate *compromis.*

38. Mr. SCELLE said that the first phrase of article 9 had not escaped his notice, and he interpreted it in the same way as the Secretary. He wondered, however, whether, on that interpretation, a tribunal would be able to take up a case in face of opposition by one of the parties on the ground that a *compromis* was necessary. In his view, the provisions of article 9 were inadequate to dispose of the contingency of one party's preventing the other from making a direct application to the tribunal despite the existence of a prior undertaking to arbitrate. He would, however, support Mr. Lauterpacht's suggestion that further discussion be deferred until his new text had been circulated.

Mr. Lauterpacht's suggestion was adopted.

39. Mr. KOZHEVNIKOV thought that, in the interests of clarity and precision, the expression "arbitral tribunal" should be used throughout the draft. He noticed that in some articles the word "tribunal" alone was used, and that article 1 referred to "arbitration". Admittedly, the comments did indicate what was meant, but they had no legal force and could not be binding on States.

40. He also wished to take the present opportunity of stating that his agreement with any article or portion of an article was not to be taken as implying agreement with the comment thereon.

41. Mr. SCELLE agreed that the expression "arbitral tribunal" should be used throughout the draft.[2]

42. Mr. LAUTERPACHT doubted whether it was either essential or justifiable to introduce such rigorous uniformity. On stylistic grounds it was, for instance, unnecessary in article 3 to qualify the word "tribunal" in every case. There was no possibility of misunderstanding as to what was meant. With regard to article 1, the word "arbitration" must be retained, since it referred to arbitration generally.

43. Mr. KOZHEVNIKOV insisted that his remarks be taken into account, the more so as their force had been recognized by the special rapporteur.

44. Mr. ZOUREK supported Mr. Kozhevnikov's view.

45. Mr. ALFARO said that it would be quite legitimate in certain instances to use the word "tribunal" alone. Indeed, the expression "arbitral tribunal" would sometimes be tautological. In a convention relative to arbitral procedure it should surely be abundantly clear that the tribunal in question was an arbitral tribunal and no other.

46. The CHAIRMAN asked the Special Rapporteur to consider whether any revision of the text was necessary in the light of Mr. Kozhevnikov's remarks.[3]

ARTICLE 4

47. Mr. SCELLE said that, in the opinion of the United States Government (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10), the first clause of paragraph 1 of article 4 was not clear. The point at issue was whether the clause applied to all procedures for the constitution of the tribunal, or only to the composition of the tribunal. He accepted the latter interpretation, but was prepared to concede that there might be some ambiguity.

48. Mr. SANDSTRÖM said that if the clause referred to all procedures for the constitution of the tribunal, he would be prepared to accept it.

49. Mr. YEPES suggested that paragraph 1 might be amended to read:

> "The parties having recourse to arbitration may constitute a tribunal of one or more arbitrators as they think fit."

50. Mr. LAUTERPACHT also considered that the first clause should be deleted, since it was redundant and open to controversial interpretation.

51. Mr. ALFARO supported the amendment proposed by Mr. Yepes. It was obvious that article 4 could only refer to the composition of the tribunal, inasmuch as the powers of the tribunal were defined in articles 11 and 13.

52. Mr. SANDSTRÖM was prepared to accept the proposed amendment.

53. Mr. ZOUREK considered that the amendment narrowed the meaning of the text, since the phrase "may act in whatever manner they deem most appropriate" declared the principle of the freedom of the parties.

54. Mr. SCELLE agreed with Mr. Yepes, Mr. Lauterpacht and Mr. Alfaro, but appreciated the pertinence of Mr. Zourek's observation. Actually, the Commission had adopted the words "may act in whatever manner they deem most appropriate" because the composition of the tribunal could differ according to the nature of the dispute. He would therefore suggest that the words "to the nature of the dispute" be added at the end of the first clause, the words "as they think fit" being deleted from the second clause. That would clearly convey confidence in the ability of the parties to compose the tribunal in the way best suited to the needs of the case in question.

55. Mr. KOZHEVNIKOV was perfectly satisfied with paragraph 1 as drafted. He objected to the proposed amendments.

56. Mr. AMADO thought that the difficulty lay in the word "act" (*agir*), which gave too much latitude. He would therefore suggest that the term "compose" or "constitute" (*composer, constituer*) be substituted for it, particularly in view of the fact that Chapter II of the draft was entitled: "Constitution of the Tribunal". The text would therefore read:

> "The parties having recourse to arbitration may constitute the tribunal in whatever manner they deem most appropriate." (*selon qu'elles le jugeront bon*)

The only objection he had to those last words was that they were very clumsy in French.

57. Mr. SANDSTRÖM asked whether the word "constitute" (*constituer*) would not be interpreted as meaning that the parties to a dispute would be free to choose the procedure for constituting the tribunal. That would mean, in fact, that the word would bear the same interpretation as in article 3, where reference was made to the constitution of an arbitral tribunal by mutual agreement.

58. Mr. AMADO thought that the point was covered by the title of the chapter.

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[2] See, however, *infra*, 232nd meeting, paras. 29-34.

[3] For further discussion of article 3, see *infra*, 192nd meeting, para. 6.

59. Mr. ZOUREK maintained that the word "act" (*agir*) was the best.

60. Mr. KOZHEVNIKOV formally moved that paragraph 1 be put to the vote as it stood.

61. Mr. SCELLE asked what procedures Mr. Sandström envisaged for the constitution of a tribunal. What possible procedure could there be except negotiation — the choice of the time and place for the negotiation, and the choice of negotiators?

62. Mr. SANDSTRÖM replied that the purpose of his question was to elucidate whether the procedure laid down in article 3 would be mandatory, or whether, in view or article 4, it could be replaced by a procedure of the parties' choice.

63. Mr. SCELLE considered that the latter interpretation would in essence be tantamount to the deletion of article 3.

64. Mr. SANDSTRÖM pointed out that article 3 could be made non-mandatory.

65. Mr. SCELLE contended that the Commission was preparing a model draft, which would not be imposed upon States. The latter would be free to adopt or to discard it. To give advice was not the sole purpose of the model, and he would remind members of the precedent set by the Hague Convention for the Pacific Settlement of International Disputes of 1907.

66. It was impossible to redraft article 4 in such a manner as to invalidate article 3.

67. Replying to the CHAIRMAN, he stated that, as Special Rapporteur, he preferred Mr. Yepes' amendment to that suggested by Mr. Amado.

68. Faris Bey el-KHOURI said he had listened to the discussion with great attention, but failed to see where paragraph 1 was at fault. There was really no difference whatsoever between the amendments and the original text, which simply declared that States were free to compose a tribunal as they thought fit.

69. Mr. AMADO drew Faris Bey el-Khouri's attention to the fact that the United States Government had rightly pointed out that the wording of paragraph 1 of article 4 was vague. He was, however, prepared to withdraw his amendment in favour of Mr. Yepes'.

Mr. Yepes' amendment to paragraph 1 of article 4 was adopted by 8 votes to 2, with 1 abstention.

70. Mr. KOZHEVNIKOV wished to submit paragraph 1 of article 4 in its original form for the Commission's consideration and decision as a drafting proposal.

71. Mr. SCELLE could not agree to such a course. The Commission had just adopted an amendment whereby the word "act" (*agir*) had been deleted.

72. Mr. ZOUREK wished to raise a general question. Was it intended that the draft should abrogate all antecedent agreements and treaties, or would it be considered as being merely supplementary thereto? He would draw attention to article 9, in the introductory clause to which reference was made to prior provisions on arbitration. Surely the same principle might apply also in the case of article 4?

73. Mr. LAUTERPACHT was in full agreement with Mr. Scelle that the Commission would be wrong to consider Mr. Kozhevnikov's proposal.

74. The CHAIRMAN asked the Commission to vote on whether it was prepared to consider Mr. Kozhevnikov's proposal as a drafting proposal.

The Commission decided against consideration of Mr. Kozhevnikov's proposal, by 8 votes to 2.

75. Mr. SCELLE, turning to paragraph 2 of article 4, said that the United States Government proposed (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) that the word "however" be deleted. He himself considered that the term *devraient* did not correspond to the English term "should", the latter being stronger.

76. Mr. LAUTERPACHT pointed out that the difficulty was not serious, since the clause was governed by the opening words: "With due regard to the circumstances of the case,".

77. Faris Bey el-KHOURI said that paragraph 1 of article 4 gave States full freedom in the voice of arbitrators, and that paragraph 2 limited that freedom, particularly by its reference to the choice of persons of "recognized competence in international law". Who would be judge of that competence? He would remind the Commission that when the General Assembly had elected the members thereto it had not applied the relevant provisions of the Statute concerning the competence of the persons elected, but had based its selection on political considerations. He would suggest that paragraph 2 be deleted.

78. Mr. SCELLE said that in the last resort States had to bow to public opinion, which, he would remind Faris Bey el-Khouri, had found expression even in the days of absolute monarchy in France. Neither governments nor the General Assembly could make such appointments as would provoke unfavourable public reaction. Paragraph 2, which uttered a salutary warning to States, should be retained.

79. Faris Bey el-KHOURI recalled that on a number of occasions Heads of States had acted as arbitrators, and had solved disputes satisfactorily. True, they had had the counsel of competent advisers.

80. Mr. PAL, supporting Faris Bey el-Khouri, said that confidence was the essential element in arbitration. It mattered more that States should have confidence in the arbitrators than that the latter should be highly competent and qualified jurists.

81. Mr. AMADO recalled that at the previous session he had voted against paragraph 2, which Mr. Scelle and Mr. Yepes were anxious to retain because they were suspicious of Heads of States and political personages. Their point of view was that of lawyers, who wished to make arbitration a judicial institution.

82. He preferred to place his confidence in the good sense of the parties, and would again vote against paragraph 2.

83. Mr. KOZHEVNIKOV said that he would be prepared to accept paragraph 2 in the light of the fact that the provision relating to the choice of the arbitrators was circumscribed by the opening clause. The expression "due regard" was clear and far-reaching.

84. The CHAIRMAN agreed with Mr. Kozhevnikov, and considered that paragraph (3) of the Comment should be slightly modified, since the reference therein to the technical nature of the issues involved was somewhat restrictive, and would, by implication, exclude the choice of sovereigns as arbitrators.

Faris Bey el-Khouri's proposal that paragraph 2 be deleted was rejected by 6 votes to 2, with 4 abstentions.

85. Mr. YEPES proposed that the word "*des*" should be substituted for the word "*les*" in the second line of the French text; the second clause would accordingly read: "*... les arbitres devraient être choisis parmi des personnes ...*"

86. Mr. ALFARO considered that the word "should" must be rendered in French by the word "*doivent*". He also supported the United States suggestion that the word "however" (*toutefois*) be deleted.

Mr. Alfaro's proposal that the word "doivent" *be substituted for the word* "devraient" *was adopted by 4 votes to 3, with 5 abstentions.*

87. The CHAIRMAN *noted* that the Commission agreed to adopt the United States suggestion that the word "however" (*toutefois*) be deleted.

Paragraph 2 of article 4 was adopted, as amended, by 6 votes to 2, with 3 abstentions.

Article 4 was adopted as amended by 6 votes to 1, with 5 abstentions.

88. After some discussion on the comments appended to the text and the Commentary prepared by the Secretariat (A/CN.4/L.40),

It was agreed that further consideration of the question be deferred.

The meeting rose at 1.05 p.m.

187th MEETING

Friday, 5 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the provisional agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

1. The CHAIRMAN said that, before asking the Commission to proceed with item 1 of the provisional agenda, he would suggest that it hold another private meeting after the plenary meeting on the afternoon of Monday, 8 June, in order to conclude its consideration of certain administrative matters.

It was so agreed.

2. The CHAIRMAN, continuing, informed the Commission that he would shortly submit a tentative time-table for the work of the fifth session, and would propose that, after considering that time-table the Commission adopt its provisional agenda (A/CN.4/62).[1]

3. So far the Commission had made but slow progress, and he would urge members not to re-open issues which had already been discussed two, if not three, times. It might be possible to conclude consideration of the draft on arbitral procedure in three or four meetings.

4. He invited members to take up article 5 of the draft on arbitral procedure.

ARTICLE 5

5. Mr. SCELLE (Special Rapporteur) said that in his view the United States Government's comment (A/CN.4/68, No. 9 or A/2456, Annex I, No. 10) was not acceptable, since it was contrary to the Commission's conception of the "immutability" of a tribunal once set up. According to the United States Government, an arbitrator might be replaced during the interval between the setting up of the tribunal and the beginning of the judicial proceedings. He would submit that once an arbitrator had been nominated, he represented the authority of the tribunal — he was, in other words, a *juge commun* — and must function as such from the time of his nomination until the rendering of the award.

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[1] See *supra*, 184th meeting, footnote 3.

6. Mr. KOZHEVNIKOV considered that a proposal based on the United States Government's comment could be accepted, and formally moved the adoption of such a proposal. If an amendment to that effect were rejected, however, he would be able to accept article 5 on the understanding that paragraph 1 thereof was not to be interpreted as mandatory, but simply as a *desideratum.*

7. Mr. YEPES associated himself with Mr. Kozhevnikov's point of view and added that an arbitral tribunal only really began to operate when the pleadings had been lodged with the registrar of the tribunal and the judicial proceedings had begun; until then its existence was little more than theoretical.

8. Mr. LAUTERPACHT supported Mr. Scelle, and considered that to amend article 5 in the sense of the United States Government's comment would unnecessarily complicate matters and necessitate consequential changes in subsequent articles. Since cases might easily occur where there were no oral arguments at all, no good purpose would be served by such an amendment. Furthermore, the whole issue of the replacement of arbitrators was dealt with in articles 6-8.

9. Mr. YEPES proposed that an additional paragraph (3) be added to article 5, reading:

> "*Pour les effets de cet article l'on entend que la procédure commence lorsque les plaidoyers écrits ont été déposés.*"
>
> ("For the purposes of this article the proceedings shall be deemed to begin when the written pleadings have been lodged.")

10. Mr. SCELLE opposed Mr. Yepes' amendment, which would have the effect of splitting the functions of the tribunal into administrative and judicial. Such a distinction was quite impossible, since it might, for instance, lead to argument whether the hearing of witnesses fell into the administrative or the judicial category of functions.

11. Mr. AMADO agreed with Mr. Scelle, and held that the term "the beginning of oral arguments" in the United States comment was open to different interpretations.

12. Mr. ZOUREK said that his views coincided with Mr. Kozhevnikov's not only for practical reasons, but also because the latter's views were in accordance with the traditional conception and practice of arbitral procedure. He was unable to accept Mr. Scelle's view that arbitrators represented the authority of the tribunal, acting, as he had put it, as *juges communs.* A number of arbitration treaties provided that the arbitrators nominated by the parties should nominate another arbitrator to act as a "super-arbitrator"—a practice which vitiated Mr. Scelle's premise. He (Mr. Zourek) failed to see why a party should be prevented from replacing the arbitrator nominated by it, and was accordingly prepared to accept an amendment based on the United States proposal.

13. The CHAIRMAN, answering Mr. LAUTERPACHT, said that he assumed that Mr. Kozhevnikov was taking over the United States proposal; he had accordingly submitted an amendment to the effect that a party might, after the "proceedings" had begun, replace an arbitrator designated by it. That amendment being furthest removed from the original text, he would put it to the vote before Mr. Yepes' amendment.

Mr. Kozhevnikov's amendment was rejected by 6 votes to 2, with 3 abstentions.

Mr. Yepes' amendment was rejected by 6 votes to 1, with 4 abstentions.

Article 5 was adopted by 9 votes to none, with 2 abstentions.

14. Mr. KOZHEVNIKOV explained that he had voted in favour of article 5 in the light of his interpretation of paragraph 1 thereof.[2]

ARTICLE 6

15. The CHAIRMAN said that there were no comments by governments on article 6.

16. At the request of Mr. KOZHEVNIKOV, he put article 6 to the vote.

Article 6 was adopted by 8 votes to 2, with 1 abstention.[3]

17. Mr. ALFARO, on a point of order, asked whether the Commission intended to put to the vote those articles which had been adopted at the fourth session and which had given rise to no comments by governments. Surely the Commission's task was not to review the draft, but to consider the comments of governments and take decisions thereon.

18. Mr. SCELLE supported Mr. Alfaro.

19. Mr. KOZHEVNIKOV held that the Commission was engaged on its final reconsideration of the draft, and must therefore make its views absolutely clear. Furthermore, he would remind members that the Commission had already decided at its 185th meeting[4] that the draft should be considered article by article.

20. Mr. ZOUREK agreed with Mr. Kozhevnikov, and pointed out that the comments made by governments might necessitate consequential changes in articles other than those to which they directly related.

21. Mr. LAUTERPACHT supported Mr. Kozhevnikov and Mr. Zourek, pointing out that article 7, which was unsatisfactory as it stood, probably required considerable alteration. Each article must be taken on its merits, and given the Commission's *imprimatur.*

22. Mr. HSU suggested that only those articles which were actually amended need be put to the vote.

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[2] For discussion of para. 3 of article 5, see *infra,* 194th meeting, paras. 23-43.

[3] For further discussion of article 6, see *infra,* 192nd meeting, para. 58.

[4] See *supra,* 185th meeting, para. 34.

23. Mr. PAL, Faris Bey el-KHOURI and Mr. AMADO supported Mr. Kozhevnikov.

24. Mr. YEPES, supporting Mr. Scelle, held that the Commission was at the present stage applying the procedure laid down in paragraph (*i*) of article 16 of its Statute.

25. Mr. SCELLE said that in supporting Mr. Alfaro he might have been too affirmative. His intention was to ensure that the essential structure of the final draft remained intact. It was impossible at that stage to re-open the discussion on fundamental principles. There were, however, very important changes that would have to be considered. He himself would be submitting two new texts, and the United Kingdom Government's comments on the possibility of revision or annulment of an arbitral award (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9), being contrary to the Commission's decisions, would necessarily have to be carefully considered. But he would urge members to refrain from raising the question of the guiding principles of arbitral procedure in connexion with each article.

26-27. After some further discussion, Mr. LAUTERPACHT moved that the Commission consider each article in the light both of the comments of governments and of those of members of the Commission and that a vote be taken on each article.

Mr. Lauterpacht's motion was adopted by 9 votes to none, with 2 abstentions.

Articles 7 and 8

28. Mr. SCELLE said that the comments of the Netherlands Government on article 7 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) raised a number of difficult issues. The objections related mainly to paragraph 1, which stipulated that once the proceedings before the tribunal had begun, an arbitrator might not withdraw or be withdrawn by the government which had appointed him, save in exceptional circumstances and subject to the consent of the other members of the tribunal. Should, therefore, paragraph 1 be deleted, or should the last clause thereof — "and with the consent of the other members of the tribunal" — be replaced by a reference to the consent of the majority of the tribunal, or the consent of the other party? Provision was made in article 6 for filling vacancies which might occur normally. Article 7 was intended to cover the case of an arbitrator being withdrawn, without replacement, by the nominating government. What would be the position if that happened? Should the incomplete tribunal continue its proceedings, as provided for in paragraph 3?

29. Mr. LAUTERPACHT said that there might be excessive rigidity in a provision laying down that an arbitrator might never withdraw. He was aware of the concern felt by the special rapporteur about the possibility of an arbitrator's resigning under pressure from his government. However, paragraph 1 did not altogether forbid an arbitrator to withdraw. What it did forbid was resignation for insufficient reason, that was, resignation intended to frustrate the proceedings.

30. Otherwise, the Netherlands Government's objections to paragraphs 2 and 3 were well-founded. He agreed that it was inadmissible that the replacement of a member of the tribunal on wholly legitimate grounds should be made dependent on the unanimous concurrence of the other members. He was not sure of the precise meaning of the words "it [the tribunal] may decide ... to request his replacement." Would the request be addressed to the arbitrator, thus constituting an invitation to him to cease functioning, or to the governments concerned, with consequent uncertainty whether they would act on the request? What would be the position if the members of a tribunal composed of three arbitrators decided that one of them must withdraw, and then continued the proceedings and rendered the award upon the request of one of the parties? He doubted the wisdom of paragraph 2.

31. He believed that the appropriate solution would be to state that in the case of a withdrawal consented to by the tribunal, the vacancy should be filled in accordance with the provisions of article 6, that was, by the method laid down for the original appointment.

32. The CHAIRMAN, speaking as a Netherlands national, informed Mr. Scelle that the Netherlands Government was particularly anxious that an arbitrator's freedom to withdraw of his own free will should be safeguarded. The alternative — the case when an arbitrator was withdrawn by the government which had nominated him — was not a source of concern to the Netherlands Government, which would be satisfied by the deletion or amendment of the words "and with the consent of the other members of the tribunal", in paragraph 1.

33. Mr. SCELLE said that the possibility of a change in the composition of the tribunal by the will of one of the parties had been carefully studied by the Secretariat in its commentary to article 7 (A/CN.4/L.70), where a reference was made, *inter alia*, to the case of the *Hungarian Optants*. A truncated tribunal was not exceptional, but most of the precedents related to commissions which had been concerned with the interests and claims of individuals. In the case of the *Hungarian Optants*, in which the interests of States had been involved, the Council of the League of Nations had decided that, though it could not oblige the Hungarian Government to appoint a deputy arbitrator, it could itself appoint one. He would also refer to the advisory opinion of the International Court of Justice on the constitution of a tribunal of three arbitrators, when the Governments of Bulgaria, Hungary and Rumania had refused to appoint their representatives to the Treaty Commissions.[5]

34. He asked whether the Commission should provide that if an arbitrator withdrew, the tribunal could request his replacement and invite the International Court of Justice or its President to appoint another arbitrator in virtue of article 3 of the draft procedure. If it did so,

[5] *Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950*, p. 65.

however, the Commission would change the nature of the draft.

35. Mr. LAUTERPACHT agreed that when a government, regardless of the decision of the tribunal, withdrew the arbitrator it had appointed, the tribunal must continue to function.

36. Mr. YEPES proposed that the final clause in paragraph 1 — "and with the consent of the other members of the tribunal" — should be replaced by the following passage:

> "*Dans le cas de déport ou de retrait d'un arbitre, le tribunal doit être complété conformément aux dispositions de l'article 3, alinéa 2.*"
>
> ("Should an arbitrator withdraw or be withdrawn, the tribunal must be completed in accordance with the provisions of article 3, paragraph 2.")

37. Mr. SCELLE pointed out that that amendment would prejudge paragraphs 2 and 3.

38. Mr. AMADO expressed doubts about the possible interpretation of the words "in exceptional cases" in paragraph 1. How were such cases to be determined?

39. Mr. LIANG (Secretary to the Commission) said that three possibilities were envisaged in articles 5, 6 and 7: resignation, which was covered by article 6; withdrawal by the arbitrator himself; and withdrawal of the arbitrator by the designating government. The last issue was covered by article 7, and in part by article 5 as well. Paragraphs 1 and 2 of article 7 emphasized that it was inadmissible for a government to withdraw its arbitrator, but also referred by implication to voluntary withdrawal. It would seem to him to be more consistent with the general structure of the draft procedure to limit article 7 to enunciation of the principle laid down in paragraph 3 thereof, paragraphs 1 and 2 being either deleted or placed elsewhere.

40. Mr. PAL was prepared to accept Mr. Yepes' amendment.

41. Mr. LAUTERPACHT feared that that amendment would open the door to continuous sabotage on the part of a government which, having once withdrawn its arbitrator, would be free to designate another in accordance with article 3, and then withdraw him too. That was the very contingency that Mr. Scelle wished to avoid.

42. Mr. SCELLE pointed out that article 5, which was based on the principle of the "immutability" of the tribunal, must be kept in mind. According to paragraph 1 of article 3, the parties to an undertaking to arbitrate could only appoint arbitrators by mutual agreement. How, then, was it possible to concede that a government should impose its nominee on the tribunal?

43. Mr. LAUTERPACHT submitted that, according to the terms of article 3, each party was free to appoint its own arbitrator; mutual consent was required only for the appointment of the umpire.

44. Mr. SCELLE wished to emphasize the fact that the words "by mutual agreement" in paragraph 1 of article 3 meant that once the arbitrators had been designated they became arbitrators on behalf of both parties (*juges communs des parties*). He was aware that Mr. Amado was opposed to that view, but it was the one which had been incorporated in the draft procedures. Indeed, it represented one of the innovations in the draft.

45. Mr. ZOUREK could not agree with Mr. Scelle's view that the arbitrators must be appointed by agreement between the parties. Such a view was at variance both with the normal concept of arbitration and with precedent.

46. Mr. LAUTERPACHT asked how Mr. Scelle reconciled his view that the arbitrators were not appointed by the parties individually with the statement in article 7, paragraph 1, that: "Once the proceedings before the tribunal had begun, the arbitrator may not withdraw, or be withdrawn by the government which has appointed him. . . ." Once the arbitrators had been appointed they became what Mr. Scelle had described as *juges communs*. It would, however, be quite revolutionary and unnecessary to say that the arbitrators had not originally been appointed by the governments.

47. Mr. SCELLE asked whether Mr. Lauterpacht would maintain that arbitrators appointed by the International Court of Justice under article 3, paragraph 4, or by a third State, could be withdrawn at the will of the parties.

48. Mr. ZOUREK observed that article 5 covered the case of one of the parties replacing an arbitrator.

49. Mr. SCELLE observed that article 5 had been drafted in very categorical terms precisely because it formed part of a system based on the theory that the arbitrators could only be nominated by agreement between parties. The purpose of article 7 was to prevent one of the parties from arresting the proceedings by withdrawing an arbitrator on the grounds that it was free to do so in virtue of the fact that it had nominated him.

50. Mr. AMADO said that if the membership of a tribunal was incomplete, it ceased to be a tribunal.

51. Mr. SCELLE said that Mr. Amado's view evidently differed from that of the International Court of Justice in its advisory opinion on the interpretation of peace treaties with Bulgaria, Hungary and Rumania.

52. Mr. AMADO emphasized that an arbitral tribunal must be constituted in accordance with the will of the parties. The Commission was engaged, not in an academic exercise, but in the elaboration of a text capable of serving as the basis for a convention which would be acceptable to States and an effective instrument for international use. He could not therefore subscribe to Mr. Scelle's views.

53. Mr. SCELLE said that the Commission must not shirk the issue. The choice lay between allowing the tribunal to go on functioning even in the absence of

one or more of it members, or of stipulating that any vacancy must be filled either by agreement between the parties or by the procedure laid down in article 3.

54. The CHAIRMAN suggested that, as the Commission had no written amendment before it, further consideration of articles 7 and 8 be deferred until those members who wished to submit amendments had done so.

It was so agreed.

55. Mr. ZOUREK said that, as he had confined himself in the foregoing discussion to paragraph 1 of article 7, he wished to comment on paragraph 3. He could not regard an incomplete tribunal as a tribunal, and his view was confirmed by the International Court's advisory opinion on the interpretation of peace treaties with Bulgaria, Hungary and Rumania. Any other view, moreover, would be contrary to the entire theory of arbitration.

56. Mr. KOZHEVNIKOV said that the views expressed by Mr. Lauterpacht and Mr. Amado confirmed his opinion that the Commission would be unable to avoid discussing certain basic issues of principle.

57. Paragraph 1 of article 7 clearly demonstrated that, by departing too far from the traditional concept of arbitration, the Commission had run into an impasse. The General Assembly would find itself in a similar predicament.[6]

ARTICLE 9

58. Mr. SCELLE said that, as the Commission had decided to defer consideration of the text he had prepared for inclusion in article 3, dealing with cases when no *compromis* was needed, he would not take up the United Kingdom Government's comment on article 9 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9) at the present stage.

59. Taking the other comments in turn, he said that he was not in favour of the Netherlands proposal concerning the addition after sub-paragraph (*d*) of a clause reading: "The nature and the way of administering evidence to be offered to the tribunal", because that would repeat the provisions of article 15 and might give rise to confusion. On the other hand, he could accept that Government's suggestion that the words "a decision" be sustituted for the words "an award" in sub-paragraph (*f*).

60. The Brazilian Government had criticized sub-paragraph (*g*), implying that the word "law" was not broad enough and should be replaced by the words "principles and rules". He did not regard that criticism as justified, since the sub-paragraph in question referred to adjudication *ex aequo et bono*. The clause had been drafted in the most comprehensive terms.

61. Referring to sub-paragraph (*h*), he considered as valid the United States argument that it might be impractical in many instances for the parties to fix in advance a period within which awards must be rendered, and therefore suggested that the words "The time limit within which the award shall be rendered" should be deleted. That amendment was all the more necessary in view of the provisions of article 23, which might place the tribunal at the mercy of one of the parties if it failed to render the award within the period laid down in the *compromis*.

62. On his own behalf, he proposed the deletion from sub-paragraph (*i*) of the words "and the date of its first meeting", since that decision would have to be based on certain practical and administrative considerations, all of which might not be known at the time when the *compromis* was concluded.

The amendments accepted and proposed by the Special Rapporteur were approved.

63. Mr. LAUTERPACHT observed that, despite the rejection of the Netherlands proposal concerning the addition of a new clause after sub-paragraph (*d*), the parties would not be precluded from laying down certain stipulations about rules of evidence in the *compromis*.

64. Mr. AMADO agreed with the Special Rapporteur about the Brazilian Government's comment on sub-paragraph (*g*). However, he must point out that the scope of the tribunal's powers when judging in equity was open to question.

65. Mr. LIANG (Secretary to the Commission) said that the sub-paragraphs in article 9 dealt with matters of varying degrees of importance. It might be well to distinguish between the compulsory and the optional elements in a *compromis*.

66. Mr. SCELLE said that he would prefer article 9 to deal only with the obligatory elements in a *compromis*; otherwise one of the parties might succeed in indefinitely postponing the conclusion of a *compromis* by demanding agreement on additional points.

67. Replying to Mr. Amado's remarks about sub-paragraph (*g*), he said that if the parties could not agree as to the law to be applied in the case, the tribunal would be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

68. Mr. AMADO considered the Secretary's observation to be extremely pertinent.

69. In general, he considered that to specify in detail what matters should be dealt with in the *compromis* would give rise to difficulties. It would have been preferable, therefore, to model article 9 upon article 25 of the General Act of 1928. He did not intend, however, to make a formal proposal to that effect.

70. Mr. SCELLE said that the Secretary's point might be met by substituting in the French text of the opening sentence, the words "doit spécifier" for the word "spécifie". No change would be required in the English text. He also proposed to adopt the Netherlands suggestions to say in sub-paragraph (*f*) "décisions" instead

[6] For further discussion of articles 7 and 8, see *infra*, 192nd meeting, paras. 61-88.

of "*jugements*" (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6).

Those amendments were approved.

71. Mr. YEPES suggested that there was a contradiction between sub-paragraph (*h*), which left the parties free to make any special provisions concerning the procedure for revision of the award, and article 29, which established an obligatory procedure in the matter. If he were correct, the words "and any special provisions... and other legal remedies" should be deleted from the end of sub-paragraph (*h*).

72. Mr. SCELLE, accepting the amendment, drew Mr. Yepes' attention to paragraph (9) of the comment on article 9.

Mr. Yepes' amendment was adopted.

73. The CHAIRMAN put to the vote article 9 as a whole, and as amended.

Article 9, as a whole and as amended, was adopted by 10 votes tot 1.[7]

74. Faris Bey el-KHOURI explained that he had voted against article 9 because of the inclusion in sub-paragraph (*e*) of the words "Without prejudice to the provisions of article 7, paragraph 3", which would empower the tribunal to render an award in the absence of one of its members.

Article 10

75. Mr. SCELLE said that the provisions of article 10 were so imprecise as to be virtually meaningless. He therefore felt that a provision should be inserted in article 3 authorizing the tribunal to impose on the parties a time-limit for the conclusion of the *compromis,* if they had previously failed to reach agreement.

76. The CHAIRMAN suggested that consideration of article 10 might be deferred until article 3 was taken up.

77. Mr. LAUTERPACHT thought that unnecessary. The objections to article 10 could be disposed of forthwith by substituting in paragraph 2 the words "after a reasonable time draw up the *compromis*" for the words "draw up the *compromis* within a reasonable time which it shall itself determine".

78. Mr. SCELLE pointed out that Mr. Lauterpacht's amendment would not entirely remove the difficulty, since it would still not be known when the tribunal was to act.

79. Mr. LAUTERPACHT then suggested an alternative wording for his amendment, namely: "after fixing a time-limit for the purpose, draw up a *compromis*".

80. Mr. LIANG (Secretary to the Commission) said that it should surely be made clear that the tribunal could only draw up the *compromis* it the procedure laid down in paragraph 1 had failed.

81. Mr. AMADO observed that the expression "within a reasonable time" meant nothing to him.

82. Mr. SCELLE said that the Commission could specify a time-limit, for instance, three months, for the conclusion of the *compromis.* It would, however, be preferable to leave the decision to the tribunal, which would be in a position to evaluate the particular circumstances attendant upon each case. Sometimes a *compromis* could be concluded expeditiously. In other instances, more time was needed. Such a solution would also be more in conformity with normal judicial procedure, and in line, therefore, with his general aim.

83. Mr. LAUTERPACHT pointed out that article 10 must stipulate the period to be allowed to the parties for concluding a *compromis,* and the time when the tribunal was to act.

84. Mr. LIANG (Secretary to the Commission) suggested that article 43 of the Pact of Bogotá of 1948 might offer a solution.

85. Mr. PAL considered that it would be sufficient to redraft the final phrase of paragraph 2 to read:

> "then, in the event of the failure of the above procedure for drawing up the *compromis within a reasonable time,* the tribunal shall draw up *the compromis*"

That would leave enough latitude to the tribunal to decide according to the merits of the case what was a reasonable time.

86. Mr. KOZHEVNIKOV said that, as he had already explained, he could not support a provision that would allow the tribunal to draw up the *compromis,* which would be an entirely unjustified departure from the normal concept of arbitration.

87. Mr. SCELLE, referring to Mr. Pal's suggestion, said that he was in favour of the Commission specifying the time-limit whithin which the parties, and in case of their failure to do so, the tribunal, were to draw up the *compromis.*

88. Mr. ALFARO said that, for article 10 to be truly effective, the time-limits at every stage of the procedure must be clearly defined. Otherwise, it would be possible for one party to prolong the process interminably. He undertook to present a new text for article 10.[8]

The meeting rose at 1.5 p.m.

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[7] For further discussion of article 9, see *infra,* 192nd meeting, para. 89. See also *infra,* 193rd meeting, para. 42.

[8] For further discussion of article 10, see *infra,* 193rd meeting, para. 77.

188th MEETING

Monday, 8 June 1953, at 2.45 p.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Adoption of the provisional agenda (A/CN.4/62)

...

It was agreed that the Commission should take up the following items in the order stated: arbitral procedure; Mr. Zourek's proposal relating to the incorporation in the Commission's report of dissenting opinions (A/CN.4/L.42); and régime of the high seas.

The provisional agenda (A/CN.4/62)[1] *was adopted, the order of priority for the remaining items thereof being left for subsequent decision.*

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*resumed from the 187th meeting*)

12.[2] The CHAIRMAN said that several proposals had been submitted on articles 3, 7 and 10, and he would therefore suggest that their authors might perhaps consider them and endeavour to draft joint texts, the Commission proceeding in the meantime to examine article 11.

It was so agreed.

[1] See *supra*, 184th meeting, footnote 3.

[2] Paras. 1-11 were devoted to the discussion on the order of priority for the agenda items.

ARTICLE 11

13. Mr. SCELLE (Special Rapporteur) was unable to accept the Netherlands Government's proposal concerning article 11 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6). The principle stated in article 11 was unexceptionable from the point of view of judicial theory; nor could the parties propose an interpretation of the *compromis* different from that delivered by the tribunal. The article must be maintained as drafted.

14. Mr. LAUTERPACHT and Mr. AMADO supported Mr. Scelle.

15. Mr. ZOUREK said he wished to take over the Netherlands Government's suggestion that the words "if the parties are at variance in this respect" be added at the end of article 11. He must draw attention to the fact that the parties were the judges of the content of the *compromis*, and not the tribunal, whose competence rested wholly on the will of the parties. If a tribunal went beyond the limits fixed by the *compromis*, the award it rendered would thereby be invalidated. Nor was it correct to lay down that the tribunal should possess the widest powers to interpret the *compromis*. The extent of those powers depended on the *compromis* itself, which might be interpreted restrictively. The Secretariat's commentary (A/CN.4/L.40), did not cite all the relevant examples.

16. Mr. SCELLE said that article 11 gave expression to a traditional practice in arbitral procedure.

17. Mr. LIANG (Secretary to the Commission) said that article 11 provided for cases where doubt might arise about the tribunal's competence. The will of the parties was a factor which came into play at the time when the *compromis* was being negotiated. He would call the attention of Mr. Zourek to the terms of article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, which provided in part that the tribunal was authorized to declare its competence in interpreting the *compromis*.

18. There was, of course, no doubt that if the parties to a dispute wished to limit the competence of the tribunal, all they need do was to say so in the *compromis*.

19. Mr. KOZHEVNIKOV considered that article 11 was too wide, and transcended normal arbitral procedure. The powers of the tribunal depended solely on the will of the parties. Furthermore, he would submit that only the parties had the power to interpret a *compromis*.

20. Faris Bey el-KHOURI held that there was no reason for depriving the parties of their right to interpret a *compromis* drawn up by themselves. Why should the tribunal interpret the *compromis* against the will of the parties? He would support Mr. Zourek's amendment.

21. Mr. AMADO thought that members of the Commission would be sufficiently familiar with his general attitude towards the draft. But in the case of article 11, he was surprised that there should be any

argument at all, since the will of the parties was clearly and unmistakably admitted. Once the latter had placed their confidence in the tribunal they could not reject its interpretation of the *compromis*.

22. Mr. ALFARO proposed, as a modification of Mr. Zourek's amendment, that the words "on any point on which the parties are at variance" should be inserted after the word "*compromis*" in the text of article 11 as drafted.

Mr. LAUTERPACHT said that he would vote against that sub-amendment and Mr. Zourek's amendment on the ground that both were superfluous.

23. Mr. KOZHEVNIKOV proposed that article 11 be deleted.

24. Mr. YEPES, recalling that article 11 had been adopted in its present form after full discussion, supported Mr. Scelle.[3] He considered that the article merely codified existing law as expressed both in article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 and in paragraph 6 of Article 36 of the Statute of the International Court of Justice.

Mr. Kozhevnikov's proposal that article 11 be deleted was rejected by 8 votes to 2, with 1 abstention.

Mr. Alfaro's sub-amendment to Mr. Zourek's amendment was rejected by 5 votes to 4, with 2 abstentions.

Mr. Zourek's amendment was rejected by 6 votes to 2, with 3 abstentions.

Article 11 was adopted unchanged by 7 votes to 3, with 1 abstention.[4]

Article 12

25. Mr. SCELLE said that there were no comments by governments on paragraph 1 of article 12. As to paragraph 2, the Governments of Brazil and India proposed that it be deleted (A/CN.4/68, Nos. 2 and 4 or A/2456, Annex I, Nos. 3 and 5). He would draw the Commission's attention to the fact that paragraph 2 had been adopted after long discussion, and that it imposed upon the tribunal the duty of rendering a judgement in all cases.[5]

26. Mr. YEPES wished to make the following statement relating to paragraph 1 of article 12, where reference was made to paragraph 1 of Article 38 of the Statute of the International Court of Justice. In his view, when that article laid down that the Court — the arbitral tribunal in the present instance — should apply, *inter alia*, "the general principles of law recognized by civilized nations" it created an obligation for the Court and for the arbitral tribunal to apply not only the principles of general or universal international law, but *also and mainly, in a dispute of a regional nature, the principles established by regional international law*. In other words, when, by virtue of article 12 of the present draft on arbitral procedure, an arbitral tribunal had to decide a question coming under the international law peculiar to a certain region of the world, it must apply the principles of that special international law and not, as was sometimes maintained, the principles of general international law. It was necessary to emphasize those circumstances because it was unfortunately true that international tribunals, even the highest — indeed, especially the highest — often forgot that Article 38 of the Statute of the International Court of Justice obliged them also to apply the principles of regional or special international law. When an international tribunal refused to apply to a particular case the principles applicable under Article 38 of the Statute of the International Court, it was responsible for a very regrettable denial of justice. It was by way of warning against such irregularities — not to use a stronger term — that he had wished to make the above statement to the Commission.

Paragraph 1 of article 12 was adopted unanimously.

Paragraph 2 of article 12 was adopted by 9 votes to 1, with 1 abstention.

Article 13

27. Mr. SCELLE pointed out that article 13 reiterated the provision laid down in paragraph (d) of article 9.

28. Mr. LAUTERPACHT wished to ask Mr. Scelle the following question. A case might arise where there was an agreement between the parties concerning the procedure of the tribunal but from which several points relating to the procedure had been omitted. Would the tribunal then be entitled to formulate the rules applicable to those points? His own answer to the question was in the affirmative, but he wondered whether Mr. Scelle considered that the text of article 13 covered the case.

29. Mr. SCELLE recalled that he had originally proposed that the tribunal should always lay down its rules of procedure. The Commission had, however, decided that the procedure should be laid down in the *compromis*. Should there be any lacunae it would be for the tribunal to fill them.

30. Mr. PAL considered that article 13 was sufficiently comprehensive to cover the possibility of omissions from the procedure, and therefore needed no amendment.

31. Mr. LAUTERPACHT said that he was satisfied with the interpretations given by Mr. Scelle and Mr. Pal.

Article 13 was adopted unanimously.

Article 14

32. Mr. SCELLE said that the Netherlands Government proposed the deletion of article 14, on the grounds that it was redundant (A/CN.4/68, No. 5 or A/2456,

[3] For further discussion of article 11, see *infra*, 193rd meeting, para. 3.

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 147th meeting, paras. 9-39 (article 11 was numbered article 19 at that stage of the discussion).

[5] *Ibid.*, paras. 66-79 (article 12 was numbered article 20 at that stage of the discussion).

Annex I, No. 6). Commenting on that proposal, the Netherlands Government had referred to the principle of the absolute impartiality of the arbitrators as being of no less importance than the equality of the parties mentioned in article 14. He would submit that impartiality found its expression above all in respect for the equality of the parties in the proceedings. The adoption of article 14 would therefore signify the acceptance of both those important principles to which the Netherlands Government referred. Furthermore, he would draw attention to paragraph (c) of article 30, which provided that the validity of an award might be challenged on the ground of a serious departure from a fundamental rule of procedure. Inequality in the proceedings would constitute such serious departure. Thus, article 14 was clearly linked with article 30, and the Commission should not go back on its earlier decision to state unequivocally the principle of the equality of the parties.

33. Mr. YEPES was opposed to the Netherlands Government's proposal.

34. Mr. LAUTERPACHT considered that article 14 stated a principle so obvious that it almost impaired the dignity of the draft, for it merely stated the obvious proposition that the tribunal must be impartial. That was what Mr. Scelle had just suggested. Since, however, the article had been adopted at the previous session, he would vote for it.

35. Mr. KOZHEVNIKOV said that he had not changed his views since the fourth session, and would vote for the retention of the article.[6]

36. Mr. YEPES drew attention to the paragraph in the Secretariat's commentary (A/CN.4/L.40), where reference was made to the *Umpire* cases which had arisen before the United States-Colombian Commission.[7] It followed that in the history of arbitration there had been cases in which the equality of the parties had not been observed.

Article 14 was adopted by 8 votes to 3.

37. Faris Bey el-KHOURI, explaining his vote, said that he had abstained because he knew of no case of inequality between the parties.

Article 15

38. Mr. SCELLE considered that the Netherlands Government's comment on paragraph 2 of article 15 (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) was pertinent, and therefore proposed the deletion of the words "with one another and" ("*entre elles et*").

39. Mr. LAUTERPACHT recalled that the issue had been discussed from two points of view. The first was that the parties to a dispute were inclined to conceal certain facts relevant to the issue, and could not be expected to produce evidence in support of the other party's case. That point of view implied an imputation of lack of good faith. In English procedure it was customary for the judge to order the parties to co-operate, and for the solicitors of the two parties to exchange correspondence, producing what was known as an agreed bundle of correspondence. The other view was that the parties must of necessity be inclined to subterfuge, a view that Mr. Scelle's proposed amendment expressed.

40. Mr. SCELLE replied that it was impossible to ask perfection of international law. Actually, he did not share Mr. Lauterpacht's certainty about judicial procedure in the United Kingdom, but he would submit that it was in any event going too far to ask the parties to furnish their adversary with weapons. He believed that that would make the display of good faith too onerous.

41. Mr. YEPES supported Mr. Scelle.

Mr. Scelle's proposal that the words "with one another and" ("entre elles et") be deleted from paragraph 2, was adopted by 8 votes to 2, with 1 abstention.

42. Mr. SCELLE, referring to the Netherlands Government's comment on paragraph 4, held that the request of one of the parties should suffice for the tribunal to visit the scene, provided that that party paid the costs of the visit.

43. The text should therefore be amended to read:

"The tribunal may decide, at the request of one of the parties, to visit the scene with which the case before it is connected, provided the requesting party undertakes to pay the cost of the visit."

Paragraph 4 was adopted, as amended, by 9 votes to 2.

Article 15, as amended, was adopted unanimously.

Article 16

44. Mr. SCELLE said that the Chilean Government (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4) wished the meaning of article 16 to be clarified by laying it down that additional claims must be related either directly or indirectly to the principal issue. The Indian and United States Governments had expressed similar views (A/CN.4/68, Nos. 4 and 9 or A/2456, Annex I, Nos. 5 and 10 respectively), the former referring to article 63 of the Rules of Court of the International Court of Justice, according to which a counter-claim might be presented provided it was directly connected with the subject matter of the application and that it came within the jurisdiction of the Court.

45. The precise significance of the comment of the Netherlands Government (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) was not clear to him.

46. The CHAIRMAN explained that, as the Netherlands Government considered that the tribunal should have the greatest possible latitude in dealing with counter-claims, it believed that the phrase "For the purpose of securing a complete settlement of the

[6] *Ibid.*, 148th meeting, para. 16 (article 14 was numbered article 23 at that stage of the discussion).

[7] See document A/CN.4/92, United Nations publication, Sales No.: 1955.V.1, p. 56.

dispute" was undesirable, since it might unduly restrict the powers of the tribunal.

47. Mr. SCELLE said that the opening phrase of article 16 was derived from article 13 of the Covenant of the League of Nations. If the thesis that arbitration must result in a complete settlement of the dispute were accepted, the tribunal should be empowered to decide upon counter-claims. The Chilean, Indian and United States Governments' concern that counter-claims should be closely linked with the main subject of arbitration was well founded, and he would accordingly be prepared to amend the French text by substituting the words "*qu'il estime en étroite connexité avec*" for the words "*fondées sur*".

48. The word "*additionnelles*" should also be transposed to follow the word "*incidentes*", since in French legal procedure incidental claims comprised the other two categories, namely, "*additionnelles*" and "*reconventionnelles*".

49. Mr. LAUTERPACHT suggested that Mr. Scelle's amendment could be rendered in the English text by inserting the word "directly" after the word "arising".

49a. Mr. SCELLE agreed.

50. Mr. LAUTERPACHT considered that the opening phrase of article 16 ("For the purpose of securing a complete settlement of the dispute") was unnecessary, and, being in the nature of an explanation, had no place in a legal text. Furthermore, it was dangerously imprecise. What in fact was a complete settlement of any dispute? A legal decision might not produce a complete settlement from the political point of view. However, as the text had been accepted at the previous session, he would not vote against it if it commanded general support.

51. Mr. SCELLE said that he would prefer to retain the opening phrase of article 16. Its inclusion would constitute progress in the theory and practice of arbitration.

52. Mr. YEPES said that at the fourth session, as a supporter of the principle it embodied, he had voted in favour of article 16.[8] However, he now found the text both vague and dangerous. It failed to stipulate any time-limit for the submission of counter-claims, and would thus enable the parties to prolong the proceedings indefinitely. Furthermore, as he was opposed to the tribunal's being given unlimited power to decide on counter-claims, he considered that the text of article 16 as amended by Mr. Scelle should be improved by the addition of a phrase modelled on that part of article 63 of the Rules of Court of the International Court of Justice referred to by the Indian Government. He also suggested that the Special Rapporteur should follow the wording of that article by using, in the French text, the expression "*en connexité directe*" rather than "*en étroite connexité*".

53. Mr. LIANG (Secretary to the Commission) did not consider that there would be any harm in retaining the opening phrase of article 16, which nearly implied that counter-claims must be closely connected with the subject matter of the dispute.

54. In preparing the commentary on article 16, the Secretariat had carefully analysed the varying definitions of counter-claims, additional or incidental claims prevailing under different systems of law. For Anglo-Saxon lawyers, the expression "counter-claims" was a general one, and could mean direct or indirect counter-claims. The insertion in the English text of the word "directly", as proposed by Mr. Lauterpacht, would therefore render the meaning clear.

55. Mr. PAL supported the amendment suggested by Mr. Lauterpacht to the English text, an amendment which would, moreover, render the words "or additional or incidental claims" unnecessary.

56. In his opinion, the opening phrase of article 16 served some purpose, and should be retained.

57. Mr. KOZHEVNIKOV contended that article 16 was obscure, and would be liable to be interpreted too broadly. To his mind it deviated from the very concept of arbitration. He therefore proposed its deletion.

58. Mr. SCELLE was unable to support Mr. Kozhevnikov's proposal.

59. Though he would not insist upon the retention of the words "additional or incidental", their omission would make the text somewhat less precise.

60. He accepted Mr. Yepes' suggestion that the word "*directe*" be used in place of the word "*étroite*".

61. Mr. AMADO said that in Brazilian law "*demandes reconventionnelles*" were different from "*demandes incidentes*".

62. Mr. ALFARO said that in order to conform with Spanish legal practice, in which the three types of claim were quite distinct, it would be necessary to refer to all three.

63. Mr. ZOUREK had grave doubts about the retention of the opening phrase of article 16, which might jeopardize the freedom of the parties. The proviso went extremely far.

64. Unless he received an assurance that the tribunal would only be empowered to decide upon claims coming within its competence, he would have to vote against the article.

65. Mr. SCELLE pointed out that it was for the tribunal itself to decide whether or not it was competent to deal with a claim.

66. Mr. YEPES then submitted an alternative text for article 16 reading:

> "The tribunal shall decide on any counter-claims or additional or incidental claims that it counters as

[8] See *Yearbook of the International Law Commission, 1952*, vol. I, 149th meeting, para. 37 (article 16 was numbered article 27 at that stage of the discussion).

arising directly out of the subject matter of the dispute, provided they fall within its competence and are submitted not later than the final written conclusions of the parties."

67. Mr. LAUTERPACHT observed that Mr. Yepes had now amplified his original amendment by including at the end a reference to a detailed question of procedure.

68. Mr. SCELLE pointed out that such an addition was unnecessary, since the tribunal was master of its own procedure by virtue of article 13.

69. Mr. YEPES, defending his text, stressed that the Commission was dealing with a draft on procedure.

70. Mr. LAUTERPACHT said that in effect Mr. Yepes' text meant that the tribunal would be competent to settle counter-claims if it were competent to do so.

71. Mr. YEPES argued that he had not been guilty of a *petitio principii,* since the competence of the tribunal would be established either in the prior undertaking to arbitrate or in the *compromis.* Those were two entirely different situations in law.

72. Mr. SCELLE again pointed out that in the last resort it would be the tribunal itself which would have to decide whether it were competent or not to admit a claim.

73. Mr. ZOUREK considered the point at issue to be of great importance. The competence of the tribunal would be delimited in the *compromis* or the prior undertaking to arbitrate. If it transgressed those limits its findings would have to be regarded as null and void.

Mr. Kozhevnikov's proposal that article 16 be deleted was rejected by 8 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposal that the words "For the purpose of securing a complete settlement of the dispute" be deleted was adopted by 7 votes to 3, with 1 abstention.

74. The CHAIRMAN then put to the vote Mr. Scelle's amendments, whereby the French text of article 16 would read:

"Le tribunal statue sur toutes demandes incidentes, additionnelles ou reconventionnelles qu'il estime en connexité directe avec l'objet du litige."

The only change necessary in the English text was the insertion of the word "directly" after the word "arising".

Mr. Scelle's amendments were adopted by 9 votes to none, with 2 abstentions.

Mr. Yepes' amendment was rejected by 5 votes to 2, with 4 abstentions.

Article 16, as a whole and as amended, was adopted by 6 votes to 2, with 3 abstentions.

75. Mr. YEPES explained that he had abstained from voting on article 16 as a whole because in its amended form it was at variance with a general principle of law that counter-claims must have a direct connexion with the main issue, and because it failed to fix any time-limit for the submission of such claims.

The meeting rose at 5.5 p.m.

189th MEETING

Tuesday, 9 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Date and place of the Commission's next session and term of office of the members and the Special Rapporteurs

1. The CHAIRMAN invited the Commission to confirm the decisions taken at the private meeting held the previous day. In the light of General Assembly resolution 698 (VII), which set out the pattern of conferences for the years 1954-57 at New York and Geneva, the Commission had decided that it would hold its next session for a period of approximately eight weeks, beginning on the third week in August, 1954.

2. As to the term of office of the members, the Commission had decided that it should expire on 31 December 1953. A Special Rapporteur who had not been re-elected by the General Assembly would have to

cease working on that date; a Special Rapporteur who had been re-elected should, on the other hand, continue his work unless and until the Commission as newly constituted decided otherwise.

The decisions taken at the private meeting of the Commission held on Monday, 8 June 1953, were confirmed.

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*resumed from the 188th meeting*)

3. The CHAIRMAN proposed that a small sub-commission should be set up to study the amendments proposed to various articles of the draft on arbitral procedure, and to submit agreed texts to the Commission. He would suggest that it be composed of the authors of the various amendments, under the chairmanship of the Special Rapporteur, Mr. Scelle.

It was so agreed.

ARTICLE 17

4. Mr. KOZHEVNIKOV said that he would vote against article 17, for the reasons he had given in his general statement on the draft.[1]

5. Mr. ZOUREK supported Mr. Kozhevnikov on the grounds that article 17 conferred on the tribunal the right to prescribe provisional measures even if no request therefore were made by the parties: that constituted a departure not only from traditional arbitral procedure, but also from the domestic procedure of courts. Nor was it possible to confer on the tribunal powers which had not been assigned to it by the parties to the *compromis*.

6. Mr. KOZHEVNIKOV moved that article 17 be deleted.

7. Mr. SCELLE (Special Rapporteur) urged the retention of article 17, which was substantially the same as Article 41 of the Statute of the International Court of Justice.

8. Mr. LAUTERPACHT considered that, like Article 41 of the Statute of the International Court, article 17 implied that the tribunal or its president should take provisional measures at the request of the parties. If explicit reference were made to the parties' request, would Mr. Zourek be prepared to vote for article 17?

9. Mr. ZOUREK replied that he would be unable to do so, because his objection rested in part on the circumstance that article 17 implied that the parties would be obliged to accept the provisional measures, even if they had not conferred the appropriate powers on the tribunal in the *compromis*.

10. Mr. SCELLE said that the Commission's object in adopting article 17 had been to forestall possible collusion between the parties to prevent the tribunal from rendering a workable award.

11. Article 17 formed part of the attempt to stabilize the judicial procedure.

12. Mr. LIANG (Secretary to the Commission) considered that it would be unreasonable to stipulate that provisional measures could only be prescribed at the request of both parties. Request by one party was in his opinion already implicit in article 17.

13. Mr. YEPES proposed that article 17 be amended by inserting the words: "at the request of one of the parties and" ("*sur la demande de l'une des parties et*") after the word "prescribe". That, he believed, would cover Mr. Zourek's point.

14. Mr. SCELLE was unable to support the proposed amendment, which would not circumvent the possibility of collusion between the parties. He drew attention to the United Kingdom Government's statement (A/CN. 4/68, No. 8 or A/2456, Annex I, No. 9) that it approved in particular the attitude taken up by the Commission in the articles numbered 17 to 20.

15. Mr. YEPES recalled that the provisional measures originated in article XVIII of the Convention of 1907 for the Establishment of a Central American Court of Justice. That article read in part: "the court may at the solicitation of any one of the parties... etc.".[2]

16. Mr. SCELLE said that an article so drafted would be very dangerous, since it might enable one party to confront the other with a *fait accompli*, causing the point at issue in the dispute to disappear. It was essential to preclude all possibility of fraud. Furthermore, since the article permitted the prescription of provisional measures without a request in that sense by the parties, it followed *a fortiori* that those measures could be prescribed if such request were made.

17. Mr. LAUTERPACHT did not share Mr. Scelle's apprehension, and was inclined to support Mr. Yepes' amendment. If the interests of one of the parties were in jeopardy, that party would surely ask the tribunal to take provisional measures at the outset of the proceedings. On the whole, he considered that the element of request by the parties was implied in the text and would therefore vote for it in its present form.

Mr. Yepes' amendment was adopted by 6 votes to 3, with 2 abstentions.

18. Mr. YEPES requested that article XVIII of the Convention of 1907 for the Establishment of a Central American Court of Justice be quoted verbatim in the summary record of the meeting, since it was only right that tribute should be paid to a remarkable innovation in international law. That innovation was one of the most important contributions of American international law to the progress and development of general international law.

[1] See *supra*, 185th meeting, paras. 79-86.

[2] See *American Journal of International Law, Supplement*, vol. 2 (1908), p. 238.

19. The text of the article in question read as follows:

"From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *status quo* pending a final decision." [3]

20. Faris Bey el-KHOURI asked whether both prerequisites which now figured in article 17 would have to operate before the tribunal or its president could prescribe provisional measures.

21. Mr. YEPES, with whom Mr. Scelle concurred, replied in the affirmative.

Article 17 was adopted, as amended, by 9 votes to 2.

ARTICLE 18

Article 18 was adopted unanimously.

ARTICLE 19

22. Mr. SCELLE considered that paragraph 2 of article 19, which stated that all questions should be decided by a majority of the tribunal, was in contradiction with sub-paragraph (f) of article 9, where it was stated that the number of members constituting the majority required for an award of the tribunal should be specified in the *compromis*. He would therefore suggest that sub-paragraph (f) of article 9 be deleted.

23. Mr. ZOUREK suggested that the contradiction might be removed by stipulating in paragraph 2 of article 19 that where no appropriate provision was made in the *compromis,* all questions should be decided by the majority of the tribunal. An amendment in that sense would follow the precedent set by other articles wherein action by the tribunal was made subsequent to and dependent upon agreement of the parties.

24. Mr. SCELLE opposed Mr. Zourek's suggestion, which was based on the concept that the will of the parties must prevail. The Commission's draft, however, was based on the principle that the tribunal should have the widest possible powers, and he would recall that at the fourth session article 19 had been adopted unanimously.[4]

25. If a two-thirds majority were required from a tribunal composed of three members, or a four-fifths majority from one composed of five members, no decision would be possible. The effect of adopting Mr. Zourek's suggestion would be to give the will of the parties too much influence. He would remind the Commission of the difficulties which arose in, for instance, national parliaments when a reinforced majority was required. The majority rule was most common, and should be stipulated in the present instance.

26. Mr. KOZHEVNIKOV considered that Mr. Zourek's suggestion was reasonable, and clarified the point at issue.

27. Mr. LAUTERPACHT thought that it would be unwise for the Commission to consider the amendment of article 19 simultaneously with the deletion of sub-paragraph (f) of article 9, since the adoption of Mr. Scelle's proposal might necessitate consequential amendments to other articles.

28. As to Mr. Zourek's suggestion, he would submit that if the parties decided in the *compromis* that all the tribunal's decisions should be unanimous, such agreement would be contrary to the whole concept of arbitration, and would have the effect of transforming the tribunal into a diplomatic conference. On the other hand, to require a four-fifths majority in a tribunal composed of five members would not conflict with the fundamental concept of arbitration. To pass from theory to practice, however, he must emphasize that the Commission's object was to avert the risk of a request for a unanimous decision. He therefore supported Mr. Scelle's views.

29. After further discussion, *it was agreed* that the Sub-Commission set up at the beginning of the meeting should examine paragraph 2 of article 19 and sub-paragraph (f) of article 9, with special reference to the character of the umpire's decision in cases where his services were called upon by two national arbitrators.

30. Mr. YEPES considered that the word "majority" in paragraph 2 of article 19 should be qualified, since it must be made clear whether a simple or a prescribed majority was intended.

31. The CHAIRMAN said that the Sub-Commission would keep that point in mind.

ARTICLE 20

32. Mr. KOZHEVNIKOV was opposed to article 20, which would allow the tribunal to take a decision in the absence of one of the parties. From his point of view that would not be desirable.

Article 20 was adopted by 8 votes to 2.[5]

ARTICLE 21

Article 21 was adopted unaimously.

ARTICLE 22

33. Mr. YEPES proposed that article 22 should form paragraph 3 of article 21, since the two articles were closely related.

[3] *Ibid.*

[4] See *Yearbook of the International Law Commission, 1952,* vol. I, 149th meeting, para. 85 (article 19 was numbered article 30 at that stage of the discussion).

[5] For further discussion of article 20, see *infra,* 193rd meeting, para. 33.

34. Mr. SCELLE pointed out that articles 21 and 22 did not deal with identical subjects even though it might be argued that they were closely related. Although, on superficial inspection, article 22 might seem to deal with the discontinuance of proceedings, in point of fact its purpose was to provide that in the event of a settlement being reached by the parties, the tribunal could embody that settlement in an award, thus, to put it in other words, giving the settlement the authority of *res judicata.*

35. Mr. PAL also considered that articles 21 and 22 differed substantively, since the withdrawal of a claim was by no means the same as the conclusion of a settlement. The two articles should therefore be kept separate.

36. Mr. LAUTERPACHT agreed with Mr. Pal.

37. Mr. ZOUREK thought that the second sentence of article 22 transcended the limits of arbitral procedure.

38. Mr. YEPES withdrew his proposal.

39. Mr. ALFARO doubted whether an arbitral tribinal would be competent to take a decision contrary to the settlement reached by the parties, or to confirm such a settlement by rendering an award. To illustrate his argument, he would refer to a hypothetical dispute about frontiers, in which one party wished agreement to be based on line A and the other wished it to be based on line B. While arbitration was in progress, the two parties arrived at a settlement on the basis of an intermediate line. It was inadmissible that the tribunal should then render the award in terms that were either contrary to the conclusions it had reached, or did not coincide with the settlement.

40. Mr. AMADO, noting the Brazilian Government's comment (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3) to the effect that article 22 appeared to ignore the will of the parties, said that that government had evidently overlooked the phrase: "At the request of the parties". He would vote for article 22.

41. Mr. SCELLE pointed out that no tribunal could be obliged to accept a settlement that was contrary to the principles of law. In the event of such a settlement being reached, the tribunal would be unable to give it the authority of *res judicata.*

42. Faris Bey el-KHOURI said that it was a question not of approval but of registration. It was usual in municipal law for courts to express a settlement in legal form.

43. Mr. AMADO agreed with Faris Beyel-Khouri, and proposed that the word "*expédient*" be deleted from the French text. That word was inspired by the comment to article 22, which, in his view, went beyond the terms of the article.

44. Mr. SCELLE said that "*expédient*" was a current French term and meant nothing but "*de commodité*".

45. He emphasized that it often happened that a settlement was contrary to law, and mentioned the case of imprisonment without trial, which constituted a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.[6] It might be that one government, after detaining the national of another State without trial for a number of years, might arrive at a settlement with the other State whereby the case would simply be dismissed. No tribunal could take the responsibility of lending its authority to such a settlement. It would be obliged to refuse to render an award. In the case of frontier disputes the parties might agree to take a line wholly different from that fixed by law, custom or the like. There again, it would be for the governments parties to the dispute, and not for the tribunal to take responsibility for a settlement which was not based on law.

46. Mr. HSU did not consider that it would be either harmful or dangerous if a tribunal refused to register a settlement. Since the parties to a dispute would be sovereign States, agreement between them would be sufficiently binding without an award.

47. Mr. YEPES agreed with Mr. Scelle, and said that he would vote for article 22 together with the amendment thereto proposed by Mr. Amado.

48. Mr. SCELLE was prepared to agree that the word "*expédient*" should be deleted.

49. Mr. KOZHEVNIKOV opposed the amendment on the grounds that the Russian text was perfectly clear as drafted. In the second sentence the emphasis was clearly on the opening words "At the request of the parties", and it would be undesirable to change that emphasis.

50. Mr. ALFARO said that he would be prepared to vote for article 22 as amended by Mr. Amado, on the understanding that it was not mandatory.

51. Mr. AMADO pointed out for Mr. Kozhevnikov's benefit that he could not agree that the word "*expédient*" should be accepted as covering such vastly important settlements involving transfers of territories as had been arrived at on the Latin-American continent. It went without saying that the Russian text must conform with the Commission's decision.

52. Mr. LAUTERPACHT asked which would be the authentic text of the draft. He was in favour of deleting the word "*expédient*". It was for the translators to find the appropriate Russian formula.

53. Mr. LIANG (Secretary to the Commission) said that the authenticity of texts was a difficult issue. Some of the conventions initiated under the auspices of the United Nations stipulated that the texts were authentic in the five official languages. In other instruments no such stipulation was made. It was not clear whether the Commission was responsible for the text in languages other than those actually used in drafting the articles on arbitral procedure. For his own part, he considered

[6] See *American Journal of International Law, Supplement,* vol. 45 (1951), pp. 26-39.

that the most the Commission could do was to draft a text in the two working languages.

54. Mr. ZOUREK did not consider that the problem could be left to translators.

55. Mr. AMADO proposed that the wording of the second sentence of article 22 be amended to read in English, "that settlement" instead of "the settlement" and in French "*cette transaction*" instead of "*la transaction*".

56. Mr. KOZHEVNIKOV reiterated that the Russian text as drafted was perfectly lucid, and perfectly acceptable to him.

57. Mr. LAUTERPACHT maintained that the point must be elucidated by the official translators. Mr. Kozhevnikov did not pretend to be an authority on the English and French languages.

Mr. Amado's amendment was adopted by 7 votes to 1, with 3 abstentions.

Article 22 was adopted, as amended, by 10 votes to none, with 1 abstention.

58. Mr. KOZHEVNIKOV explained that he had voted in favour of article 22 on the understanding that the Russian text thereof was unaffected by the amendment, and in particular that the words "*mirovaya sdelka*", appropriately inflected, were retained.

ARTICLE 23

59. Mr. SCELLE considered that the Indian Government had good reason for considering that paragraph 2 of article 23 was open to misunderstanding (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5).

60. For his own part, he regarded the whole article as disastrous, based as it was on the assumption that the parties would be able to forecast when the tribunal would be in a position to render the award. Moreover, it now conflicted with article 9, sub-paragraph (h), from which the words "The time limit within which the award shall be rendered" had been deleted.[7] He therefore proposed that the whole of article 23 be deleted.

61. Mr. LAUTERPACHT observed that the Special Rapporteur's proposal was a very radical one. Most arbitration treaties or *compromis* contained a provision concerning a time-limit for rendering the award. The Commission ought not to ignore past practice in that respect. The only consequence of the change made in article 9, sub-paragraph (h), was that the parties were no longer bound to include in the *compromis* a provision about the time-limit.

62. It was true that paragraph 2 was not very well drafted, but as it was not of fundamental importance the text might be left as it stood.

63. Mr. SCELLE said that his views were diametrically opposed to those of Mr. Lauterpacht. In his view, it would be patently absurd to allow the parties to fix in advance the time-limit within which the tribunal was bound to render the award. The existence of such a stipulation might oblige the tribunal either to take a hasty and ill-considered decision, or to prolong it unduly. That would be contrary to every principle of justice and good order, and he must accordingly press for the deletion of the article.

64. Mr. AMADO considered that paragraph 1 should be maintained, since the parties must be entitled to lay down a time-limit in the *compromis*. On the other hand, he agreed with the Indian Government that paragraph 2 required amendment.

65. Mr. ZOUREK said that the provision made in article 23 was a necessary one. The amendment of article 9, sub-paragraph (h), did not preclude the parties from fixing a time-limit for the award in the compromis. The parties' concern that the proceedings should not be unduly protracted was a legitimate one, and should be taken into account. If for some reason the tribunal found itself unable to comply with the time-limit laid down it could always ask for an extension; in practice, such time-limits had not given rise to substantial difficulties.

66. Mr. PAL could not support Mr. Scelle's proposal that article 23 be deleted. The parties should not be placed in a position where they might have to wait indefinitely for an award. There was all the more reason for setting a time-limit, inasmuch as in international law there was no means of reaching a settlement between the parties other than by arbitral award. Nor should the matter of a time-limit be left entirely to the discretion of the arbitrators. Paragraph 1 should therefore not be abandoned and if it conflicted in any way with the amended text of article 9, sub-paragraph (h), it was the latter that should be modified.

67. He was in agreement with the Indian Government's comment and suggested that the word "shall" be substituted for the word "may" before the word "refrain" in paragraph 2.

68. Mr. LIANG (Secretary to the Commission) failed to see any contradiction between article 23 and article 9, sub-paragraph (h), as amended. The former merely laid down the essential matters that must be specified in the *compromis*, and in no way precluded provision being made for a time-limit within which the award should be rendered.

69. Perhaps it could with justice be argued that a permanent arbitral tribunal with fixed rules of procedure should not be bound by a time-limit. That argument did not, however, apply to an *ad hoc* tribunal.

70. Mr. LAUTERPACHT could not agree with Mr. Scelle that it would be absurd to allow the parties to fix a time-limit. Their concern that the tribunal should not be in a position to prolong the proceedings indefinitely was legitimate. He was glad, therefore, that there seemed to be general agreement in the Commission that paragraph 1 should be retained. He also hoped that no change would be made to paragraph 2, and could not

[7] See *supra*, 187th meeting, paras. 61-62.

support Mr. Pal's amendment which would mean that if the parties were unable to agree on an extension of the time-limit the tribunal would be obliged to refrain from rendering the award. The present wording was sufficiently elastic to permit of reasonable and fair interpretation, and should therefore be left unchanged.

71. Mr. PAL pointed out that if paragraph 2 were accepted unchanged, an extension of time-limit would be entirely within the discretion of the tribunal, which was an untenable solution.

72. Mr. SCELLE said that even if he received no support at all he would still firmly abide by his stand. There was no justification whatsoever for retaining article 23 on the ground that it was consistent with precedent. Such a step would have the fatal effect of enabling one party — in all probability the party at fault — to prevent the award from being rendered at all. Unlike Mr. Lauterpacht, he had greater faith in the tribunal than in the parties. Only the tribunal could determine when it was ready to render the award. The retention of article 23 might have the gravest repercussions on the efficacy of the whole draft either by obliging the tribunal to judge in haste, or by giving one of the parties an opportunity of frustrating the settlement. Its maintenance would make justice subject to the whim of the parties.

73. Faris Bey el-KHOURI endorsed Mr. Scelle's arguments about the dangers of article 23, but believed the provision to be a necessary evil. The parties must be free to give the tribunal a time-limit. Arbitration was an exceptional procedure for the settlement of disputes, and derived from the free will of the parties. Their rights must therefore be safeguarded.

74. He supported Mr. Pal's amendment to paragraph 2.

75. Mr. ALFARO said that a time-limit had been laid down in many former treaties and had in certain cases prevented the rendering of an award. The absence of such a provision, on the other hand, had not retarded proceedings unduly. All things considered, he believed that it would be best to leave the tribunal free to render its decision as and when it deemed itself to be in full possession of the facts. He therefore supported the Special Rapporteur's proposal.

76. Mr. YEPES said that, in the light of the extremely forceful arguments put forward by partisans of both views, he was still undecided. It was true that the practice of fixing a time-limit was widespread, and that the speedy settlement of disputes was desirable for reasons of public policy. On the other hand, it must be remembered that once public interest had declined, the circumstances were more propitious for the tribunal to reach its decision. He also recognized the force of the argument that it was impossible to foresee in advance how much time the tribunal would need before it was in a position to reach its conclusions. For example, it would be impossible to say in advance to what counter-claims a case might give rise. Even the International Court of Justice, a permanent body with fixed rules of court, could not establish in advance the time within which it would be able to render an award. How much more difficult would it be for an *ad hoc* body to do so.

77. Given all the difficulties, perhaps an acceptable compromise might be engineered by substituting for article 23 a provision stating that in principle the time-limit within which the award should be rendered should be laid down in advance in the *compromis,* but that the tribunal was free to extend that time-limit if it thought fit or necessary, according to the nature of the case.

78. Mr. SCELLE said that the compromise suggested by Mr. Yepes would be acceptable to him.

79. Mr. KOZHEVNIKOV said that the issue was of crucial importance. The discussion had again confirmed his conviction that the author of the draft had gone a great deal too far in his concept of what an arbitral tribunal should be. That theoretical concept had indeed provoked serious practical objections. Surely the tribunal should be created for the parties, and not *vice versa.* It was inadmissible that the parties should be made a kind of appendage to the tribunal and be deprived of all their elementary rights. Article 23 must be maintained as a counterweight to some of the Special Rapporteur's extreme innovations.

80. Mr. HSU agreed with the Special Rapporteur that article 23 should either be deleted or be very radically modified. Its disadvantages outweighed the advantages. Its deletion, moreover, would not prevent the parties from specifying a time-limit for rendering an award if circumstances so required and a reasonably accurate prediction could be made of the time the tribunal would need.

81. Mr. ZOUREK emphasized that the purpose of article 23 was not to settle the question of whether or not time-limits for rendering the award should be established in advance, but to indicate the obligations of the tribunal if such a time-limit existed. The deletion of the article, therefore, would in no way resolve the issue. The disastrous effects of retaining it described by the Special Rapporteur were largely imaginary. Time-limits had been laid down in numerous cases, and had very seldom prevented a tribunal from rendering its award.

82. Mr. LAUTERPACHT proposed that article 23 be replaced by a new text, to read as follows:

> "The award shall be rendered within the period fixed by the *compromis,* unless the tribunal, with the consent of either or both parties, decides to extend the period fixed in the *compromis.*"

83. That text was not very far removed from the solution suggested by Mr. Yepes, according to which it was for the tribunal alone to decide whether or not a prescribed time-limit should be extended.

84. Mr. SCELLE said that if Mr. Lauterpacht's text commanded the support of the majority he would accept it, since it removed the major defect of article 23, which was that the losing party might be enabled to prevent the tribunal from rendering the award.

85. Mr. YEPES criticized Mr. Lauterpacht's text on the grounds that it would be imprudent to require the agreement of one or both parties to any extension of a time-limit. The tribunal would be the best judge of whether it was in a position to render the award. As it would be composed of persons of high standing, it should command every confidence.

86. Mr. KOZHEVNIKOV said that he would have voted in favour of the original text of article 23. He now had some hesitation, in view of the new proposals before the Commission. He therefore asked that further discussion be deferred until they had been circulated in writing.[8]

It was so agreed.

ARTICLE 24

87. Mr. SCELLE said that no government had commented on article 24.

88. Mr. YEPES suggested that in the interests of courtesy the word "*convoqués*" be substituted for the word "*appelés*" in paragraph 1 of the French text.

89. Mr. SCELLE accepted Mr. Yepes' suggestion.

Mr. Yepes' amendment to the French text was adopted by 5 votes to none, with 6 abstentions.

Paragraph 1, as amended, was adopted unanimously.

90. Mr. KOZHEVNIKOV then proposed a similar drafting change in the Russian text. The word "summoned" had been translated by a somewhat brusque term.

91. Faris Bey el-KHOURI, referring to paragraph 3, proposed that the word "them" be substituted for the words "the president and the registrar or secretary of the tribunal".

92. Mr. LAUTERPACHT could not support Faris Bel el-Khouri's amendment. The question had been fully discussed at the fourth session, and the reason why it had been decided not to require signature by all members of the tribunal was that in the past national arbitrators had often refused to sign the award.[9] If signature were to be made mandatory upon all members, there would be a danger of the proceedings being frustrated in the concluding stages.

93. Faris Bey el-KHOURI pointed out that by virtue of article 19, which stated that the deliberations of the tribunal should be attended by all of its members, it would be only normal for all of them to sign the award.

94. Mr. KOZHEVNIKOV supported Faris Bey el-Khouri's amendment, which would enhance the authority of the award rendered by the tribunal.

95. Mr. LAUTERPACHT was not surprised by Mr. Kozhevnikov's approval of the amendment, which would go a long way towards giving him satisfaction with regard to the whole procedure laid down in the draft. The serious consequences of requiring all members of the tribunal to sign the award were obvious.

96. Mr. SCELLE considered the difficulty mentioned by Mr. Lauterpacht to be a real one. It might, however, be removed by the inclusion of a proviso stating that refusal by one of the arbitrators to sign the award could not constitute grounds for challenging its validity. He would not like to suggest, however, that any arbitrator would be guilty of such bad faith as to fall back on a purely formal provision in order to invalidate the decision of the tribunal.

97. Mr. ALFARO said that, in order to meet Mr. Lauterpacht's point, he would propose that Faris Bey el-Khouri's amendment be amended by the addition at the end of the paragraph of the words "without prejudice to the provision of article 25 regarding dissenting opinions".

98. Mr. LIANG (Secretary to the Commission) pointed out that Faris Bey el-Khouri's amendment was inspired by The Hague Convention of 1899. The significance of the signatures to an award was different both in The Hague Convention of 1907 and in the Statute of the Permanent Court of International Justice, according to which they became merely a means of authentication. If that interpretation were to be maintained, it would be pointless to discuss the possibility of the absence of one signature affecting the validity of the award. On the other hand, adoption of Faris Bey el-Khouri's amendment might give rise to doubt on that question.

99. Mr. PAL said that he was in favour of paragraph 3 as it stood. Mr. Alfaro's sub-amendment would not avert the danger to which attention had been drawn by Mr. Lauterpacht.

100. Mr. SCELLE agreed with Mr. Pal.

101. Mr. ZOUREK considered Faris Bey el-Khouri's amendment to be acceptable. Matters submitted by States to arbitration were always important, and it was therefore appropriate that the award should be signed by all members of the tribunal.

102. Mr. AMADO, drawing attention to the seventh paragraph of the Secretariat's comment on article 24 (A/CN.4/L.40),[10] said that if signature by the president of the tribunal constituted authentication of the award there was no need to complicate the process further by requiring all members to sign. The difficulty would be eliminated if the words "and the registrar or secretary of the tribunal" were replaced by a proviso stating that the award should be signed by the president and each member who had expressed himself in agreement with the award. He accordingly proposed an amendment to that effect.

[8] See *infra*, 190th meeting, para. 11.

[9] See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, paras. 42, 53-63 (article 24 was numbered article 32 at that stage of the discussion).

[10] See document A/CN.4/92, p. 87.

103. Faris Bey el-KHOURI said that the authentication of decisions by the International Court of Justice, which was a permanent body, could not be compared with authentication of awards rendered by *ad hoc* arbitral tribunals. He therefore pressed his amendment, while accepting the sub-amendment suggested by Mr. Alfaro. He could also support Mr. Amado's amendment.

Mr. Amado's amendment was adopted by 8 votes to none, with 3 abstentions.

Paragraph 3, as amended, was adopted by 9 votes to none, with 2 abstentions.

104. Mr. YEPES considered that the English and French texts of paragraph 2 were inconsistent. He preferred the former, believing that a statement of reasons was essential. He therefore intended to submit a new wording for the French text, and to propose the addition in Chapter VII, "Annulment of the Award", of a clause providing that any award not containing a full statement of reasons should be null and void. No terms could ever be too strong for the conduct of arbitrators like President Cleveland in the *Cerruti* case, between Colombia and Italy, who not only omitted to state any reason for his decision, but also exceeded his powers by giving a decision *ultra petita*.[11]

105. Mr. AMADO saw no reason for changing the existing text of paragraph 2 in either language.

106. Mr. ALFARO observed that the Spanish text of paragraph 2 concorded perfectly with the English version.

The meeting rose at 1.5 p.m.

[11] Award of 2 March 1897. See Stuyt, *Survey of International Arbitrations 1794-1938* (The Hague, Martinus Nijhoff, 1939), p. 188.

190th MEETING

Wednesday, 10 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

ARTICLE 24 (*continued*)

1. Mr. YEPES said that he was anxious to ensure that the award should include a full statement of reasons. As he had mentioned at the previous meeting in the *Cerruti* case between Colombia and Italy the arbitrator, President Cleveland of the United States of America, had exceeded his competence and given no reasons whatsoever for what could only be described as an absolutely arbitrary decision.[1] He feared that the French text of paragraph 2 was not sufficiently explicit. It might therefore be modified to read:

"*La sentence doit contenir un exposé complet des motifs sur lesquels elle est basée.*"

2. He also intended to re-introduce the proposal he had suggested at the fourth session[2] to the effect that failure to include a full statement of reasons in the award should be a ground for challenging its validity (article 30).

3. Mr. SCELLE (Special Rapporteur) considered Mr. Yepes' amendment to the French text of paragraph 2 unnecessary. He was prepared, however, to support his proposal concerning article 30.

4. Mr. YEPES said that he would not press his amendment to the French text of paragraph 2 provided there was no doubt as to the meaning of that provision.

5. Mr. LAUTERPACHT observed that Mr. Yepes' text had the merit of being a literal translation of the English version. The requirement in the original French text of paragraph 2 hardly seemed to go so far as requiring a full statement of reasons.

6. Mr. ALFARO considered that the phrase "*dûment motivée*" in paragraph 2 precisely conveyed Mr. Yepes' intention. Moreover, it had an exact equivalent in Spanish. On the other hand the words "*un exposé complet des motifs*" had another connotation both in French and in Spanish.

7. Mr. KOZHEVNIKOV said that the Russian text was sufficiently clear as it stood, but might be rendered yet more precise by Mr. Yepes' amendment, which therefore would be acceptable to him.

[1] Award of 2 March 1897. See Stuyt, *Survey of International Arbitrations 1794-1938* (The Hague, Martinus Nijhoff, 1939), p. 188.

[2] See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, para. 37 (article 24 was numbered article 32 at that stage of the discussion).

8. Mr. SCELLE suggested that the texts of paragraph 2 should be left as they stood in both languages, since in their present form they accurately conveyed the meaning intended.

9. Mr. LIANG (Secretary to the Commission) expressed some apprehension about the phrase "a full statement of reasons", which might be exploited by one of the parties as a ground for challenging the validity of the award, and thereby encourage endless litigation. The decisions of the Permanent Court of Arbitration, unlike those of the International Court of Justice, were usually framed very concisely. Too much importance should therefore not be attached to the word "full".

10. The CHAIRMAN put to the vote the original text in both languages of paragraph 2 of article 24.

Paragraph 2 was adopted by 11 votes to none, with 1 abstention.

Article 24, as a whole and as amended, was adopted unanimously.[3]

ARTICLE 23 (*resumed from the 189th meeting*)

11. The CHAIRMAN invited the Commission to continue its consideration of the amendment to article 23 proposed by Mr. Lauterpacht at the previous meeting.[4] The text proposed by Mr. Yepes, which had now been circulated, read:

> "In principle, the award must be rendered within the period fixed by the *compromis,* but the tribunal shall have the right to extend this period if it considers that circumstances so require or if the parties consent to an extension."

12. He suggested that the last phrase of Mr. Yepes' amendment, reading: "or if the parties consent to an extension", was redundant.

13. Mr. YEPES contested the Chairman's arguments. The amendment stated two alternative cases in which the time-limit for rendering the award might be extended.

14. Mr. SCELLE considered that the phrase "if it considers that circumstances so require" was too vague. The only circumstance in which the tribunal would wish to extend the time-limit would be if it felt that it was not in full possession of the facts. Apart from that point, he preferred Mr. Yepes' text to that proposed by Mr. Lauterpacht, because it was more radical and would give the tribunal powers similar to those enjoyed by ordinary courts of law. If, however, given the nature of arbitration, the Commission felt that the consent of the parties was essential, and that the danger of one party preventing an extension of the time-limit had been eliminated by Mr. Lauterpacht's text, he would support the latter.

15. Mr. YEPES said that in order to meet Mr. Scelle's point he was prepared to substitute the words "if it considers that it is not in full possession of the facts" for the words "if it considers that circumstances so require".

16. Mr. KOZHEVNIKOV said that Mr. Yepes' text would be acceptable to him if amended by the deletion of the words "In principle", which were restrictive, by the deletion of the redundant words "it considers that", and by the substitution of the word "and" for the word "or" after the word "require".

17. Mr. Lauterpacht's text was nearer the original, and would also be acceptable if the words "either or" were deleted.

18. Mr. YEPES accepted the first two amendments proposed by Mr. Kozhevnikov, but was unable to agree to the third.

19. Mr. AMADO believed that the words "if it considers that it is not in full possession of the facts" were unnecessary. He failed to see any essential difference between Mr. Yepes' proposal and the original text, except for the inclusion of that totally unnecessary phrase.

20. The CHAIRMAN pointed out to Mr. Amado that, unlike the original provision, Mr. Yepes' text would enable the tribunal itself to extend the time-limit.

21. Mr. SCELLE pointed out that Mr. Kozhevnikov's third amendment to Mr. Yepes' text, and his amendment to Mr. Lauterpacht's text, entirely destroyed their purpose by requiring the consent of both parties to any extension of the time-limit.

22. Mr. KOZHEVNIKOV expressed surprise at Mr. Scelle's remarks. He would have thought that his amendments would have given the Special Rapporteur satisfaction, inasmuch as they would render both texts closer to the original.

23. Mr. ZOUREK considered that the original text of paragraph 1 of article 23 should be retained, and paragraph 2 deleted. He had already explained at the fourth session[5] why, both on theoretical and on practical grounds, it was undesirable to permit the tribunal to extend the time-limit on its own initiative.

24. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that the word "and" be substituted for the word "or" after the word "require" in Mr. Yepes' text.

The amendment was rejected by 8 votes to 3, with 1 abstention.

25. The CHAIRMAN put to the vote Mr. Yepes' text with the two amendments proposed by Mr. Kozhevnikov and accepted by the author.

Mr. Yepes' text was rejected by 6 votes to 3, with 3 abstentions.

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[3] See paras. 65-93 *infra*. For further discussion of article 24, see *infra*, 193rd meeting, para. 44.

[4] See *supra*, 189th meeting, para. 82.

[5] See *Yearbook of the International Law Commission, 1952*, vol. I, 150th meeting, para. 14.

26. The CHAIRMAN put to the vote Mr. Kozhevnikov's proposal that the words "either or" be deleted from Mr. Lauterpacht's text.

The amendment was rejected by 8 votes to 4.

27. The CHAIRMAN put to the vote Mr. Lauterpacht's substitute text for article 23.

Mr. Lauterpacht's text was adopted by 7 votes to 2, with 2 abstentions.

28. Mr. SPIROPOULOS said that, if the consent of one party was enough to secure an extension of the time-limit, the words "or both" in Mr. Lauterpacht's text were redundant.

29. Faris Bey el-KHOURI agreed.

30. Mr. SCELLE said that, although the deletion of the words "or both" would improve the style of the text, their retention would be more consistent with the principles of arbitration, and would duly reflect the Commission's preference that time-limits should be extended only with the consent of both parties. In any event, as a vote had already been taken on the amendment, no change could now be accepted.

ARTICLE 25

31. Mr. SCELLE said that no observations had been submitted on article 25, which, he suggested, should be adopted without change.

Article 25 was adopted unanimously.

ARTICLE 26

32. Mr. SCELLE said that the Chilean Government had justly criticized (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4) the unsatisfactory manner in which article 56 had been drafted. He also agreed that time must be allowed for an additional period after the expiry of the *compromis* during which the parties might apply for corrections to be made to the award. He therefore proposed that article 26 be replaced by a new text stating that once the award had been made, the tribunal would have a period of one month to correct what he would describe in French as "*erreurs matérielles*", to which the parties might draw its attention.

33. Mr. AMADO said that certain authorities on arbitration held that once the award had been rendered the tribunal ceased to exist, and its competence came to an end.

34. Mr. SCELLE said that it was perfectly true that once the award had been rendered the tribunal could not make any substantive change in it. On the other hand, acting in a purely drafting capacity, it should be empowered to rectify, for example, typographical errors or mistakes in calculations.

35. Mr. LIANG (Secretary to the Commission) pointed out that the secretariat of an *ad hoc* arbitral tribunal would not be empowered to rectify such errors. Provision must therefore be made to enable the tribunal itself to do so. He feared, however, that in Anglo-Saxon law "*erreurs matérielles*" might be interpreted as material errors — i.e., errors of substance which might render a judicial decision void. It might perhaps be wiser to use a more innocuous expression, such as "clerical or typographical errors", which had a very limited connotation.

36. Mr. SPIROPOULOS asked the Special Rapporteur whether any provision similar to article 26 existed in earlier arbitration treaties or in the Statute of the International Court of Justice. It would also be interesting to know what procedure existed in municipal law to enable a court to correct a judgement.

37. Mr. SCELLE referred Mr. Spiropoulos to the Secretariat's comment on article 26 (A/CN.4/L.40).[6]

38. Mr. LIANG (Secretary to the Commission) observed that the Registrar of the International Court of Justice was empowered to correct clerical errors, but arbitral tribunals would not have such an officer.

39. Mr. ALFARO shared the Secretary's doubts about the use of the expression "*erreurs matérielles*", which might well be confused with errors of fact having a bearing on the substance of the award. If such a phrase were to be used, it must be made clear that it referred to arithmetical or typographical errors. He would also welcome some explanation of whether the tribunal's attention would have to be drawn to such errors by one or by both of the parties.

40. Faris Bey el-KHOURI asked from what date the month suggested by Mr. Scelle for the correction of errors would run. There was sometimes an interval between the reading of the award in open court and its communication to the parties.

41. Mr. AMADO endorsed the Secretary's remarks. It was essential that it be made clear that article 26 referred solely to mistakes of form or errors in calculation.

42. He agreed with the Chilean Government that the parties must be allowed time to apply for rectification after the expiration of the time-limit for rendering the award.

43. Mr. PAL said that, generally speaking, there were two kinds of errors, substantive and clerical. The first could only be rectified by invoking the process of review. If the intention was that article 26 should deal only with the latter, he proposed that it read:

> "Within one month after the award is rendered and communicated to the parties, the tribunal, either of its own motion or at the request of either party, shall be entitled to rectify any clerical, typographical or arithmetical errors apparent on the face of the award."

[6] See document A/CN.4/92, comment to article 27 (corresponding to comment to article 26 in document A/CN.4/L.40), pp. 93-95.

44. Mr. LAUTERPACHT pointed out that precedent justified a provision of the kind contained in article 26.

45. He agreed with the Chilean Government that the opening clause concerning the time-limit should be amended, but doubted whether the Special Rapporteur's alternative proposal, which spoke of "*erreurs matérielles*", was satisfactory. Apart from typographical and arithmetical errors, errors of description, such as had occurred in boundary disputes, must also be taken into account.

46. With those considerations in mind, he proposed an alternative wording for article 26, reading:

> "Within two months of rendering the award, the tribunal may, on the application of either party, rectify typographical errors or mistakes in calculation or description."

47. Mr. SCELLE agreed with the views expressed by Mr. Alfaro, Mr. Lauterpacht and Mr. Pal. It had never been his intention that article 26 should apply to errors of fact affecting the substance of the award. He could accept either Mr. Lauterpacht's or Mr. Pal's text, the meaning of which appeared to him to be almost identical. He would, however, draw attention to the disadvantages of attempting to enumerate the possible types of error that might require rectification. He fully recognized the difficulty of rendering in English the expression "*erreurs matérielles*".

48. Faris Bey el-KHOURI considered that some provision should be made to enable the tribunal itself to correct any errors of which it became aware before the parties drew its attention to them.

49. Mr. KOZHEVNIKOV said that article 26 was clearly of limited application, and dealt solely with typographical mistakes and errors of description as distinct from substantive errors. The use in the French text of the expression "*erreurs matérielles*" might give rise to difficulties in the Russian text, since the equivalent term in Russian would also cover errors of substance. The Special Rapporteur's proposal should be regarded as an entirely new one, and not as an amendment to article 26.

50. Mr. YEPES, opposing both the original text of article 26 and the alternative suggested by the Special Rapporteur, proposed that the article simply be deleted. The stipulation in article 27 that the award must be carried out in good faith implied that any errors of form would be corrected. If there was any doubt as to the interpretation of the award the provisions of article 28 would come into play.

51. Mr. SPIROPOULOS suggested that in the light of Mr. Scelle's comments article 26 might be amended by the addition of the words "or errors of the same nature" ("*des erreurs de même nature*"). He drew Mr. Yepes' attention to the fact that article 28 dealt with interpretation, and not with the rectification of errors.

52. Mr. PAL accepted the amendment suggested by Mr. Spiropoulos.

53. Mr. YEPES formally moved that article 26 be deleted.

54. Mr. SCELLE supported the motion.

55. Mr. ALFARO considered that article 26 should be retained, and was inclined to favour Mr. Lauterpacht's proposal, although the suggested time-limit of two months was, in his opinion, too long. Typographical and arithmetical errors should be noticed and corrected immediately.

56. As to the way in which those errors should be referred to, he believed that the word "description" would be dangerous, especially in the case of frontier disputes.

57. He also considered that Mr. Pal's suggestion, that the word "clerical" be used, deserved attention, since it was clear and definite in meaning.

58. Mr. LAUTERPACHT agreed that the word "clerical" should be added, and that the time-limit should be fixed at one month instead of two months.

59. The CHAIRMAN said that the text of article 26 with the various amendments proposed thereto would be circulated to members, who would then be able to vote upon it.

60. He would now request them to vote only on Mr. Yepes' motion that the article be deleted.

61. Mr. AMADO said that he would vote in favour of article 26 as set out in the draft, since he considered that the term "description" was highly dangerous, and might lead to serious difficulties in the case of disputes involving areas where frontiers were not clearly marked.

62. Mr. ZOUREK was opposed to the deletion of article 26, which met a practical need. Errors might be made which the tribunal alone would be able to rectify. The principle of correction was widely accepted, and had been included in the draft on arbitral procedure prepared by the *Institut de Droit international*.

Mr. Yepes' motion that article 26 be deleted was rejected by 10 votes to 1, with 1 abstention.[7]

Article 27

63. The CHAIRMAN considered that the French text of article 27, which read in part: "*La sentence est obligatoire... dès qu'elle est rendue...*" was clearer than the English, which used the word "when". He also noted the Chilean Government's comment on the article (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4).

64. Mr. SCELLE agreed that the French text was preferable to the English. As to the Chilean Government's objection, he held that suspension did not affect the obligatory character of the award. In point of fact, the Chilean Government's argument really related to article 28. Although a reference to the cognizance of

[7] For further discussion of article 26, see *infra*, 193rd meeting, para. 73.

the parties might be added to article 27, in his view that article should be retained as drafted.

65. Mr. LIANG (Secretary to the Commission) recalled that at the fourth session the Commission had rejected the alternative solution that the award should become binding when it had been communicated to the parties.[8] Article 24 stipulated that the parties must be summoned to appear. If they did not comply with the summons, they could not complain that the award had not been communicated to them.

66. Mr. YEPES proposed that article 27 be amended by the addition of the following words after the word "rendered":

> "namely, from the day that it has been read in open court before the parties" ("*c'est-à-dire du jour ou elle a été lue en séance publique devant les parties*").

67. Mr. ALFARO said that, since articles 26 and 28 were obviously closely connected, whereas article 27 was more general, he would suggest that they be renumbered, article 27 following article 25, and article 26 being consequently renumbered 27.

68. Mr. SCELLE accepted Mr. Alfaro's suggestion.

69. The CHAIRMAN said that the Sub-Commission would deal with that point in due course.[9]

70. Mr. LAUTERPACHT was not sure that Mr. Yepes' amendment would add anything to the text, since it was already laid down in article 24 that the award should be read in open court.

71. Faris Bey el-KHOURI said that article 24 did not make it clear when the award was to be considered as having been rendered. According to paragraph 3 of article 24, its validity would run from the date on which the president of the tribunal signed it. The point should be made clear in article 27.

72. Mr. LIANG (Secretary to the Commission) drew attention to the Secretariat's commentary (A/CN.4/L.40)[10] where that very point had been dealt with.

73. Mr. LAUTERPACHT considered that the Commission should either clarify the text of article 24 or adopt Mr. Yepes' amendment to article 27. One of the considerations that made it difficult to modify article 24 was that in practice there might be a time-lag between the communication of the award to the parties and the reading of it in open court.

74. Mr. ALFARO considered that the second sentence of paragraph 1 of article 24 should be amended to read: "It shall be rendered by reading in open court."

75. Mr. SCELLE maintained that the Commission was creating artificial difficulties, and that article 24 was perfectly clear and satisfactory.

76. Mr. LIANG (Secretary to the Commission) suggested that article 24 should be rearranged, paragraph 1 being made to refer only to the drawing up of the award in writing and the signing thereof by the president. Paragraph 2 should refer to the rendering of the award, and paragraph 3 to the communication thereof to the parties. Normally, a judgement was first read in open court and then communicated to the parties. Such, for instance, was the practice of the International Court of Justice.

77. Mr. PAL pointed out that if the rendering of the award were held to be equivalent to the fulfilment of article 24 in the several stages prescribed, article 27 would need no amendment.

78. Mr. KOZHEVNIKOV considered that article 24 failed to make clear at what moment the award was to be considered as having been rendered.

79. Faris Bey el-KHOURI thought that the parties might regard that moment as the one at which the written communication come into their possession. He would suggest that that be made clear in paragraph 1 of article 24.

80. Mr. YEPES wished to modify his amendment by adding the words: "the parties having been duly summoned to appear in accordance with article 24." Article 27 would then read:

> "The award is binding upon the parties when it is rendered — namely, when it has been read in open court, the parties being present or having been duly summoned to appear in accordance with article 24."

81. Mr. SCELLE pointed out that once the award had been dated and signed it became binding and final. The agents who were present at the reading would represent the parties, namely, the governments parties to the dispute. There was no possible doubt about the matter, and he failed to see why the Commission should wish to reiterate in article 27 what it had clearly enunciated in article 24. He conceded that the possibility would always exist that the parties might refuse to take cognizance of an award, but they would do so on their own responsibility.

82. Mr. AMADO agreed with Mr. Scelle, and suggested that article 27 should be put to the vote in its original form, which expressed Mr. Scelle's views.

83. Mr. ALFARO agreed with Mr. Scelle that article 24 covered all the issues, but considered that the order of its constituent paragraphs should be changed, since confusion might follow from the circumstance that paragraph 1 referred first to the drawing up of the award in writing and its communication to the parties, and then to its being read in open court. He therefore agreed with the Secretary's suggestion, the adoption of which would ensure that the article ran logically.

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[8] See *Yearbook of the International Law Commission, 1952*, vol. I, 174th meeting, paras. 55-56.

[9] See *infra*, 194th meeting, para. 77.

[10] See document A/CN.4/92, p. 93.

84. Mr. ZOUREK supported Mr. Kozhevnikov's view that the award must be considered as having been rendered at the moment when it was communicated to the parties, regardless of the presence of the agents in court or their absence.

85. Mr. KOZHEVNIKOV proposed that paragraph 1 of article 24 be amended by the addition of the words "and shall become binding on the receipt thereof by the parties" at the end of the first sentence.

86. Mr. SCELLE was unable to accept Mr. Kozhevnikov's amendment, and reiterated that it would be enough if the award was dated and signed. Furthermore, he would draw Mr. Kozhevnikov's attention to the words "or duly summoned to appear" at the end of paragraph 1.

87. Mr. SPIROPOULOS pointed out that if the Commission wished to re-open the discussion on article 24, it would have to take a formal decision to that effect.

88. Turning to the point at issue, he agreed that the precise moment at which the award should be considered as having been rendered was difficult to define. It was usual for an award to become binding once it had been read in open court, the text thereof being there and then transmitted to the parties. In the event of an arbitrator's failing to read the award in open court, his signature would constitute proof of the rendering. In point of fact, that possibility was not envisaged in the draft, which specifically provided for the reading. He too preferred the rearrangement of the paragraphs of article 24 suggested by the Secretary and sponsored by Mr. Alfaro.

89. Mr. LAUTERPACHT said that there were three ways out of the difficulty. The first would be for the Commission to defer to the views of the Special Rapporteur, even though he had introduced an element of confusion by suggesting that an award should be considered as having been rendered once it had been signed by the president. The second way would be to adopt Mr. Alfaro's suggestion concerning the rearrangement of the paragraphs in article 24; and the third way would be to adopt Mr. Yepes' amendment to article 27, which would have the effect of clarifying article 24 and of disposing of the whole issue.

90. He would be disinclined to support any suggestion that the discussion on article 24 be re-opened.

91. Mr. KOZHEVNIKOV emphasized that in his view article 24 was badly drafted. The following three stages should be carefully dealt with therein: reading of the award in open court; communication to the parties; receipt of the communication by the parties.

92. Mr. SPIROPOULOS agreed with Mr. Scelle that the Commission was creating artificial difficulties. The general practice of arbitral tribunals was perfectly familiar to everyone: an award was rendered once it had been read, it being understood that the text thereof existed and had been handed to the parties at the time of reading. He could not agree with Mr. Kozhevnikov that the operative moment was that of receipt of the communication by the parties.

93. Faris Bey el-KHOURI proposed that Mr. Alfaro be requested to put his suggestion concerning the rearrangement of article 24 in writing, further discussion on the article being deferred.

It was agreed that the Sub-Commission should revise the order of articles 24 and 27 in the light of the foregoing discussion.

ARTICLE 28

94. Mr. SCELLE, after drawing attention to the Chilean Government's comments (A/CN.4/68, No. 3 or A/2456, Annex I, No. 4), proposed that article 28 be amended as follows: the first clause "Unless the parties agree otherwise," to be deleted; the second clause to read "Any dispute between the parties as to the meaning and scope of the award may, at the request of either party and within the period of one month, be submitted ..." (*"Tout différend qui pourrait surgir entre les parties, concernant l'interprétation et la portée de la sentence, sera, à la requête de l'une d'elles, et dans le délai d'un mois, soumis..."*); and the following sentence to be added at the end of paragraph 1: "On a request for interpretation the execution of the award shall be deferred pending decision." (*"Le recours en interprétation suspend l'exécution de la sentence jusqu'à ce qu'il ait été jugé."*)

95. Mr. YEPES supported Mr. Scelle's amendments.

96. Mr. SCELLE, replying to Mr. ZOUREK, said that the first clause of paragraph 1, the deletion of which he had proposed, added nothing to the text. If the parties wished to seek an interpretation, the latter would obviously have to be provided by the tribunal which had rendered the award. If, on the other hand, the parties submitted the issue to another tribunal, the proceedings would merely start all over again, and article 28 would be inapplicable.

97. Mr. SPIROPOULOS supported Mr. Scelle's proposal that the first clause in paragraph 1 be deleted, on the ground that such a formula could be inserted at the beginning of every article in the draft. Obviously, if the parties agreed otherwise, the rest of the text would become superfluous in each case.

It was agreed by 9 votes to 2 that the first clause of paragraph 1 of article 28 should be deleted.

The proposal that the words "and within the period of one month" should be inserted in the second clause was adopted by 9 votes to none, with 2 abstentions.

Mr. Scelle's proposal that a second sentence be added at the end of paragraph 1 was adopted by 11 votes to 1, with 1 abstention.

Paragraph 1 of article 28 was adopted, as amended, by 10 votes to 2.

The meeting rose at 1 p.m.

191st MEETING

Thursday, 11 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

1. The CHAIRMAN announced that the Sub-Commission had unfortunately failed to achieve any great success the previous day, and he must therefore, albeit regretfully, rule that it would be best for it to cease its endeavours. The discussions had turned on questions of principle, which it was in any case incumbent upon the Commission itself to solve.

2. The appropriate solution might be to set up a drafting committee, and he would make certain relevant proposals the next day.

3. Answering Mr. Kozhevnikov, he explained that the Sub-Commission's difficulties had begun with the interpretation of paragraph 1 of article 3, which laid down that within three months from the date of the request made for the submission of a dispute to arbitration, or from the date of the decision of the Internationan Court of Justice in conformity with article 2, paragraph 1, the parties should constitute an arbitral tribunal by mutual agreement (*d'un commun accord*).

4. The Special Rapporteur considered that the words "by mutual agreement" were to be interpreted as meaning that such agreement was required even in the case of the appointment of a national arbitrator. Other members felt that those words did not preclude the possibility of national arbitrators being nominated by each party without the consent of the other. Other questions were closely related to, and affected by, that major divergence of views.

ARTICLE 28 (*continued*)

5. The CHAIRMAN recalled that at its preceding meeting, the Commission had concluded its examination of paragraph 1 of article 28.

6. At the suggestion of Mr. LIANG (Secretary to the Commission) *it was agreed* that the word "interpretation" should be substituted for the word "meaning" in the second line of the English text of paragraph 1 of article 28.

7. The CHAIRMAN invited the Commission to consider paragraph 2 of article 28.

8. Mr. SCELLE (Special Rapporteur) was unable to accept the views expressed by the Indian Government (A/CN.4/68, No. 4 or A/2456, Annex I, No. 5). A change of tribunal did not transform an old dispute into a new one. It would be inadmissible to allow all the antecedent procedure to be wasted simply as a result of a request for interpretation. Indeed, the interpretation of an award in no way invalidated the original decision.

9. Mr. ZOUREK appreciated the importance of the point, and believed that the difficulty was due to an excessive tendency to introduce into the draft provisions from the Statute of the International Court of Justice, despite the fact that that instrument differed essentially from any code of arbitral procedure.

10. He had some doubts about the wisdom of accepting one month's delay for a request for interpretation, as had been agreed at the previous meeting.[1] Was that long enough? The history of arbitration knew cases when twenty-five years had elapsed between the original rendering of the award and the final interpretation. He held that in the event of disagreement about the interpretation, such disagreement constituted a new dispute, and must be treated as such. The Indian Government had made a valid point.

11. Mr. SCELLE said that in the event, for proceedings to be started all over again it would suffice if one party were displeased with the award, then a request for interpretation would become a new dispute, and so on and so on. He really found the greatest difficulty in attributing any validity at all to Mr. Zourek's argument, but he must point out yet again that he was the servant of the Commission, that he did not support texts simply because they had been adopted, but because it was his duty to remind the Commission of what its earlier attitude had been, in order that it might not fall into the snare of calling white what at the previous session it had called black.

[1] See *supra*, 190th meeting, para. 97.

12. Mr. AMADO supported Mr. Zourek and the Indian Government's suggestion, and said that he would vote in that sense if paragraph 2 failed to provide for the possibility that the tribunal might find means of resolving difficulties of interpretation. In point of fact, the words "if the parties have not agreed otherwise" allowed for the full application of arbitral procedure before the issue was brought before the Court. That was why he would vote in favour of paragraph 2.

13. Mr. KOZHEVNIKOV found it difficult to accept the Special Rapporteur's thesis that the Commission must cleave to its earlier decisions. At the fourth session, the Commission had carried out a preliminary examination of the draft arbitral procedure, and was now engaged on its final examination, in the course of which questions of principle must be tackled afresh. For what other purpose had the members come together?

14. Paragraph 2 was unacceptable to him, because it would allow an alien organ to intervene in arbitral procedure, with consequent impairment of the fundamental principle of mutual agreement.

15. Mr. LAUTERPACHT said that Mr. Kozhevnikov was perfectly consistent in his attitude. He wished one party to be in a position to frustrate arbitral proceedings at various stages, despite the original undertaking entered into by both parties to submit a dispute to arbitration.

16. As to the Indian Government's comment, he would ask Mr. Pal to explain what practical alternative that Government had in mind.

17. Mr. PAL pointed out that he was in no way responsible for the Indian Government's opinion, and could only speculate as to the reasons which had prompted the Indian Government to formulate an objection.

18. His own view of paragraph 2 was that the International Court of Justice would presumably step in if, for any reason, such as the expiry of the time-limit imposed in paragraph 1 as amended, the parties were unable to submit a request for interpretation to the tribunal which had rendered the award in the first instance. On the other hand, if a much longer period were allowed under paragraph 2 — say five or ten years — it might legitimately be argued that a new dispute had arisen, that the prceedings must be initiated all over again, and that consequently the Court had no say in the matter.

19. Mr. SCELLE concurred with Mr. Pal. As a rule, interpretations were sought at once, sometimes on the very day on which the award was rendered.

20. Mr. PAL considered that the procedure envisaged in paragraph 2 should also be subject to a time-limit, and suggested that the words "within the same time-limit" be added at the end of it. If the parties failed to avail themselves of the time at their disposal, the provision would become inoperative.

21. Faris Bey el-KHOURI asked Mr. Scelle what would happen in a case in which paragraph 2 of article 28 became inoperative.

22. Mr. SCELLE said that the draft arbitral procedure contained no relevant provision; he was prepared to accept Mr. Pal's view, subject to the reservation that a time-limit of one month would be too short. It was conceivable that it would be impossible in practice to re-convene within one month the tribunal which had rendered the original award.

23. Mr. ZOUREK did not consider that the Commission should follow the Special Rapporteur in starting from the premise that it would be the wish of governments that the arbitration should fail, and that they would therefore drag matters out endlessly by renewing proceedings. After all, the whole concept of arbitration rested on the agreement of States, and there were cases enough on record when awards had been rendered and implemented.

24. He would note, with reference to the general argument, that the Commission had already made radical changes in a number of articles.

25. Mr. KOZHEVNIKOV proposed that paragraph 2 be amended by the substitution of the words "both parties" for the words "either party". The last clause would then read: "... the dispute may be referred to the International Court of Justice at the request of both parties".

26. Mr. ALFARO was prepared in principle to accept Mr. Pal's amendment, but wished to clarify the course of events as they would occur under article 28. An award would be rendered; within a period of one month (paragraph 1) one party would raise a question of interpretation; the parties then disagreed, in which event the dispute could be referred to the Court. The provision in paragraph 2 must clearly be made subject to a time-limit, and he believed that reference thereto should be made after the word "otherwise", so that the clause would read: "... and if the parties have not agreed otherwise within one month, ..."

27. Mr. SCELLE asked whether the month referred to in paragraph 2 would be identical with that stipulated in paragraph 1, or a successive month.

28. Mr. ZOUREK suggested that three months would be a more suitable period, in view of the habitual slowness of diplomatic procedure.

29. Faris Bey el-KHOURI said that a difference might arise between the parties not only years after the award had been rendered, but also during the course of its application, which might in certain circumstances be prolonged and carried out in different stages. In his view, paragraph 2 should be retained as drafted.

Mr. Zourek's proposal that a time-limit of three months be prescribed in paragraph 2 was adopted by 7 votes to 2.

30. Mr. AMADO, explaining his vote, said that in his opinion the time-limit was still too short.

31. Mr. SCELLE pointed out that, all told, the parties would have four months in which to seek an interpretation: one month during which they could request an interpretation from the tribunal, and three months during which they could appeal to the International Court of Justice, after which no further requests for interpretation would be admissible. Proceedings would then have to be re-initiated.

32. The CHAIRMAN said that the drafting committee would redraft the text of paragraph 2 in accordance with the Commission's decision.

33. Mr. KOZHEVNIKOV said that before his amendment was put to the vote he would like to emphasize that in his view arbitration was based on the mutual consent of the parties.

Mr. Kozhevnikov's proposal that the words "both parties" be substituted for the words "either party" in paragraph 2 was rejected by 9 votes to 3.

34. Mr. YEPES said that he had voted against the amendment because its effect would be to render the application of an award impossible.

ARTICLE 29

35. Mr. SCELLE said that the Governments of India and the United Kingdom had suggested the deletion of article 29 (A/CN.4/68, Nos. 4 and 8 or A/2456. Annex I, Nos. 5 and 9). The quarrel between the partisans of a definitive judgement and of revision dated from the conferences held at The Hague in 1899 and 1907. At the fourth session the Commission had taken a substantive decision, adopting the thesis of eminent English lawyers and of the preparatory commission entrusted with the task of drafting the Statute of the Court of International Justice.[2] Members would find all the relevant information in the Secretariat's commentary (A/CN.4/L.40).[3] He did not need to insist on the fact that, if article 29 were dropped, the Commission would have fundamentally modified the whole concept of the draft on arbitral procedure. Everyone was familiar with the principle which had been applied in English jurisprudence for the past fifty years, and which was expressed in the formula "nothing is settled until it is settled right". Revision was not the same thing as an appeal against the sentence or the annulment thereof. It depended upon the recognition of the existence of a new fact which invalidated the original award, making it unacceptable to universal conscience. He could only mention in passing the tremendous repercussions of French public opinion at the beginning of the present century in connexion with the Dreyfus Case.

36. He would suggest that the Commission first pronounce itself on the issue of principle, and then examine the text of article 29 in detail.

37. Mr. YEPES strongly supported Mr. Scelle's views.

38. Mr. LAUTERPACHT also supported them. The arguments advanced by the United Kingdom Government on article 29 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9) were in the nature of suggestions for a further examination of the question. They were not necessarily intended to affect a decision which the Commission had taken after long and thorough discussion. Indeed, the same held good for the United Kingdom Government's objections to articles 30 and 31.

39. Mr. PAL said that he agreed with the principle laid down in article 29, but would have some comments to offer on its various paragraphs.

40. The CHAIRMAN noted that the Commission accepted the principle laid down in article 29. It had, then, to examine the text in detail.

41. Mr. LAUTERPACHT suggested that, in the light of the Brazilian Government's comments (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3), the period of six months stipulated in paragraph 2 should be extended to two years. The paragraph should consequently be amended to read as follows: "The application for revision must be made within six months of the discovery of the new fact and in any case not later than two years after the rendering of the award."

42. At the suggestion of Mr. SCELLE and Mr. AMADO, he agreed that the period should be fixed at ten years.

43. Mr. YEPES, having drawn attention to paragraph 5 of Article 61 of the Statute of the International Court of Justice,

44. Mr. SCELLE agreed that the amendment might read: "... after the lapse of ten years from the date of judgement."

45. Mr. LAUTERPACHT was prepared to accept that formula.

Mr. Lauterpacht's amendment to paragraph 2 of article 29, as itself amended, was adopted by 9 votes to none, with 2 abstentions.

46. Mr. SCELLE held that the Netherlands Government's comments (A/CN.4/68, No. 5 or A/2456, Annex I, No. 6) on paragraph 3 were pertinent, and suggested that the text of that paragraph be redrafted to read:

> "The proceedings for revision shall consist of two stages. At the first stage the tribunal which rendered the award shall record the existence of the new fact and rule upon the admissibility of the application. At the second stage the tribunal gives its opinion on the revision proper."

47. The CHAIRMAN noted that the Commission agreed with the proposed text, and *ruled* that it be transmitted to the drafting committee for final review.

48. Mr. PAL considered that paragraph 4 contained an innovation. In accordance with the decision just taken, it would be possible for an application for revision to be

[2] See *Yearbook of the International Law Commission, 1952*, vol. I, 151st meeting, paras. 34-53.

[3] See document A/CN.4/92, pp. 99-104.

made at any time during a period of ten years. Surely an application for revision made towards the end of that period would constitute a renewal of the dispute. According to the procedure suggested in paragraph 4, however, the application for revision could be addressed not to the arbitral tribunal but to the International Court of Justice on the initiative of one party. He held that to be contrary to the principles of arbitration and revision. The original tribunal must undertake the task of revision.

49. Mr. SCELLE drew Mr. Pal's attention to the escape clauses in paragraph 4, namely: "If, for any reason, it is not possible...", and "unless the parties agree otherwise,". Would Mr. Pal's point be met if the following words were included in paragraph 4: "and the parties have been unable to agree to the setting up of a new tribunal".

50. Mr. PAL said that the parties could not be obliged to apply to the International Court of Justice.

51. Mr. SCELLE pointed out that if the parties failed to agree, the provisions of article 3 would come into play.

52. Mr. LAUTERPACHT felt that it would be desirable to make the second sentence somewhat more precise. One of the reasons which might militate against application to the original tribunal was the death of all or most of its members. But what other reasons could there be? It would seem to him that the logical outcome of Mr. Pal's argument would be that the party which desired revision would be denied the right to claim it, since the other party would withhold its consent.

53. Mr. PAL said that if the original tribunal were no longer available, means should be devised to enable a new tribunal to be set up, the parties thus starting the proceedings all over again. He considered that method to be preferable and closer to national practice in jurisprudence than application to the International Court of Justice. The latter should be able to take action only if the constitution of a new tribunal were wholly impossible.

54. Mr. LAUTERPACHT presumed that Mr. Pal wished to amend the last two lines of paragraph 4 in the sense that the application for revision should be made to a tribunal constituted in accordance with paragraph 2 of article 3.

55. Mr. ALFARO thought that Mr. Pal's attitude was conditioned by apprehension lest the original tribunal should no longer exist. Mr. Pal's proposal that a tribunal should be reconstituted in accordance with article 3 might be interpreted as conveying that a certain prejudice against the International Court of Justice existed in the International Law Commission. He (Mr. Alfaro) would submit that that fear was unfounded. The ideal of the international community was the maintenance of peace and security, the peaceful settlement of all conflicts between States and the obligatory jurisdiction of the International Court of Justice. But until that ideal was realized there was no reason why the parties should not apply to the International Court in cases such as those provided for in article 29, paragraph 4. The solution — adopted consistently by the Commission — that in the last resort the Court should take action was ideally the correct solution. He failed to see why the Commission should provide for the constitution of another, new tribunal.

56. Faris Bey el-KHOURI also considered that paragraph 4 was an innovation in international law. The jurisdiction of the International Court of Justice was not universally applicable and obligatory. But it should certainly be made so, and Mr. Alfaro had taken a progressive attitude which he, for his part, was prepared to support. If the International Court should act under paragraph 4 of article 29, it would in practice be acting as an arbitral tribunal, and it was desirable that an attempt should be made to extend the Court's authority step by step.

57. Mr. PAL accepted Mr. Lauterpacht's interpretation of his views.

58. Mr. HSU agreed with Mr. Alfaro's general view of arbitration as forming part of the judicial life of the world community. He did not therefore believe that application to the International Court in the last instance would conflict with the principle enunciated by Mr. Pal.

59. Mr. KOZHEVNIKOV disagreed with Mr. Alfaro about the ideal of obligatory international jurisdiction; that thesis presupposed the existence of a supranational authority. The very foundations of existing international law, as an expression of the will of sovereign States, would thus be called into question. Though States might voluntarily abandon some particle of their sovereignty, the whole theory and practice of arbitration were based upon the agreement of the parties. At present there was no problem in dispute or unsettled which could not be settled by peaceful means through the mutual agreement of the countries concerned. To his mind, it would be totally contrary to the principles of arbitration to oblige the parties to act against their will. He therefore agreed with Mr. Pal and Faris Bey el-Khouri that the last part of paragraph 4 went too far, and violated the rights of the parties.

60. Mr. SCELLE considered that there was general agreement that the International Court of Justice would only intervene if the parties were unable to reach agreement on the constitution of a new tribunal; that would be perfectly consistent with the provisions of article 28, paragraph 2.

61. The CHAIRMAN pointed out to the Special Rapporteur that there was a fundamental cleavage of opinion in the Commission, inasmuch as Mr. Pal and his supporters considered that the tribunal could only be reconstituted by agreement between the parties.

62. Mr. ZOUREK considered the provisions of articles 2, 3, 28 and 29 relating to the International Court of Justice to be out of place, because they would transform the arbitral tribunal into a court of first instance, which was totally at variance with the principle

of arbitration. If the competence of the International Court were thus extended, arbitration as such would disappear.

63. Mr. YEPES considered that paragraph 4, which, he believed, might be made generally acceptable by the insertion of the words: "at the request of one of the parties" after the words "that tribunal", should be retained.

64. Mr. SCELLE agreed that Mr. Yepes's amendment was consistent with the purpose of paragraph 4.

65. Mr. ZOUREK opposed Mr. Yepes's amendment, which would result in the parties being bound to apply to the Court if they failed to reach agreement. He saw no purpose whatsoever in preparing a draft on arbitral procedure that would make obligatory the jurisdiction of the International Court, and therefore proposed that the second sentence of paragraph 4 be deleted.

66. Mr. KOZHEVNIKOV suggested that Mr. Pal's amendment failed to achieve the intended object by referring to article 3, paragraph 2, which conflicted with the principle that the parties should not be forced to accept a certain procedure against their will.

67. Mr. SCELLE pointed out that acceptance of Mr. Pal's amendment would not alter the fact that in the last resort the International Court would intervene.

68. Mr. PAL said that as the procedure of revision was recognized in Indian law, he had no objection to the principle underlying paragraph 4. However, he saw no reason why, if one party were prepared to designate members of the new tribunal, it should be precluded from doing so by the recalcitrance of the other. The intervention of the International Court should in that event be limited to the appointment of the remaining members. He was anxious to safeguard the right of the parties to choose their own arbitrators.

Mr. Zourek's proposal that the second sentence of paragraph 4 be deleted was rejected by 7 votes to 2, with 3 abstentions.

69. Mr. YEPES said that if Mr. Pal's amendment entailed the deletion of the words: "unless the parties agree otherwise", he would be obliged to vote against it, since it would then be unduly restrictive.

70. Mr. SPIROPOULOS pointed out that the possibility of the parties finding another solution would not be precluded by the deletion of that phrase.

71. The CHAIRMAN then put Mr. Pal's amendment to the vote.

Five members voted in favour of the amendment and 5 against, 2 members abstaining. The amendment was accordingly rejected.

72. The CHAIRMAN then put to the vote Mr. Yepes' proposal that the words: "at the request of one of the parties" be inserted after the words: "that tribunal".

Mr. Yepes's amendment was adopted by 6 votes to 3, with 3 abstentions.

73. Mr. ALFARO said that he had understood the Special Rapporteur to have suggested a compromise consisting in the insertion of the words "and if the parties cannot agree on the constitution of another arbitral tribunal" before the words: "the application may". He would have been in favour of such an amendment.

74. Mr. SCELLE observed that the amendment in question was a drafting one, and should be referred to the Drafting Committee.

Paragraph 4 was adopted as amended by 6 votes to 3, with 2 abstentions.

75. Mr. LAUTERPACHT explained that he had voted in favour of paragraph 4, which contained an essential provision. However, the text would have been improved by the adoption of Mr. Pal's amendment.

76. Mr. SCELLE explained that he had abstained from voting on paragraph 4, as amended, because it was not substantially different from the original text.

Article 29, as a whole and as amended, was adopted by 9 votes to 2, with 1 abstention.

Article 30

77. Mr. SCELLE said that he could accept the Brazilian Government's suggestion (A/CN.4/68, No. 2 or A/2456, Annex I, No. 3) that failure to include a full statement of reasons, as required by article 24, might be made a ground for annulment of the award.

78. It would be remembered that at the fourth session the Commission had decided that no appeal should be allowed from an arbitral award.[4] It therefore remained to confirm the decision that the validity of the award might be challenged on certain grounds.

79. Mr. LAUTERPACHT said that the lengthy discussions on article 30 at the fourth session had clearly shown that certain members regarded it as one of the most important articles in the draft.[5] The existence of two conflicting principles, namely, that the tribunal had power to decide the scope of its jurisdiction, and that an award rendered by a tribunal which had exceeded its powers was nugatory, had been pointed out, and it had been shown that unless provision were made for proper and judicial determination as to whether there had been excess of jurisdiction, one of the fundamental safeguards in arbitral procedure would have been removed. Therefore, and in view of the importance of article 30, he advocated its maintenance, and expressed the hope that it would not be weakened by the additon of any other grounds of nullity.

80. Mr. Yepes, too, was in favour of the retention of article 30, but considered that it should be amplified by the addition of two extra paragraphs, to read:

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[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 153rd meeting, paras. 64-84, and 154th meeting, paras. 1-18.

[5] *Ibid.*, 152nd meeting.

"(*d*) that the award is not supported by valid reasons;

"(*e*) that the *compromis* is void."

81. Mr. ALFARO felt grave misgivings about Mr. Yepes's amendments. It had already been stipulated in article 24 that the award should include a full statement of reasons. It would be extremely dangerous if failure to comply with that requirement were made a ground for challenging the validity of an award, since it would then be open to either party to claim that the statement of reasons was insufficient. It must be remembered that the party against which the award had gone would inevitably be tempted to seek any pretext for challenging it.

82. He would be unable to express any opinion about paragraph (*e*) in Mr. Yepes's amendment until he had been told how a *compromis* could be void.

83. Mr. LAUTERPACHT endorsed Mr. Alfaro's views, and expressed the hope that Mr. Yepes would see his way to withdrawing his amendments. The judgement whether or not an award had been supported by valid or sufficiently detailed reasons must necessarily be very subjective. Moreover, it was not clear who was to make it.

84. Mr. Yepes' second amendment might have far-reaching consequences. Whether or not a treaty concluded in excess of constitutional limitations was null was one of the most controversial questions. If Mr. Yepes' second amendment were accepted, the tribunal might be called upon to decide whether a government had observed the provisions of its own constitution. If it had disregarded them in concluding the *compromis*, that should surely be an additional reason for not allowing it to challenge the award on those grounds.

85. He must again reaffirm that any additions to article 30 would seriously weaken it.

86. Mr. YEPES said that he had based his second amendment on the draft prepared by the *Institut de Droit international*. In his view, it was patently absurd that an award should be binding upon the parties when based upon a *compromis* that was null and void. The theory and practice of establishing whether a *compromis* was null was part of the law of treaties. He would refer the Commission to the passage in the Secretariat's comment (A/CN.4/L.40)[6] reading:

"The converse of the foregoing is that an award rendered in violation of such fundamental principles is not binding upon the parties. Theory and practice abundantly demonstrate that when one or more of the fundamental conditions for the validity of an award are lacking, the State concerned is not bound to carry it into effect. Among the earliest of authorities who have affirmed this principle is Pufendorf, who said:

"'But the statement that one has to abide by the decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.' (S. Pufendorf, *De Jure Naturae et Gentium*, Oldfather Translation, 1688 Edition (Oxford, 1934), Vol. II, Book V, Chapter XIII, Sec. 4, p. 827 at p. 829).

"Some two centuries later the *Projet*, 1875, stated in article 27:

"'The arbitral award is void when the *compromis* is void, or when the Tribunal has exceeded its jurisdiction, or in case of proved corruption of one of the arbitrators, or in case of essential error.'

"Bluntschli set forth the applicable principles as follows:

"'The decision of the arbitral tribunal can be considered void:

"'(a) To the extent that the arbitral tribunal has exceeded its jurisdiction;

"'(b) In case of lack of devotion to duty and denial of justice on the part of the arbitrators;

"'(c) If the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure;

"'(d) If the arbitral award is contrary to international law.

"'But the decision of the arbitrators cannot be attacked on the ground that it is wrong or unjust. Errors in calculation are excepted from this statement.' (Bluntschli, *Le Droit International Codifié* (Paris, 1886) Section 495, p. 289)."

87. There should be no need for an explanation of his (Mr. Yepes's) first amendment. Surely there must be general agreement that flagrant cases of excess of jurisdiction must be prevented. The expression "*dûment motivé*" had a perfectly precise meaning in French, and any doubts as to its interpretation would be settled by the tribunal, and not by the parties. He therefore failed to see what danger such a provision could entail. On the other hand, its inclusion was essential.

88. The CHAIRMAN, speaking in his personal capacity, said that he shared the doubts expressed by Mr. Alfaro and Mr. Lauterpacht about Mr. Yepes's first amendment, which would require the International Court of Justice to decide as a Court of Appeal whether the statement of reasons given by the tribunal was adequate or not, and would thereby greatly extend its competence.

89. Mr. PAL said that, unless failure to give valid reasons for an award was merely a minor defect which

[6] See document A/CN.4/92, pp. 105-106.

had no bearing upon its validity, some provision would have to be made in article 30 as to what authority was to decide whether the reasons given were satisfactory.

90. Mr. SCELLE referred Mr. Pal to article 31.

91. Mr. LIANG (Secretary to the Commission) said that, as he had already indicated during the discussion on article 24, paragraph 2 of that article was equivocal in both languages.[7] The Commission might do well to note the wording of article 56 of the Statute of the International Court of Justice, which ran:

"The judgement shall state the reasons on which it is based."

Failure to give reasons would be a serious departure from a fundamental rule of procedure.

92. Mr. PAL pointed out that if sanctions were to be imposed for failure to observe every rule of procedure, the validity of an award might be challenged on the grounds that it had not been communicated to one of the parties. It was for the tribunal itself to decide whether disregard of a rule of procedure was or was not grave.

93. Faris Bey el-KHOURI said that the question was not a purely procedural one. It was essential that the tribunal should give valid — and he must insist upon that word — reasons for its award. If one of the parties considered that the reasons were not satisfactory, it should be entitled to appeal to the International Court of Justice.

94. Mr. YEPES said that he would be prepared to accept any modification to his first amendment, provided the principle itself were sustained. To meet the views of certain members of the Commission, he would withdraw the word "valid".

95. He would ask Mr. Lauterpacht whether the arbitrators were entitled to refrain from giving valid reasons for their award.

96. Mr. LAUTERPACHT observed that by the provisions of article 24, paragraph 2, the tribunal was obliged to make a full statement of reasons. Disregard of other rules of procedure had not been made a ground of nullity. Surely some confidence should be placed in the good faith of the tribunal and in its judicial integrity.

97. Faris Bey el-Khouri's interpretation of Mr. Yepes's amendment as admitting appeal would be regarded by most members of the Commission as profoundly damaging to the whole draft, inasmuch as it would call in question the final character of the award.

98. Mr. SCELLE agreed with Mr. Yepes that safeguards against flagrant cases of injustice were essential. He considered failure to give valid reasons to be a fundamental deviation from the rules of procedure, and suggested that, instead of Mr. Yepes's first amendment, paragraph (*c*) in the original text should be modified by the addition of the words "*et notamment absence de motivation de la sentence.*" ("and particularly omission to furnish a statement of reason for the award").

99. Mr. YEPES accepted Mr. Scelle's proposal, and withdrew his second amendment.

Mr. Scelle's proposal was adopted by 11 votes to 1.

100. Mr. AMADO explained that he had voted against Mr. Scelle's proposal in the belief that the substance of Mr. Yepes's first amendment was already contained in paragraph (*c*) of the original text of artcle 30, which, moreover, had the merit of being restrictive. He was not convinced by the overwhelming support accorded to the proposal that that particular departure from a fundamental rule of procedure should receive special emphasis.

101. Mr. ZOUREK said that he had not quite understood why Mr. Yepes should have withdrawn his second amendment which was fully justified on theoretical grounds. The arguments adduced against the amendment applied equally to the other paragraphs in article 30. He would therefore himself take up Mr. Yepes's amendment, consisting in the addition at the end of article 30 of the words "that the *compromis* is void".

102. He would also draw the attention of the Drafting Committee to the fact that the introductory phrase to article 30 was unsatisfactory, since both in practice and in jurisprudence an award in the cases covered by article 30 was considered as null and void and not merely voidable. It appeared to confuse a principle with procedure, which was dealt with in article 31.

Mr. Zourek's proposal was rejected by 6 votes to 4, with 2 abstentions.

103. Mr. SCELLE regretted that the problem of a *compromis* being void should not have been previously discussed in connexion with Mr. Lauterpacht's report on the law of treaties. The whole problem hinged on the important issue of nullity in municipal and in international law. He had therefore abstained from voting on Mr. Zourek's proposal, which, moreover, was not precise enough.

Article 30, as amended, was adopted unanimously.

104. Mr. ZOUREK proposed that the final vote on his amendment to article 30 should be deferred until item 4 of the agenda had been disposed of.

105. Mr. SCELLE observed that, as Mr. Lauterpacht's report on the law of treaties was extremely lengthy, it would be a very long time before Mr. Zourek's amendment could be reconsidered. He would therefore be opposed to such a proposal.

Mr. Zourek's proposal was rejected by 9 votes to 2, with 1 abstention.

ARTICLE 31

106. Mr. SCELLE said that it had been asked why the time-limit laid down in paragraph 2 of article 31 should not apply equally to paragraph (*b*) of article 30. The

[7] See *supra*, 190th meeting, para. 9.

matter was not of very great importance, and might be dealt with by deleting either paragraph (*b*) from article 30, or the opening phrase from article 31, paragraph 2, reading: "In cases covered... of article 30."

107. Mr. LAUTERPACHT hoped that paragraph 2 of article 31 would be left as it stood. Though not particularly well drafted, it reflected the view that it would be improper to apply the same time-limit to paragraph (*b*) of article 30 as to paragraphs (*a*) and (*c*).

108. Mr. SPIROPOULOS said that article 29 and 31 should either stipulate the same time-limits, or none at all.

109. Mr. PAL was in favour of establishing a time-limit for challenging the validity of an award on the grounds that there was corruption on the part of a member of the tribunal; otherwise such a challenge might be made after a very considerable lapse of time.

110. Mr. YEPES proposed a time-limit of ten years.

111. Mr. ALFARO considered such a period unduly lengthy. A clause of that kind might reflect adversely upon the finality of the award, and the personal honour of the arbitrators.

112. Mr. SCELLE proposed a time-limit of six months for the case covered by paragraph (*b*) in article 30.

Mr. Scelle's proposal was adopted by 8 votes to none, with 3 abstentions.

Article 31, as a whole and as amended, was adopted by 10 votes to 2.

The meeting rose at 1.5 p.m.

192nd MEETING

Friday, 12 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

ARTICLE 32

1. Mr. KOZHEVNIKOV said that he could not vote for article 32; he had already explained why, in his opinion, the International Court of Justice could not be allowed to intervene in arbitral proceedings.

2. Mr. ZOUREK said that he had voted against article 31, and would vote against article 32, for the following reasons. He considered that, once the award had been rendered, arbitral proceedings came to an end, and the tribunal's competence, deriving as it did solely from the consent of the parties, was accordingly extinguished. Any dispute to which the award might give rise, whether relating to interpretation, to the discovery of new facts giving ground for revision, or to a challenge on grounds of nullity, should therefore be regarded as a new dispute to be dealt with by peaceful means according to existing agreements between the parties.

3. An obligatory application to the International Court of Justice at the request of one party would tend to transform arbitral tribunals into tribunals of first instance subject to the control of the Court. Such a system would make the Court a normal court of appeal, and would be totally at variance with the essential character of arbitral proceedings, which must end in a final award against which there was no appeal.

4. Acceptance by States of a provision such as article 31 would constitute a direct invitation to any losing party to bring the dispute before the International Court of Justice, and the intervention of that body, as provided for in articles 2, 3, 8, 28, 29, 31 and 32 of the draft arbitral procedure, conflicted with the theory of arbitration, which was based on the right of the parties to choose the arbitrators. The provisions to which he had referred would encourage acceptance of the obligatory jurisdiction of the International Court of Justice in matters submitted to arbitration, which would mean in effect the total disappearance of arbitration. His opposition was not inspired by any distrust of the International Court, which he held in great regard, but by the theoretical and practical considerations he had just stated.

Article 32 was adopted by 11 votes to 2.

5. The CHAIRMAN said that, as the Drafting Committee had been unable to reach final agreement on the texts of those articles which had been held over for

further consideration, they would have to be taken up in plenary meeting.

ARTICLE 3 (*resumed from the 186th meeting*)

6. The CHAIRMAN said that certain amendments to article 3 had been withdrawn, and the Commission now had before it only texts submitted by Mr. Lauterpacht and Mr. Sandström.

7. Mr. SCELLE (Special Rapporteur) proposed the addition of the following paragraph at the end of article 3:

"Once the tribunal has been constituted, either party may submit the dispute to it by direct citation. If the other party refuses to answer the citation and calls for the preparation of a *compromis*, the tribunal shall decide whether there is agreement between the parties on the points mentioned in article 9 (a, c, d, e, f, g, h, i, j, k). Failing such agreement, the tribunal fix a time-limit of... months for the parties to conclude the *compromis*. On the expiry of this time-limit, the procedure laid down in article 10 shall apply."

8. He had been prompted to move his amendment by the United Kingdom Government's comment on article 9 (A/CN.4/68, No. 8 and A/2456, Annex I, No. 9). He entirely agreed with that government that it was necessary to envisage the possibility of either party submitting the dispute immediately to the tribunal once it was constituted, without first concluding a *compromis*. His proposal would both simplify and accelerate the procedure.

9. The CHAIRMAN suggested that Mr. Scelle's proposal would more properly be dealt with as a separate article.

It was so agreed.

10. Mr. LAUTERPACHT proposed an alternative text for article 3, to read:

"1. Within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice in conformity with article 2, paragraph 1, the parties to an undertaking to arbitrate shall proceed to constitute the arbitral tribunal by appointing a sole arbitrator or arbitrators in accordance with the compromis referred to in article 9 or with any other instrument embodying the undertaking to arbitrate.

"2. If a party fails to make the necessary appointments under the preceding paragraph within three months, the appointments shall be made by the President of the International Court of Justice at the request of the other party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

"3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate. In the absence of such provisions the composition of the tribunal shall be determined after consultation with the parties by the President of the International Court of Justice or the judge acting in his place.

"3. In cases where provision is made for the appointment of a president, the tribunal shall be deemed constituted when the president is appointed. If there has been a failure to make the appointment within two months of the appointment of the other arbitrators, the president shall be appointed in accordance with paragraph 2."

11. The purpose of his text was to make clear what were the necessary appointments to the tribunal, and to provide for the case when there was failure to agree upon the appointment of its president. It had been generally agreed that paragraphs 2 and 3 of the original text were cumbersome, and could be dropped without loss.

12. Mr. SCELLE said he could accept paragraph 1 of Mr. Lauterpacht's text, which would render article 4 superfluous.

13. He was unable, however, to understand the precise meaning of paragraph 2. What would happen if neither party made the necessary appointments? With considerable subtlety, Mr. Lauterpacht appeared to have reintroduced the principle that each party would necessarily appoint a national arbitrator. Paragraph 2 would be improved if the opening words were amended to read:

"If the parties fail to constitute a tribunal within three months the appointments..."

14. Mr. PAL considered that the meaning of paragraph 2 was perfectly clear in the English text, and required no modification.

15. The CHAIRMAN observed that the President of the International Court of Justice could only make the appointments if requested to do so by one of the parties. It was conceivable that neither of them would do so.

16. Mr. PAL pointed out that in that case there would clearly be no arbitration.

17. Mr. LIANG (Secretary to the Commission) considered that the Commission must decide whether or not provision should be made to meet the possibility of neither party asking the President of the International Court of Justice to make the appointments.

18. Mr. SANDSTRÖM said that he was prepared to withdraw his amendment in favour of Mr. Lauterpacht's, though the latter suffered from certain drafting

defects.[1] Paragraph 2, for example, failed to deal with the case where arbitrators were nominated by the two parties or by the arbitrators nominated by the two parties.

19. Mr. LAUTERPACHT pointed out that paragraph 2 related solely to the arbitrators appointed by the parties.

20. Mr. SANDSTRÖM then asked whether the contingency of the arbitrators being unable to agree on the choice of president of the tribunal was covered.

21. Mr. LAUTERPACHT referred Mr. Sandström to paragraph 4 of his (Mr. Lauterpacht's) text.

22. Mr. SCELLE considered that Mr. Lauterpacht's text would unjustly place one party at a disadvantage, by enabling the President of the International Court of Justice to accept the appointments of one party and to impose his own appointments upon the other. In paragraph 2, the words "at the request of the other party" should therefore be replaced by the words "at the request of one of the parties".

23. The CHAIRMAN observed that if the President of the International Court were to appoint the whole tribunal because, although one party had made its appointments the other refused to do so, the first party would be penalized.

24. Mr. SCELLE disagreed with the Chairman. Precedent did not suggest that it was an absolute right of the parties to appoint national arbitrators. For his part, he considered such a practice as vicious, because it meant that the tribunal would always be composed of *ad hoc* judges, although in saying that he in no way wished to impugn the impartiality of such judges. Such tribunals would not constitute progress, and he hoped that so dangerous a theory would not be embodied in a rule which would go a long way towards destroying the whole purpose of his draft.

25. Mr. LAUTERPACHT pointed out that the free choice of the arbitrators by the parties was the essence of arbitration. At the previous session, the Commission had not thought it necessary to depart from that principle. At the same time it was quite unacceptable that one party should be deprived of that right if the other failed to make its appointments.

26. Mr. SANDSTRÖM said that if the parties wished to appoint national arbitrators they could not be prevented from doing so.

27. He had concluded from the foregoing discussion that his amendment was simpler and more comprehensive than Mr. Lauterpacht's. He would therefore reintroduce it.

28. Mr. ZOUREK, referring to paragraph 1 of Mr. Lauterpacht's text, pointed out that the Commission had never precisely defined what was meant by an undertaking to arbitrate. In his opinion, it was a *pactum de contrahendo,* an agreement between the parties to conclude a *compromis* defining the disputes to be settled by arbitration, the choice of arbitrators and the method of their appointment.

29. Mr. SCELLE said that an undertaking to arbitrate was an undertaking to submit either a specific or a future dispute to arbitration.

30. Mr. LAUTERPACHT noted that Mr. Zourek seemed to suggest that there could be no undertaking to arbitrate unless the parties had agreed upon the *compromis*. Surely the meaning of the expression "an undertaking to arbitrate" — whether specific or general — was self-explanatory? The draft under consideration laid down the procedure for giving effect to such an undertaking.

31. Mr. YEPES said that the answer to Mr. Zourek's question was to be found in article 1, paragraph 3, which read: "The undertaking constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results."

32. Mr. ZOUREK disagreed with Mr. Yepes. Article 1 did not specify what made an undertaking to arbitrate definitive.

33. The CHAIRMAN put to the vote paragraph 1 of Mr. Lauterpacht's text.

Paragraph 1 of Mr. Lauterpacht's text was adopted by 9 votes to 1, with 3 abstentions.

Mr. Scelle's amendments to paragraph 2 were rejected by 7 votes to 5, with 1 abstention.

Paragraph 2 of Mr. Lauterpacht's text was adopted by 6 votes to 3 with 4 abstentions.

34. Mr. YEPES opposed the second sentence in paragraph 3 of Mr. Lauterpacht's text, on the ground that it sought to give simple guidance to the President of the International Court of Justice in constituting the tribunal. Surely that was entirely inappropriate in view of his position and high authority? Moreover, full confidence in his judgement was clearly implied by the terms of paragraph 2.

35. Mr. LAUTERPACHT pointed out that paragraph 3 provided for cases in which the parties had made no stipulation in the *compromis* about the composition of the tribunal. Since, in such cases, a heavy responsibility would then be placed on the President, he would need to consult the parties.

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[1] Mr. Sandström's amendment to article 3 read as follows:

"1. If the parties have not designated arbitrators in the undertaking to arbitrate, they must constitute the arbitral tribunal by mutual agreement or in accordance with the procedure, if any, agreed for this purpose within the period they have fixed therefor or if no such period has been fixed within four months from the date of the request made for submission of the dispute to arbitration or from the date of the decision of the International Court of Justice taken in conformity with Article 2, paragraph 1.

"2. If the tribunal is not constituted within the period prescribed in the preceding paragraph, the necessary appointments shall be made...".

36. Mr. YEPES contended that that was self-evident.

37. Mr. LIANG (Secretary to the Commission) said that the deletion of paragraph 3 would remove the provision explaining what the "necessary appointments" were.

38. Mr. AMADO said that it would be undesirable to delete a reference to the necessary association between the President of the International Court of Justice and the parties in cases where the Court was called upon to determine the composition of the tribunal.

39. Mr. YEPES said that he was merely anxious to avoid a statement of the obvious in the second sentence of paragraph 3. Moreover, courtesy was due to the President of the International Court.

40. Mr. ALFARO suggested that Mr. Yepes' point would be met by the deletion of the words "after consultation with the parties". In his view, the whole matter was of minor importance, since the provision in no way derogated from the power and dignity of the President of the International Court.

41. Mr. YEPES accepted Mr. Alfaro's suggestion.

42. Mr. AMADO urged that some consideration be given to the parties. To treat them as outcasts would be to deny the very essence of arbitration. The President of the International Court would in no way lose face by consulting them.

43. Mr. LAUTERPACHT observed that even if Mr. Alfaro's amendment were accepted, there would be nothing to preclude the President of the International Court from consulting the parties.

44. Mr. SPIROPOULOS considered that no harm would be done by retaining the phrase "after consultation with the parties". The cases in which the President would not wish to consult them would be very rare indeed.

45. Mr. SCELLE said that he would be unable to vote for paragraph 3, which seemed to him too great an innovation.

46. Mr. LAUTERPACHT expressed surprise that the special rapporteur, who had formerly agreed that a provision of the kind contained in paragraph 3 was necessary, should now oppose it.

Mr. Alfaro's amendment was rejected by 7 votes to 1, with 4 abstentions.

Paragraph 3 of Mr. Lauterpacht's text was adopted by 7 votes to 3, with 3 abstentions.

47. Mr. SCELLE was unable to understand the precise significance of the words "the tribunal shall be deemed constituted when the president is appointed" in paragraph 4. What would be the situation if the president was appointed before the other members of the tribunal? He was also opposed to the new time-limit contained in the second sentence, which would unnecessarily prolong the whole process of appointing the tribunal.

48. Mr. LAUTERPACHT explained that the purpose of paragraph 4 was to provide aginst the contingency of the arbitrators failing to reach agreement on the choice of president.

49. Mr. LIANG (Secretary to the Commission) was doubtful whether the first sentence in paragraph 4 was necessary. It was true that the president was sometimes chosen by the other members of a tribunal, but that was not invariably so, in which case the provision failed to cover all contingencies.

50. Mr. ALFARO considered Mr. Scelle's objection to the first sentence to be well founded. Perhaps it could be disposed of by transposing the phrase "the tribunal shall be deemed... is appointed" to the end of paragraph 4. In his opinion, it was certainly necessary to provide for the possibility of the arbitrators failing to agree upon the choice of the president; a matter which was much more likely to give rise to difficulties than the appointment of the national arbitrators themselves.

51. Mr. PAL, in order to meet the objections raised, proposed the insertion of the words "by the arbitrators" after the words "the appointment of a president", and the insertion of the word "only" after the word "constituted".

52. Mr. LAUTERPACHT accepted Mr. Pal's amendments, but could not agree to Mr. Alfaro's amendment, since the two were incompatible.

53. Mr. ALFARO supported Mr. Pal's amendments.

54. Mr. LIANG (Secretary to the Commission) pointed out that as the president was one of the members of the tribunal, though he might be selected by the other members, he derived his authority from the parties. He therefore suggested that Mr. Pal's intention might be better rendered by the substitution of the words "for the choice of a president by the other arbitrators" for the words "appointment of a president".

55. Mr. PAL accepted Mr. Liang's wording for his first amendment.

56. Mr. LAUTERPACHT said that as no objections had been put forward to Mr. Pal's amendment as amended by the Secretary, the final wording might be left to the Drafting Committee.

It was so agreed.

Paragraph 4, as amended by Mr. Pal and the Secretary, was adopted by 7 votes to none, with 5 abstentions.

Article 3, as a whole and as amended, was adopted by 7 votes to 4, with 2 abstentions.

57. Mr. SCELLE explained that he had been unable to accept Mr. Lauterpacht's text for article 3, which differed radically from the original version and did not conform very closely to the observations made by governments.

ARTICLE 6 (*resumed from the 187th meeting*)

58. Mr. SANDSTRÖM said that, since his absence had prevented him from following the course of the Commission's work uninterruptedly, he would withdraw the various amendments he had submitted and reserve his position on the draft as a whole.

59. Mr. LAUTERPACHT submitted the following text to replace the original article 6:

"Should a vacancy occur on account of death or incapacity of an arbitrator or, prior to the commencement of proceedings, the resignation of an arbitrator, the vacancy shall be filled by the method laid down for the original appointment."

60. He explained that his proposal was intended to define the reasons for vacancies which were "beyond the control of the parties". Such reasons were the death or incapacity of an arbitrator. He had also included in the text a previous proposal relating to the filling of a vacancy caused by the resignation of an arbitrator prior to the commencement of proceedings.

Mr. Lauterpacht's text for article 6 was adopted by 10 votes to 1, with 1 abstention.

ARTICLE 7 (*resumed from the 187th meeting*)

61. Mr. LAUTERPACHT, in apologising for the large number of amendments he was putting forward, explained that he had submitted a series of proposals in his capacity as the Commission's General Rapporteur. His proposed text for article 7 read:

"1. Once the proceedings before the tribunal have begun, an arbitrator may not withdraw without the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointment.

"2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled in accordance with paragraph 2 of article 3."

62. Answering Mr. Yepes, he agreed that no reference was made in his proposal to the possibility of the withdrawal of an arbitrator by a government. Juridically, such a situation could not occur. Once a tribunal had been constituted, the parties to the dispute had nothing further to do with it.

63. It was true that an arbitrator might be obliged to withdraw through pressure exercised by his government, but that possibility was covered by paragraph 1 of his text.

64. Mr. SCELLE considered that the point should be clearly stated, in order that there should not be the slightest uncertainty about the immutability of a tribunal. If no such statement were included, the matter would be left in doubt, since the Commission had accepted the principle of national arbitrators. He would suggest that the best way of solving the difficulty would be to add the following words at the end of paragraph 1 of article 5:

"and governments shall then not have the right to withdraw arbitrators whom they have appointed."

65. Mr. LIANG (Secretary to the Commission) suggested that reference be made in paragraph 2 of Mr. Lauterpacht's proposal to a request or an application for the filling of the vacancy. It could not be assumed that the President of the International Court of Justice would know that a withdrawal had taken place without being officially apprised of it.

66. As to the premise that the withdrawal of an arbitrator by a party was a juridical impossibility, if that were so, the second sentence of paragraph 2 of article 5 should be deleted. However, he was inclined to agree with Mr. Scelle that the possibility did exist.

67. Mr. LAUTERPACHT reiterated that a government could not in law withdraw an arbitrator from a tribunal over which it had no control. In practice, a government could certainly instruct an arbitrator to withdraw.

68. The Secretary's point concerning paragraph 2 was well taken. He would therefore suggest that the paragraph be amended by the addition of the words "at the request of the tribunal" after the words "in accordance with paragraph 2 of article 3".

69. Mr. ZOUREK said that he would oppose any modification or article 5, which was both sensible and in keeping with normal practice.

70. Mr. SCELLE said that he would not insist on his proposed amendment to paragraph 1 of article 5. The simplest way of solving the difficulty would be to make a slight change in the first sentence of paragraph 2: "A party may, however, only replace an arbitrator appointed by it, if the tribunal etc." Article 7 could then stand.

71. Mr. PAL pointed out that paragraph 2 of article 5 did not affect the principle enunciated by Mr. Lauterpacht, for the simple reason that it dealt with the replacement of an arbitrator before the beginning of proceedings. Once proceedings had begun, the provisos of article 7 came into force. There was, therefore, no need to refer to the possibility of withdrawal of an arbitrator by the parties, and he would urge the deletion of the words "without the consent of the tribunal" from paragraph 2 of Mr. Lauterpacht's proposal.

72. Mr. YEPES said that it was essential that the Commission should define precisely what was meant by the beginning of proceedings. He would consequently suggest that the second sentence of paragraph 2 of article 5 be clarified by the addition, after the word "*commencée*", of the following phrase:

"*c'est-à-dire au moment où le premier mémoire écrit est soumis au greffe du tribunal.*"

73. In any case he thought that clarification should be made somewhere in the draft because it was absolutely indispensable to fix the time from which certain periods began to run. In arbitration procedure, precise deter-

mination of the time when proceedings must be considered as having begun was essential.

74. The CHAIRMAN asked Mr. Yepes to submit his proposal in writing.

75. Mr. HSU asked Mr. Lauterpacht what the position would be if the withdrawal of national arbitrators by one or other of the parties were continued *ad infinitum*.

76. Mr. SCELLE said that that very situation had been foreseen in paragraph 2 of Mr. Lauterpacht's former proposal relating to article 7, which read as follows:

> "Should the withdrawal take place in disregard of paragraph 1, the remaining members shall have the power, upon the request of one of the parties, to continue the proceedings and render the award."

77. He preferred that version of the proposal, and would draw member's attention to the Secretariat's valuable comments on the subject.[2]

78. The CHAIRMAN pointed out that the Commission had felt that such a provision, which had also been included in the original article 7, was somewhat too drastic, since it would in practice be difficult to distinguish between a voluntary and an enforced withdrawal. To apply sanctions to a party if the arbitrator it had nominated withdrew of his own free will would not, perhaps, be entirely fair.

79. Mr. SCELLE replied that it would be for the tribunal to judge each case on its merits. He could not insist too strongly on the fact that the parties were in no way masters of the tribunal.

80. Mr. LAUTERPACHT recalled that the whole issue had already been discussed at great length, and added that, although truncated tribunals had been known since the end of the eigtheenth century, the reason why they had functioned as such was because no provision for the replacement of an arbitrator had existed. The purpose of the present draft was to make provisions for replacement, and to ensure that a tribunal should always function with a quorum.

81. As to Mr. Hsu's question, the obvious answer was that, if a party persisted in obliging an arbitrator, who was its national, to withdraw, the President of the International Court of Justice would, if the same situation arose once more, take the simple precaution of appointing an arbitrator who was not a national of that party.

82. Mr. SANDSTRÖM stated that he would be able to accept Mr. Lauterpacht's proposal now that it was couched in less drastic terms.

The proposal that the words "at the request of the tribunal" be added after the words "in accordance with paragraph 2 of article 3" in paragraph 2 of Mr. Lauterpacht's proposed text for article 7 was adopted by 11 votes to 2.

Paragraph 1 of Mr. Lauterpacht's text was adopted by 8 votes to 2, with 3 abstentions.

83. Mr. YEPES explained that he had abstained from voting on paragraph 1 because the procedure of filling a vacancy by the method laid down for the original appointment would take far too long.

Paragraph 2 of Mr. Lauterpacht's text, as amended, was adopted by 10 votes to 2, with 1 abstention.

Mr. Lauterpacht's proposed text for article 7 was adopted, as a whole and as amended, by 10 votes to 2 with 1 abstention.

ARTICLE 8 (*resumed from the 187th meeting*)

84. Mr. LAUTERPACHT proposed that article 8 be amended by adding the words "The resulting vacancy shall be filled by the method laid down for the original appointment." at the end of paragraph 1, and by replacing paragraph 2 by the following text:

> "In the case of a sole arbitrator, the question of disqualification shall be decided by the International Court of Justice on the application of either party."

85. Mr. SANDSTRÖM wished to amend Mr. Lauterpacht's amendment to paragraph 1 of article 8 by replacing the clause following the word "filled" by the words "in accordance with paragraph 2 of article 3 at the request of the tribunal". The sentence would then read:

> "The resulting vacancy shall be filled in accordance with paragraph 2 of article 3 at the request of the tribunal."

86. Mr. LAUTERPACHT accepted Mr. Sandström's sub-amendment, which *was adopted by 10 votes to 2, with 1 abstention.*

Mr. Lauterpacht's proposed text for paragraph 1 of article 8 was adopted, as amended, by 10 votes to 3.

87. Mr. LIANG (Secretary to the Commission) suggested that the method of filling vacancies prescribed in paragraph 1 of article 8 should also apply to the case of a sole arbitrator. He would therefore suggest that the sentence be amended to read:

> "The resulting *vacancies* shall be filled in accordance with paragraph 2 of article 3 at the request of the tribunal."

and then transposed to the end of article 8 as paragraph 3.

88. Mr. LAUTERPACHT accepted the Secretary's suggestion, which *was adopted by 10 votes to 2, with 1 abstention.*

Mr. Lauterpacht's proposed text for paragraph 2 of article 8 was adopted, as amended, by 11 votes to 2.

Article 8 was adopted, as a whole and as amended, by 9 votes to 3.

[2] See document A/CN.4/92, pp. 28-30.

ARTICLE 9 (*resumed from the 187th meeting*)

89. Mr. ALFARO submitted the following text to replace article 9.

"Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify:

"(*a*) The subject matter of the dispute;

"(*b*) The method of constituting the tribunal and the number of arbitrators;

"(*c*) The place where the tribunal shall meet;

"(*d*) The manner in which the costs and expenses shall be divided.

"In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

"(1) The law to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono*;

"(2) The power, if any, of the tribunal to make recommendations to the parties;

"(3) The procedure to be followed by the tribunal;

"(4) The number of members constituting a quorum for the conduct of the proceedings;

"(5) The majority required for an award;

"(6) The right of members of the tribunal to attach dissenting opinions to the award;

"(7) The time-limit within which the award shall be rendered;

"(8) The appointment of agents and counsel; and

"(9) The languages to be employed in the proceedings before the tribunal."

90. He recalled that he had already explained that article 9 should be so redrafted as to make a clear distinction between those requirements in the absence of which arbitration could not take place and other requirements which, though not specified in the *compromis*, were contained in the present draft.

91. Mr. SCELLE supported Mr. Alfaro's proposal, which, he considered, clarified the issue.

92. Mr. YEPES also supported it in principle, but held that proviso (d) should be listed among the *desiderata,* whereas proviso (1) should be included in the category of compulsory requirements. The manner in which the costs and expenses should be divided formed part of customary law and, indeed, Article 64 of the Statute of the International Court of Justice gave guidance on the matter. But the law which the tribunal should apply and its power to adjudicate *ex aequo et bono* must be specified in the *compromis* if that was the intention of the parties. It would be very dangerous if it were not made an obligation to lay down in the *compromis* just how far the tribunal could go in the matter of the application of certain principles of law.

93. Mr. ALFARO said that he had included the manner of division of costs and expenses in the obligatory category, because it might prove embarrassing for arbitrators to have to deal with that question themselves. He did not, however, feel strongly about the matter.

94. But he must insist that the questions of the law to be applied and adjudication *ex aequo et bono* need not be specified in the *compromis,* because they were already covered by article 12. Furthermore, cases might occur where claims had to be decided according to different legal systems, and it was preferable to give the tribunal the necessary latitude.

95. Mr. AMADO supported Mr. Alfaro.

96. Mr. SCELLE reminded Mr. Yepes that various systems of law applied if and when they were not in contradiction with international law.

97. Mr. SANDSTRÖM also opposed Mr. Yepes' suggestion.

98. Mr. LAUTERPACHT, agreeing with Mr. Scelle and Mr. Sandström, held that Article 64 of the Statute of the International Court clearly proved that no general principle of law existed in regard to the manner in which the costs and expenses should be divided.

Mr. Yepes' proposal that proviso (d) be relegated to the category of non-obligatory stipulations was rejected by 6 votes to 1, with 6 abstentions.

Mr. Yepes' proposal the desideratum (1) be promoted to the category of requirements which must be included in the compromis was rejected by 9 votes to 2, with 2 abstentions.

99. Mr. LIANG (Secretary to the Commission) felt that the introductory phrase ("Unless there are prior provisions on arbitration") was unsatisfactory, and presumed that by such provisions Mr. Alfaro really meant the instrument or instruments embodying the undertaking to arbitrate. That was the formula used in paragraph 1 of article 3, as adopted earlier at the meeting by the Commission.

100. The CHAIRMAN ruled that that point be left to the Drafting Committee.

Mr. Alfaro's proposed text for article 9 was adopted unanimously.

The meeting rose at 1.10 p.m.

193rd MEETING

Saturday, 13 June 1953, at 9.45 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*continued*)

1. The CHAIRMAN said that the Commission would have to defer consideration of article 10 until Mr. Scelle's amendment thereto had been circulated.

2. He would therefore invite the Commission to examine Mr. Alfaro's amendment to article 11.

ARTICLE 11 (*resumed from the 188th meeting*)

3. Mr. ALFARO said that his amendment to article 11 proposed that the words "and to supplement it where necessary" be added after the word "*compromis*". The purpose was to give the tribunal the power not only to interpret the *compromis*, but to complete it if the parties had failed to include any of the required stipulations, such as that relating, for instance, to the division of expenses.

4. Mr. SCELLE (Special Rapporteur) supported Mr. Alfaro's amendment.

5. Mr. ZOUREK doubted whether it was necessary. Furthermore, it raised a question of principle in respect of the powers of the tribunal to complete a *compromis* concluded by the parties. Article 13 gave the tribunal the power to formulate its rules of procedure in the absence of agreement between the parties.

6. Mr. PAL recalled that at the preceding meeting the Commission had adopted Mr. Alfaro's proposal on article 9 wherein the matters to be settled in the *compromis* were grouped in two categories. He considered that Mr. Alfaro's amendment went too far, since it might be interpreted as meaning that the tribunal was competent to supplement the *compromis* on such important issues as the subject-matter of the dispute, or the method of constituting the tribunal and the number of arbitrators.

7. Faris Bey el-KHOURI also considered the amendment to be too far-reaching, since it would enable the tribunal to add to the *compromis* elements of which the parties had not thought.

8. Mr. YEPES concurred with the preceding speakers and held that article 11 as it stood covered the issue, since it gave the tribunal the widest powers to interpret the *compromis*.

9. Mr. KOZHEVNIKOV shared the apprehensions voiced by several members of the Commission, and was opposed to the amendment.

10. Mr. SCELLE said that there was one possibility which must at all costs be avoided, namely, that the tribunal should find itself unable to render an award because of the unsatisfactory nature of the *compromis*. He would therefore suggest that Mr. Alfaro's amendment be modified as follows:

> "to the extent required to enable it to render the award."

11. Mr. HSU favoured Mr. Alfaro's amendment, and pointed out that to add to a *compromis* was a very different thing from interpreting it. Indeed, it would be wise not to rely too much on interpretation, but to provide for supplementing the *compromis* whenever necessary, in order to ensure the smooth and successful application of arbitral procedure.

12. Furthermore, he would point out that to supplement the *compromis* did not mean to change it.

13. Mr. LAUTERPACHT said that he would abstain from voting on the amendment, because he considered that all questions were adequately covered by articles 9 and 13. Indeed, for practical purposes Mr. Alfaro's amendment constituted a reiteration of article 13.

14. Mr. LIANG (Secretary to the Commission) thought that as article 13 related to the formulation of the tribunal's rules of procedure, and article 9 dealt with a number of substantive points, the justification for the amendment would be that it could permit the tribunal to complete the *compromis* if the latter omitted some substantive points. If, however, the purpose of the amendment was to refer to questions of procedure alone, then he did not consider it necessary.

15. Mr. ALFARO drew Mr. Pal's attention to the limitative words "where necessary". It might, for instance, happen that the parties would forget to specify in the *compromis* the languages to be used by the tribunal. The latter would in that event supplement the *compromis* in that respect. But in the matter of the law to be applied by the tribunal, article 12 became applicable. Similarly, article 13 covered the issue of procedure, and article 19 the question of the majority. If the *compromis* did not give the tribunal the power to adjudicate *ex aequo et bono*, the tribunal would not be entitled to add a provision to that effect, since the silence of the *compromis* on the subject would mean that the parties did not wish the tribunal to adjudicate

in that manner. He was prepared to accept Mr. Scelle's sub-amendment.

16. Mr. PAL failed to see why the amendment was necessary if all the main points were covered by other articles in the draft.

17. Mr. YEPES supported Mr. Pal; he thought the amendment would scare governments away from arbitration.

18. Mr. SCELLE pointed out that article 10 went much farther than the proposed amendment, since it empowered the tribunal itself to draw up the *compromis* in certain circumstances.

19. Mr. ZOUREK said that the discussion had convinced him that the amendment was in part inadmissible and in part useless. The freely-given consent of the parties was the sole source of a tribunal's competence, and he failed to see how the tribunal could enlarge or complete a compromis which expressed the parties' agreement. No government would be able to accept a provision of that nature.

20. As to Mr. Scelle's point that a tribunal might find itself in the position of being unable to render an award because the *compromis* was defective, he woud submit that that would be a relatively minor difficulty. All the tribunal need do in such an event was to ask the parties to complete the *compromis*.

21. Mr. SANDSTRÖM said that there was no single case to which the amendment would apply. The question of languages would be dealt with under article 13, and the draft made appropriate provision for all other contingencies.

22. He would vote against the amendment.

23. Mr. YEPES emphasized that the consequences would be very serious if the tribunal, having started proceedings on the basis of a *compromis* which did not empower it to adjudicate *ex aequo et bono,* subsequently introduced that element into the *compromis*. His proposal that a *compromis* should be required to specify whether the tribunal was empowered to adjudicate *ex aequo et bono* had been rejected by the Commission at the previous meeting.[1] He was strongly opposed to the amendment.

24. Mr. SCELLE pointed out that an arbitral tribunal always tended to judge *ex aequo et bono*; indeed, therein lay its difference from the International Court of Justice.

25. Mr. ALFARO said that Mr. Yepes' hypothesis was untenable, because article 12 provided that, in the absence of agreement between the parties concerning the law to be applied, the tribunal should be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice. That article did not allow for adjudication *ex aequo et bono.*

26. In the light of the strong opposition expressed to his amendment, he would withdraw it.

27. Faris Bey el-KHOURI moved the deletion of the word " widest " from article 11.

28. Mr. SCELLE was strongly opposed both to Faris Bey el-Khouri's amendment in particular, and to the submission of amendments to articles which had already been adopted by the Commission in general.

29. Mr. ZOUREK supported Faris Bey el-Khouri's amendment. The expression " widest " was contrary to the intentions of the draft. The only powers which the tribunal possessed were the powers given it in the *compromis*, and the *compromis* must be interpreted in accordance with the generally accepted rules of international law.

30. Mr. KOZHEVNIKOV said that the special rapporteur seemed only to object to the submission of amendments which were contrary to his ideas. He had supported Mr. Alfaro's amendment, despite the fact that it had been submitted to an article which had already been adopted.

31. He shared Faris Bey el-Khouri's views, and supported his amendment.

32. The CHAIRMAN moved the closure of the debate, and invited the Commission to vote on the motion.

The motion for the closure of the debate was carried by 7 votes to 3.

Faris Bey el-Khouri's amendment was rejected by 6 votes to 5.

ARTICLE 20 (*resumed from the 189th meeting*)

33. At the suggestion of the CHAIRMAN, Mr. SANDSTRÖM agreed that his amendment to article 20, which consisted in the fusion of the two paragraphs thereof, should be considered by the Drafting Committee.

ARTICLE 19 (*resumed from the 189th meeting*)

34. The CHAIRMAN pointed out that, since the Sub-Commission[2] had not completed its task, the Commission must examine paragraph 2 of article 19 in relation to paragraph 5 of article 9 (formerly paragraph (f) of article 9), and decide whether the two tallied.

35. Mr. YEPES recalled that at the 189th meeting he had suggested that the word " majority " should be qualified.[3] He thought that should be done by adding the word " absolute ".

36. Mr. SCELLE asked Mr. Yepes exactly what he had in mind. An absolute majority would imply that a tribunal would have to have a considerable number of members.

[1] See *supra,* 192nd meeting, para. 98.

[2] See *supra,* 189th meeting, para. 3.

[3] *Ibid.,* para. 30.

37. Mr. YEPES explained that in a tribunal of five members, an absolute majority would be three and a prescribed or "qualified" majority four.

38. Mr. SANDSTRÖM said that the question of majority was very complex, and drew attention to Article 55 of the Statute of the International Court of Justice.

39. Mr. ALFARO considered that Mr. Yepes' amendment was unnecessary. Surely the word "majority" as used in paragraph 2 of article 19 meant a simple majority, namely, half the members plus one.

40. Mr. YEPES withdrew his amendment.

41. After some discussion on the relation between paragraph 5 of article 9 and paragraph 2 of article 19,

42. Mr. LAUTERPACHT moved that the Commission decide that there was no inconsistency between the two paragraphs, and that the discussion thereon be closed.

The Commission decided that there was no inconsistency between paragraph 5 of article 9 and paragraph 2 of article 19.

43. Mr. LIANG (Secretary to the Commission) said that the scope of paragraph 2 of article 19 was doubtful. Its present position seemed to suggest that it applied to the deliberations of the tribunal, but since there were other matters which it might well cover, its rightful place would, perhaps, be in article 13. The point could, however, be referred to the Drafting Committee.

It was so agreed.

ARTICLE 24 (*resumed from the 190th meeting*)

44. The CHAIRMAN drew the attention of the Commission to Mr. Alfaro's proposed text for article 24, which read:

"1. The award shall be drawn up in writing. It shall contain the names of the arbitrators and shall be signed by the President and the members of the tribunal who have voted for it.

"2. The award shall contain a full statement of reasons.

"3. The award is rendered by being read in open court, the agents of the parties being present or duly summoned to appear.

"4. The award shall be communicated to the parties."

45. The French text of paragraph 3 should be corrected by the substitution of the word "*convoqués*" for the word "*appelés*".

46. Mr. ALFARO said that the purpose of his amendment was to clarify the procedure for rendering the award and to determine the precise moment at which it should be regarded as rendered. The text contained no new elements.

47. Mr. YEPES supported Mr. Alfaro's amendment, which would also cover a point he had himself intended to deal with in an amendment to article 27. That amendment would thereby become unnecessary.

48. Mr. SCELLE, accepting Mr. Alfaro's text, proposed that the word "immediately" be added to paragraph 4.

49. Mr. ZOUREK asked whether the provisions of article 24 were obligatory, or whether the parties could make in the *compromis* other stipulations relating to the rendering of the award. For instance, the parties might with good reason decide that the award should not be read in public. In that connexion he referred to the *Chevreau* case.[4]

50. Mr. KOZHEVNIKOV asked at what precise moment the award became binding upon the parties.

51. The CHAIRMAN said that the answer to Mr. Kozhevnikov's question was to be found in article 27, read in conjunction with Mr. Alfaro's text for article 24, paragraph 3.

52. Mr. ALFARO, in reply to Mr. Zourek, said that the parties could insert in the *compromis,* among the other optional clauses, one concerning the rendering of the award.

53. He accepted Mr. Scelle's amendment to paragraph 4 of his text.

54. Mr. SANDSTRÖM agreed that an award might not necessarily be read in open court. It would be enough to say that it was rendered once read in the presence of the parties.

55. Mr. Scelle's amendment to paragraph 4 could have practical disadvantages if printed copies of the award were not immediately available for communication to the parties.

56. Mr. SCELLE considered that Mr. Sandström's objection to his amendment was one of detail; surely the award would not be read until sufficient copies were available.

57. Mr. YEPES suggested an alternative amendment to that proposed by Mr. Scelle, namely, the addition at the end of paragraph 4 of the words "as soon as possible".

58. Mr. SCELLE said that such an amendment would be unacceptable, since it would render indeterminate the time at which an award became binding upon the parties.

59. Mr. YEPES withdrew his suggestion.

60. Mr. ZOUREK said that it was essential to stipulate when the award would become binding. Some provision must therefore be made for the possibility of the parties agreeing to its not being read in public.

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[4] See Manley O. Hudson, "The Chevreau Claim between France and Great Britain", *American Journal of International Law*, vol. 26 (1932), p. 807.

61. Mr. YEPES believed there was danger in retaining the words "by being read in open court". In certain cases an award was read *in camera* prior to publication, so as to enable public opinion to be prepared for it.

62. Mr. ALFARO considered that, except in very exceptional cases, it was unlikely under modern conditions that governments would wish to withhold publication of an award.

63. The CHAIRMAN pointed out that if paragraph 3 were adopted as it stood, it would be impossible to regard as rendered an award not read in open court.

64. Mr. LAUTERPACHT disagreed with the Chairman; as Mr. Alfaro had pointed out, the parties were free to decide otherwise in the *compromis*.

65. Mr. SCELLE regretted that the Commission should be giving so much attention to a possibility which he could only regard as retrograde. It was a general principle of law that any decision by a judicial body must be read in public.

66. Mr. LAUTERPACHT suggested that the parties were unquestionably free to insert in the *compromis* provisions other than those contained in article 24. The only objection would be if article 24 were interpreted to mean that the award *must* be read in open court.

67. The CHAIRMAN said that the parties might not foresee the need to insert different provisions in the *compromis,* but it might arise during the proceedings. Would the parties then have to comply with paragraph 3 of article 24?

68. Mr. LIANG (Secretary to the Commission) said that the whole draft required examination in order to establish which provisions were obligatory. At the moment, a hierarchy of three different types of provision appeared to have been established, namely: provisions which were not subject to modification by the parties in the compromis; optional provisions such as article 25; and finally, provisions such as that the award should include a full statement of reasons which, if not adhered to, might invalidate the award.

69. It was difficult to see to which category article 24 belonged. If Mr. Lauterpacht's argument was sound, the words "Subject to any contrary provision in the *compromis*" should preface paragraphs 1 and 2, but not paragraph 4.

70. Mr. YEPES proposed the substitution of the words "before the parties" for the words "in open court". Special circumstances might often require that an award should not be made known to the general public immediately. Accordingly, it would not be prudent to insist on immediate publicity as laid down in the article.

71. Mr. SCELLE said that he would be unable to accept such an amendment.

Mr. Yepes' amendment was rejected by 4 votes to 3, with 4 abstentions.

Mr. Scelle's proposal that the word "immediately" be added at the end of paragraph 4 was adopted by 8 votes to 2 with 1 abstention.

Mr. Alfaro's text for article 24, as a whole and as amended, was adopted by 10 votes to none, with 1 abstention.

72. Mr. YEPES explained that he had voted in favour of the text because, generally speaking, it was acceptable to him. It was regrettable, however, that no provision had been made allowing the parties to defer publication of the award.

ARTICLE 26 (*resumed from the 190th meeting*)

73. The CHAIRMAN drew attention to the amended version of Mr. Pal's proposal, moved at the 190th meeting. The new text read:

> "Within a month after the award is rendered and communicated to the parties, the tribunal, either of its own motion or at the request of either party, shall be entitled to rectify any clerical, typographical or arithmetical errors or errors of the same nature apparent on the face of the award."

He understood that the French translators had found difficulty in rendering the expression "apparent on the face of the award".

74. Mr. PAL said that what he had in mind were manifest errors immediately obvious on perusal of the text.

75. Mr. SCELLE considered that the words "errors of the same nature apparent on the face of the award" could be rendered in French by the words "*toute erreur manifeste du même ordre contenue dans la sentence*".

76. Mr. ALFARO considered that the word "contenue" did not quite accurately express Mr. Pal's intention. The point should be referred to the Drafting Committee.

Article 26 was adopted unanimously subject to final review by the Drafting Committee.

ARTICLE 10 (*resumed from the 187th meeting*)

77. Mr. SCELLE introduced an alternative text for article 10, reading:

> "Once the tribunal has been constituted, either party may submit the dispute to it by direct citation. If one of the parties refuses to answer the citation and calls for the preparation of a *compromis,* the tribunal shall decide whether there is already sufficient agreement between the parties on the points mentioned in article 9 to enable it to examine the case forthwith. Failing such agreement, the tribunal shall fix a time-limit of four months for the parties to conclude a *compromis,* either directly between themselves or through the good offices of a third State. On the expiry of this time-limit, the tribunal may draw up the *compromis* within a reasonable time which it shall itself decide."

78. Mr. ALFARO also submitted a text for article 10, reading:

> "When the parties are bound by an undertaking to arbitrate and the tribunal has been constituted, if the parties fail to agree on the *compromis* within three months after the date on which one of the parties had notified the other of its readiness to conclude the *compromis,* the tribunal shall draw up the *compromis* within the ensuing three months."

79. His purpose had been to simplify the cumbersome procedure laid down in the original text, with the succession of time limits it implied. He had also eliminated the intervention of a third State, which had not found favour with the Commission. Provided the latter change were accepted, however, he woud be prepared to withdraw his text in favour of that proposed by Mr. Scelle.

80. Mr. LAUTERPACHT said that he had intended submitting a text for article 10, but would not do so because Mr. Alfaro's proposal gave him satisfaction. He hoped, therefore, that it would not be withdrawn by its author.

81. He would be unable to support Mr. Scelle's text because he believed that the *compromis* was essential to arbitration when no permanent tribunal existed. The special rapporteur's new text, which had clearly been inspired by the observations of the United Kingdom Government on article 9 (A/CN.4/68, No. 8 or A/2456, Annex I, No. 9), would, moreover, conflict with the provisions of article 9. The United Kingdom Government had, perhaps, failed to take fully into account the opening words of article 9, namely: "Unless there are prior provisions on arbitration which suffice for the purpose".

82. Mr. SCELLE said that he had retained the provision enabling the parties to seek the good offices of a third State out of respect for precedent and the will of the parties. The suppression of such a provision would, however, certainly not prevent the parties from applying to a third State if they so wished. If the Commission wished to reverse its previous decision, he would be prepared to delete that provision.

83. Replying to Mr. Lauterpacht's point, he observed that the United Kingdom Government had presumably not prepared its comment without careful reflection. It had sought to emphasize that in many cases a matter was submitted to the tribunal by complaint on the part of one of the parties. He agreed that once the tribunal was constituted there was nothing to prevent the parties from applying to it direct without first concluding a *compromis,* which, in his opinion, was often the stumbling-block in arbitration. There would be enormous advantage in the parties being able to dispense with the *compromis,* to which certain members of the Commission seemed unduly attached. If one of the parties, however, insisted upon a *compromis* it would be left to the tribunal to decide whether there was sufficient agreement between them on the essential points mentioned in article 9 to enable it to examine the case forthwith. Adoption of his text would greatly accelerate the procedure, and enable a settlement to be reached more quickly. It would be pure formalism to insist that a *compromis* was always essential.

84. Mr. YEPES said that he would be unable to accept Mr. Scelle's text as, generally speaking, he regarded the *compromis* as the corner-stone of arbitration, though he admitted there were exceptional cases where it would not be necessary. He was usually prepared to support the Special Rapporteur, but in the present instance could not subscribe to a text which ran counter to the whole purpose of the draft.

85. He therefore proposed the deletion from Mr. Scelle's text of the words "decide whether there is already sufficient agreement between the parties on the points mentioned in article 9 to enable it to examine the case forthwith. Failing such agreement, the tribunal shall", and the substitution of the words "reasonable time-limit according to the circumstances of the case" for the words "time-limit of four months".

86. Mr. KOZHEVNIKOV also considered the *compromis* to be extremely important. It would be totally contrary to the nature of arbitration to compel the parties to act against their will. Mr. Scelle's text was totally unacceptable because it refused to recognize that arbitration was based upon the free consent of the parties and because it would enable the tribunal to impose a time-limit on them for the conclusion of the *compromis,* or failing that, to impose the *compromis* itself.

87. Mr. SCELLE said that he was prepared to accept Mr. Yepes' second amendment, since the words "a reasonable time-limit according to the circumstances of the case" would further extend the powers of the tribunal.

88. Contrary to what Mr. Kozhevnikov thought, his proposal was based on respect for the will of the parties, since it would enable them to dispense entirely with the *compromis* if they so wished. Moreover, he was anxious to prevent one of the parties from unilaterally repudiating its prior undertaking. The tribunal would be able to decide if that undertaking were sufficiently specific to enable it to examine the case. The article was consistent with the spirit and the letter of the draft arbitral procedure.

89. Faris Bey el-KHOURI opposed Mr. Scelle's proposal, because he considered that arbitration was based upon the free will of the parties, which could only be given concrete expression in the *compromis.* It was therefore quite inadmissible to allow the tribunal to force a *compromis* upon the parties. If they could not agree upon a *compromis,* there would be no arbitration. He was prepared to concede, however, that the tribunal could assist them in the preparation of the *compromis.*

90. Mr. SCELLE insisted that when there was already sufficient agreement between the parties on the essential elements mentioned in article 9, *pacta sunt servanda.*

Unless his text were accepted, the parties would be able to repudiate earlier agreements.

91. Mr. PAL said that the criticism levelled against Mr. Scelle's proposal was unjustifiably severe. Such a provision would assist the parties in the peaceful settlement of the dispute and should therefore be supported by those who regarded that as the purpose of arbitration. If Mr. Scelle were prepared to abandon the clause relating to the intervention of a third State, the text would be preferable to Mr. Alfaro's.

92. Mr. ALFARO, endorsing Mr. Pal's remarks, said that the reason why he had withdrawn his text was that the Special Rapporteur had taken into account the proviso contained in the opening words of article 9, namely, "Unless there are prior provisions on arbitration which suffice for the purpose".

93. In drafting his own text, his main concern had been to eliminate the delays allowed in the original text of article 10. In the new version proposed by Mr. Scelle that danger had been removed, and any delay which would now occur would be the outcome of the mutual consent of the parties.

94. Mr. SANDSTRÖM proposed the addition at the end of Mr. Scelle's text of the words "taking due account of agreements between the parties".

95. Mr. SCELLE accepted Mr. Sandström's amendment, and moved the closure of the debate on article 10.

96. Mr. LAUTERPACHT said that the discussion had not been exhausted. If a vote were taken immediately on Mr. Scelle's version of article 10 he would have to vote against it, though for reasons other than those expounded by Mr. Kozhevnikov and Faris Bey el-Khouri. He would be placed in an embarrassing position if Mr. Scelle's motion were put to the vote without a further opportunity for discussion.

97. Mr. KOZHEVNIKOV expressed surprise at the Special Rapporteur's motion, which was highly inappropriate in a discussion between scholars. He failed to see the reason for haste on so important a question.

98. Mr. SCELLE observed that the matters being dealt with by the Commission had been discussed at great length and inconclusively by many authorities in the past. In truth, Mr. Kozhevnikov was opposed to allowing the tribunal to draw up the *compromis* itself, as decided by the Commission three years ago.[5]

99. Mr. KOZHEVNIKOV said that it was not the Commission's task merely to confirm the Special Rapporteur's own views.

100. Mr. SCELLE reiterated that he had referred to a decision taken by the Commission.

101. Mr. ZOUREK moved that further discussion on article 10 be deferred until the next meeting.

Mr. Zourek's motion was carried by 7 votes to 2.

The meeting rose at 1.15 p.m.

[5] See *Yearbook of the International Law Commission, 1950*, vol. I, 73rd meeting, paras 1-51, and 80th meeting, paras. 5-16.

194th MEETING

Monday, 15 June 1953, at 2.45 p.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Arbitral procedure (item 1 of the agenda) (A/2163, A/CN.4/68 and Add.1, A/CN.4/L.40) (*concluded*)

ARTICLE 10 (*concluded*)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 10, said that it still had before it Mr. Yepes' amendment, whereby the Special Rapporteur's text would read:

"Once the Tribunal has been constituted, either Party may submit the dispute to it by direct citation. If one of the Parties refuses to answer the citation and calls for the preparation of a *compromis*, the Tribunal shall fix a reasonable time-limit, in accordance with the circumstances of the dispute, for the Parties to conclude a *compromis*, either by direct agreement between themselves or through the good offices of a third State. On the expiry of this time-limit, the Tribunal may draw up the *compromis* within a reasonable time which it shall itself determine."

2. Since the previous meeting Mr. Alfaro had also submitted a new text reading:

"1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal is constituted, either party may submit the dispute to the tribunal by direct citation. If the other party refuses to answer the citation on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the points set forth in article 9 to enable it to examine the case forthwith. In the affirmative case the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case the tribunal shall order the parties to conclude a *compromis* within such time-limit as the tribunal may consider reasonable, according to the nature of the litigation.

"2. If the parties fail to agree on a *compromis* within the time-limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

"3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and they fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*."

3. Mr. ALFARO said that he had sought in his text to cover the points made by the Special Rapporteur and Mr. Lauterpacht, as well as those contained in his own original proposal. He had not introduced any new elements.

4. Mr. YEPES emphasized that his amended version of Mr. Scelle's text was radically different from the original, since it made it obligatory upon the parties to conclude a *compromis*. As he saw it, the *compromis* was the cornerstone of all arbitral procedure and it ought not to be permitted to dispense with it save in exceptional cases.

5. Mr. SCELLE (Special Rapporteur) said that Mr. Alfaro's text, which was both comprehensible and clearly expressed, was acceptable to him, and he would withdraw his proposal in its favour.

6. Mr. ZOUREK was unable to understand the reasons for a provision of the kind contained in article 10. Either an undertaking to arbitrate was specific, and contained all the essential elements of a *compromis*, thus enabling the tribunal to open proceedings at once, or it was entirely general, and required the conclusion of a special *compromis* if a particular matter was to be submitted to arbitration. In the latter case it would be totally inadmissible to allow the tribunal itself to formulate the *compromis*. Nor could it be argued that a precedent existed in article 53 of the Hague Convention for the Pacific Settlement of International Disputes of 1907, since that applied only in those cases when the parties had agreed to have recourse to the Permanent Court of Arbitration for the purpose. He could not therefore subscribe to the theory underlying article 10, or to the amendments thereto.

7. Mr. SCELLE said that article 10 was no new departure. Numerous treaties provided for the conclusion of the *compromis* by the tribunal if the parties failed to agree.

8. Mr. SANDSTRÖM said that Mr. Scelle's original amendment to article 10 was superior to Mr. Alfaro's new text, which made submission of a dispute by direct citation conditional upon there being in the undertaking to arbitrate provisions which seemed sufficient for the purpose of a *compromis*. Mr. Alfaro's text would complicate the procedure.

9. Mr. SCELLE considered that there was no essential difference between the two texts, since according to his proposal, one party could contest the right of the other to submit the dispute by direct citation.

10. Mr. PAL considered that the Special Rapporteur had been right in withdrawing his own proposal in favour of Mr. Alfaro's, which not only covered all points dealt with in the former, but was also more consistent with other articles of the draft on arbitral procedure.

11. The CHAIRMAN first put to the vote Mr. Yepes' amendment as being farthest removed from the original.

Mr. Yepes' amendment was rejected by 9 votes to 1, with 2 abstentions.

12. Mr. YEPES asked that Mr. Alfaro's text be put to the vote paragraph by paragraph, as he had an amendment to propose to paragraph 3.

Paragraph 1 of Mr. Alfaro's text for article 10 was adopted by 8 votes to 2, with 2 abstentions.

Paragraph 2 was adopted by 8 votes to 4.

13. Mr. YEPES proposed the substitution of the words "a reasonable time-limit fixed by the tribunal" for the words "three months", in paragraph 3. As he had explained at the previous meeting, the time-limit for the conclusion of the *compromis* must be determined according to the circumstances attending the case.[1] There could not be a uniform time-limit for all *compromis*. Some were very easy to draw up and for those a very short time-limit was sufficient, but for others the suggested time-limit of three months might prove too short.

14. Mr. ALFARO pointed out that Mr. Yepes' point was covered by the last sentence of paragraph 1. Paragraph 3 dealt with the case of one party refusing to co-operate with the other in preparing the *compromis*. In that instance a definite time-limit must be established.

15. Mr. YEPES failed to see the difference between

[1] See *supra*, 193rd meeting, para. 85.

the contingency envisaged in paragraph 1 and that dealt with in paragraph 3. In each case the time-limit should be determined by the same criteria.

16. Mr. SCELLE considered Mr. Yepes' objection to be well-founded.

17. Mr. SANDSTRÖM supported Mr. Alfaro's views. Mr. Yepes' amendment would give the tribunal the delicate task of having to decide what was a reasonable time-limit to impose upon the parties for concluding the *compromis*.

18. Mr. ALFARO said that acceptance of Mr. Yepes' amendment would involve modification of the whole procedure laid down in paragraph 3.

19. The CHAIRMAN suggested that some of the objections to Mr. Yepes' amendment might be removed if the words "at the request of one of the parties" were added to it.

20. Mr. YEPES accepted the Chairman's suggestion.

Mr. Yepes' amendment, as amended, was rejected by 6 votes to 1, with 5 abstentions.

Paragraph 3 of Mr. Alfaro's text for article 10 was adopted by 6 votes to 4, with 2 abstentions.

21. Mr. YEPES explained that he had voted against paragraph 3 in its present form because it was in flagrant contradiction with paragraph 1.

Mr. Alfaro's text for article 10, as a whole, was adopted by 7 votes to 4, with 1 abstention.

22. Mr. YEPES explained that he had voted in favour of the text as a whole while maintaining his objections to paragraph 3.

New article proposed by Mr. Yepes

(Article 5, para. 3)

23. Mr. YEPES proposed a new article for inclusion in the draft, to read as follows:

> "Wherever this draft refers to the beginning of the proceedings it shall be understood to mean the time when the written memorials are officially received by the president of the tribunal."

24. If the Commission were prepared to accept in principle the necessity for a provision stipulating when the proceedings had begun, he would be ready to consider other suggestions as to the precise moment chosen.

25. Mr. SCELLE was in favour of such a provision, but considered that the proceedings should be regarded as having begun once the tribunal had been constituted, and had convened for the first time to perform some procedural act.

26. Mr. LAUTERPACHT observed that Mr. Scelle had in fact suggested two dates.

27. Mr. SCELLE said he would prefer the second.

28. Mr. LAUTERPACHT pointed out that it might be unnecessary for the tribunal to meet at all before the pleadings began. It was conceivable that the president alone could take the necessary steps to request the parties to make their written submissions. Further, it was not clear from Mr. Yepes' text precisely which stage in the written proceedings he had in mind.

29. Mr. YEPES pointed out that Article 43 of the Statute of the International Court of Justice referred to communications.

30. Mr. SCELLE said that he could not accept Mr. Yepes' proposal since it might make evasion possible. For that reason, he felt that the proceedings should be deemed to have begun once the tribunal acting as a corporate body had taken its first procedural decision.

31. Mr. LAUTERPACHT pointed out that sometimes there were no written proceedings.

32. Mr. SCELLE observed that surely, before taking up a case, the judges always met, even if not in court.

33. Mr. ZOUREK asked the Special Rapporteur at what moment the proceedings would begin if there was a single arbitrator.

34. Mr. SCELLE replied that in that case the proceedings would begin with the first procedural act performed by the arbitrator.

35. Mr. ALFARO said that, so far as he could judge, Mr. Yepes' text should be included in article 7.

36. Mr. YEPES thought that, if such a provision were regarded as generally necessary, it should be inserted at the end of the draft.

37. Mr. SANDSTRÖM expressed doubts as to whether an analogy could be drawn between an arbitral tribunal and the International Court of Justice. The proceedings of the former should be deemed to begin with its convocation.

38. Mr. LIANG (Secretary to the Commission) said that in the light of the provisions of article 7 the Special Rapporteur's suggestion hardly met the case. The opening of the proceedings must have some reference to the parties.

39. It was not easy to decide whether such a provision was necessary at all. Under the terms of article 13 the tribunal itself could determine when its proceedings had begun.

40. Mr. LAUTERPACHT proposed an alternative text reading:

> "The proceedings are deemed to have begun when the President or the sole arbitrator has made the first order concerning written or oral proceedings."

41. Mr. YEPES accepted Mr. Lauterpacht's proposal.

42. Mr. SCELLE, accepting Mr. Lauterpacht's text, asked whether the words "the first order" could be translated by the words "*la première ordonnance*".

43. Mr. LAUTERPACHT replied in the affirmative.

Mr. Lauterpacht's text was adopted by 9 votes to none with 2 abstentions.[2]

GENERAL CLAUSES

44. The CHAIRMAN invited the Commission to take up the question of general clauses. Texts were to be proposed by the Special Rapporteur and by Mr. Sandström.

45. Mr. LAUTERPACHT, on a point of order, said that the Commission would first have to decide whether it was to limit itself to the proposals by Mr. Scelle and Mr. Sandström, or whether it was also to discuss other general clauses such as those dealing with denunciation, reservations and interpretation.

46. Mr. SCELLE introduced his proposal, which read:

"This Convention shall enter into force as soon as it has been signed and ratified by two States.

"In the absence of express reservations made at the time of signature, ratification or accession to this Convention, its provisions shall be binding on the signatory States, in respect both of prior undertakings to arbitrate and undertakings given subsequent to the entry into force of the Convention.

"Nevertheless, where arbitration proceedings are already in progress before a constituted tribunal or a designated arbitrator, or where a definitive *compromis* has been concluded, any signatory State shall have the right to stipulate that the proceedings shall be carried through to completion in accordance with the procedure previously laid down."

47. It would be remembered that at the fourth session the Commission had not contemplated the inclusion of general clauses. He had put forward his text in the light of the considerations raised at the present session concerning retrospective effect. He had sought to be as liberal as possible. If the Commission went into too much detail on the matters referred to by Mr. Lauterpacht, it would be unable to reach any final conclusion for a considerable time.

48. Mr. SANDSTRÖM said that he was not wholly in agreement with Mr. Scelle, but if Mr. Scelle were prepared to withdraw his proposal, he would also withdraw his own.[3]

49. Mr. LAUTERPACHT said that he had expected that any discussion of the proposals for general clauses submitted by Mr. Scelle and Mr. Sandström would lead to a discussion of the general issue of final clauses. Several possibilities were open to the Commission. In the present instance the Statute of the Commission was somewhat difficult to apply, since the decision must depend on whether the Commission had been engaged on the task of codification or on the progressive development of international law. Assuming that the Commission agreed that its draft on arbitral procedure fell within the category of codification, then article 23 of the Commission's Statute applied, and for his part he would hope that the Commission would be able to recommend to the General Assembly that it recommend the draft to Member States with a view to the conclusion of a convention.

50. Mr. YEPES said that the Commission had prepared a draft on arbitral procedure which could be framed as a convention if the General Assembly so decided. Approaching the problem from that angle, it would follow that no final clauses were necessary, since such questions as ratification were no concern of the Commission's. He suggested accordingly that the Commission's Draft should be given the title "Statute of Arbitral Procedure".

51. He was under the impression, moreover, that the United Nations had a standard formula for the final clauses of conventions.

52. Mr. SCELLE supported Mr. Yepes.

53. Mr. LIANG (Secretary to the Commission) thought that it would be appropriate for the Commission to consider whether it wished to apply sub-paragraph (*c*) of paragraph 1 of article 23 of its Statute in transmitting the draft on arbitral procedure to the General Assembly. The latter would then take an appropriate decision.

54. He was inclined to agree that it was not absolutely necessary to draft final clauses. As to the standard clauses to which Mr. Yepes had referred, they had been drawn up by the Secretariat as a piece of research, and there was no suggestion that any attempt should be made to persuade governments to use them.

55. Mr. Scelle's proposal actually went beyond the traditional framework of final clauses. He would consequently suggest that appropriate reference be made to the question of reservations and retrospective effect in the Commission's report, which would be submitted, together with the draft, to the General Assembly.

56. Mr. SCELLE withdrew his proposal.

57. Mr. LAUTERPACHT assumed that the Commission would transmit the draft to the General Assembly with a recommendation on the lines of sub-paragraph (*c*) of paragraph 1 of article 23 of its Statute.

58. There was one general point which he wished to mention, namely: the articles which the Commission had examined at the fourth and present sessions were

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[2] This text later became paragraph 3 of article 5.

[3] The text of Mr. Sandström's proposal read as follows:

"This Convention shall enter into force as soon at it has been signed and ratified by two States.

"It shall replace as between the parties bound by it any general convention on arbitral procedure, except where proceedings have already been instituted at the date of its entry into force.

"It shall also be applicable to proceedings instituted in virtue of undertakings to arbitrate entered into prior to its entry into force, except where express stipulations are laid down in the undertaking."

entitled "Draft on Arbitral Procedure". That was not entirely accurate. Though certain articles did relate to arbitral procedure, the draft actually prescribed the steps which should be taken in order to make arbitral procedure effective. From the practical point of view, parties drafting a *compromis* would find nothing in the draft to guide them except certain articles dealing with procedure.

59. He wondered whether the draft should not include some text on the lines of the proposals made by Mr. Carlston.[4]

60. Mr. SCELLE said that he had been under the impression that the Commission had practically concluded its work on arbitral procedure. If the whole discussion were to be started all over again, he would request the Commission to appoint another Special Rapporteur.

61. Mr. LIANG (Secretary to the Commission) agreed with Mr. Lauterpacht that the draft did not contain detailed procedural rules. It followed the precedents set by the relevant Hague conventions. As to Mr. Carlston's proposals, to which Mr. Lauterpacht had referred, he (the Secretary) took the view that they dealt with the procedure to be applied by arbitral tribunals as distinct from the procedure to be followed by States in regard to arbitration in general. The distinction was subtle, but tenable. He would in that connexion draw attention to article 13 of the draft, whereby the tribunal was empowered to formulate its rules of procedure. To illustrate the distinction, he would suggest that the Commission's draft might be compared to the Statute of the International Court of Justice, the detailed rules of procedure to be applied by tribunals then corresponding to the Court's rules.

62. The CHAIRMAN considered that Mr. Lauterpacht should have raised the issue at the fourth session and drew attention to the fact that no government had referred to it.

63. Mr. LAUTERPACHT said that he was not making a formal proposal, since it was obviously impossible for the Commission to embark on the subject at the present stage.

64. Mr. AMADO considered that the Commission was approaching the end of its work on arbitral procedure, and that its Statute gave clear guidance in article 23 as to what the next step should be. It was for the General Assembly to pursue the matter further.

65. Mr. YEPES moved that no fiscal clauses be included in the draft.

66. The CHAIRMAN said that the issues raised in the proposal which Mr. Scelle had just withdrawn, especially the question of retrospective effect, would be mentioned in the introduction to the Commission's report.

67. Mr. SCELLE indicated his agreement with such a course of action.

68. Mr. ZOUREK wished to make the following general comments. First, he considered that the draft on arbitral procedure duplicated existing instruments. Secondly, assuming that the draft were, with certain inevitable modifications, accepted by governments as a convention, what would be the relationship between it and prior treaties relating to arbitration? Two different views had been expressed on that point, some members of the Commission holding that all prior instruments would be invalidated, others maintaining that they would remain in force except in the case of articles where the contrary was explicitly stated.

69. Mr. SCELLE considered that the question was perfectly simple. Some governments would accept the draft, others would not. The former would thus have adhered to a new law, subject always to any reservations that might be made. It was a generally accepted principle that a new law superseded the old. The same was true of treaties, except that no treaty could be imposed on any State. So long as a State which was a party to the General Act for the Pacific Settlement of International Disputes did not adhere to another instrument it was bound by the General Act. When, however, a State adhered to the present draft, the General Act would thereby be invalidated in so far as that State was concerned.

70. The CHAIRMAN asked the Commission whether it was prepared to adopt Mr. Yepes' proposal, and whether it would agree that reference be made in the report to Mr. Scelle's proposal on the general clauses, with special references to retrospective effect.

The Commission adopted Mr. Yepes's proposal by 8 votes to 1, with 3 abstentions, and agreed that reference be made in its report to Mr. Scelle's proposal on the general clauses, with special reference to retrospective effect.

71. Mr. KOZHEVNIKOV proposed that the Commission decide what action it should take on the draft on arbitral procedure only after it had finally adopted the draft.

It was so agreed.

72. Mr. SANDSTRÖM drew attention to the comments by the Government of Sweden (A/CN.4/68, No. 7 or A/2456, Annex I, No. 8), to which no reference had been made in the course of the Commission's discussions. What was the Special Rapporteur's attitude to the statement that the Commission's draft seemed to apply to both legal and non-legal disputes?

73. Mr. SCELLE said that his opinion on that issue formed part of his general conception of law. He had not alluded to the Swedish Government's comments because they raised issues which lawyers had been discussing for centuries and which the Commission could discuss endlessly. He did not himself believe that any distinction was possible between political and legal

[4] See Kenneth S. Carlston, "Codification of international arbitral procedure", *American Journal of International Law*, vol. 47 (1953), pp. 203-250.

disputes. All disputes could be settled on the basis of law, and the silence of the law simply meant that a party was free to decide as it wished. Indeed, the Commission had decided, in article 12, that judgement could not be withheld on the ground of the silence or obscurity of international law or of the *compromis*. In that event, it was for the parties to decide whether the dispute should be solved according to rules of law or *ex aequo et bono*.

74. Mr. ZOUREK was not convinced by Mr. Scelle's arguments. The question of a new law superseding the old was not perfectly straightforward in international law, particularly in regard to multilateral treaties. Existing practice was far from clear.

75. He would, however, not insist further on the point, since it fell outside the framework of the Commission's tasks.

The CHAIRMAN declared the discussion closed.

76. *It was agreed* that Mr. Scelle's drafting amendment to paragraph 2 of article 5 be considered by the Drafting Committee. The amendment consisted in making the following slight changes in the first sentence:

"A party may only replace an arbitrator appointed by it, if the Tribunal..."

77. *It was also agreed* that the Drafting Committee consider the Secretary's suggestion that a general reference to paragraph 2 of Article 35 of the Statute of the International Court of Justice be included in the draft[5] and Mr. Alfaro's proposal that articles 26, 27 and 28 be re-numbered, article 27 to follow article 25.[6]

78. The CHAIRMAN said that the Commission must now set up a Drafting Committee. Experience suggested that such a body should be as small as possible, and he would therefore propose that it be composed of himself, the General Rapporteur, the Special Rapporteur and Mr. Alfaro, whose great experience of drafting would be most useful.

It was so agreed.

COMMENTARY ON THE DRAFT ON ARBITRAL PROCEDURE (A/CN.4/L.40)

79. The CHAIRMAN asked the Commission to express its views on what action should be taken on the commentary on the draft on arbitral procedure (A/CN.4/L.40) prepared by the Secretariat. The last sentence of the introductory note by the Secretariat (A/CN.4/L.40) read as follows: "It will be for the Special Rapporteur and the Commission to consider the commentary and revise it wherever they deem necessary or desirable." Actually, the commentary applied to the text of the draft adopted by the Commission at the fourth session. He feared that neither the Commission nor the Secretariat had time to revise it at the present session.

80. In the circumstances, would the correct solution not be for the General Rapporteur to append the commentary to the Commission's report, stating that the Commission had taken note thereof?

81. Mr. SCELLE said that he had read the commentary in the course of its preparation by the Secretariat, and could express appreciation of its objectivity. He would urge that the Commission approve it, since merely to take note of an excellent piece of work was hardly sufficient.

82. Mr. AMADO asked what was the usual procedure. He doubted whether the Commission could approve the commentary.

83. Mr. LIANG (Secretary to the Commission) said that the Secretariat had not taken the initiative of asking for approval of a document compiled on the Commission's instructions in pursuance of article 20 of its Statute, which laid down that the Commission should prepare its drafts in the form of articles and submit them to the General Assembly together with a commentary. It had been thought at the preceding session that the commentary should accompany the draft on arbitral procedure, and that, indeed, was why the Secretariat had been requested to undertake the task. The commentary was not a working document, and it was for the Commission to decide whether it wished to apply, in that specific instance, the provisions of article 20 of its Statute.

84. Mr. SANDSTRÖM drew attention to sub-paragraphs (*a*) and (*b*) of article 20, which gave details of the type of information which a commentary should include. The Commission should approve the document.

85. Mr. LAUTERPACHT was inclined to the view that the Commission should not decide the issue forthwith. For his part, he had not thought that the subject would come up, and was not therefore prepared to express a definite opinion in the matter. He would, however, say that he was not sure whether he agreed with the Secretary's interpretation of article 20, which dealt with the presentation of a preliminary, not a final, draft. Stipulations regarding the latter were laid down in article 22, and were applicable in the present instance. Article 22 contained no reference to a commentary, and it was therefore not certain that the Commission need submit one.

86. He agreed that the commentary was a valuable piece of work, but would hesitate to say that it was the best of which the Secretariat was capable. He did not see how the Commission could approve it as being part of its own work or include it in its report to the General Assembly as a product of its own deliberations.

87. In view of those considerations, he believed that it would be best to defer a final decision on the matter.

88. Mr. YEPES proposed that the Commission adopt the commentary as one of its own documents; it had been complied by the Secretariat on the Commission's behalf, and clearly illustrated the course of the discussions on arbitral procedure. It went without saying

[5] See *supra*, 185th meeting, para. 111.

[6] See *supra*, 190th meeting, para. 67.

that certain changes would have to be made in the text in the light of the changes made in the draft at the present session. That, however, in no way detracted from the value of the document, which had been prepared scientifically and objectively and was a credit to the Secretariat.

89. Mr. LIANG (Secretary to the Commission) said that the commentary was objective in so far as it supported the spirit and the guiding considerations of the draft adopted by the Commission at the fourth session. He would not venture to say whether the presentation was adequate, but he thought that Mr. Lauterpacht was mistaken in his interprepation of article 20 of the Statute. Only the final draft was to be transmitted to the General Assembly and that draft should be accompanied by a commentary on the lines set forth in article 20 of the Statute. The origin of the matter was clearly set out in paragraph 14 of Chapter II of the Commission's report on its fourth session.[7] The Secretariat had acted in conformity with the Commission's instructions, which were based on the decision that a commentary should be attached to the draft.

90. Mr. YEPES had already pointed out that no radical modification of the commentary need be undertaken to make it a final draft, although certain changes had been adopted by the Commission in the draft code as approved at the fourth session. In fact, the Secretariat, in preparing the commentary, had not entered into a discussion of the individual parts of the articles, but had confined its comments to a presentation of the theory and practice in international law in relation to the general problems dealt with by each article of the draft agreed upon at the fourth session.

91. Mr. KOZHEVNIKOV wished to offer some preliminary observations on the matter. He considered that it was articles 16 and 22 of the Statute that were applicable in the present instance. Those articles required the Commission to prepare a final draft and explanatory report, submitting it with its recommendations to the General Assembly. Article 20 stipulated that the Commission should prepare its drafts in the form of articles, adding thereto commentaries containing the elements defined in sub-paragraphs (*a*) and (*b*).

92. First of all, the Commission could not on its own behalf submit commentaries prepared by the Secretariat. Should the Commission decide to do so, and thus assume responsibility, the question of the contents of the commentary would immediately arise. He feared that the position in so far as the relationship of the commentary to article 20 was concerned would be unsatisfactory. He was unable to join in the chorus of praise. True, the commentary had certain merits, but it fell far short of the proviso of article 20 that an adequate presentation should be given of the divergencies and disagreements, as well as of arguments invoked in favour of one or another solution.

93. He would draw attention to paragraph 24 of Chapter II of the Commission's report on its fourth session,[8] where it was clearly stated that two currents of opinion were represented in the Commission. The Secretariat's commentary was wholly silent about the conception of arbitration according to which the agreement of the parties was the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. Indeed, the whole issue had been so framed as to suggest that the only possible solution was that advocated in the draft, that was, the solution favoured by the Special Rapporteur. That could hardly be described as objective. Several governments, among them those of Belgium and the Netherlands, had expressed their opposition to the conception of arbitration reflected in the draft, but no reference was made to their views in the commentary. The discussions at the present session had also shown serious divergencies. Was the Commission justified in concealing the situation from the General Assembly, which, if the terms of article 20 were to be fulfilled, must be given full information?

94. He must also express doubts about some of the examples and precedents quoted in the commentary, and about the attempt that had been made to lend a political gloss to certain events and documents, for instance the interpretation of peace treaties and advisory opinions of the International Court of Justice.

95. To sum up, he maintained that in its present form the commentary could not be transmitted to the General Assembly even if the Commission gave it the seal of its approval. The first requirement was that it should be redrafted in the light of article 20 of the Statute.

96. The CHAIRMAN ruled that further discussion be postponed to a later meeting.

97. While the Commission proceeded to other business, he would ask members to think about the commentary and also about the Special Rapporteur's comments on each article. What form should those comments take? His own view was that the Special Rapporteur should limit his comments strictly to the modifications made in the draft at the present session, and leave untouched the comments adopted by the Commission at its previous session, and recorded in its report thereon (A/2163).

98. In his (the Chairman's) opinion the draft on arbitral procedure prepared by the Commission was not a work of codification, but one of development of international law. Article 20 of the Statute was therefore not applicable in the present case, and there was no need for a detailed commentary as described in that article.

The meeting rose at 6.10 p.m.

[7] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), p. 2. Also in *Yearbook of the International Law Commission, 1952*, vol. II.

[8] *Ibid.*, p. 3.

195th MEETING

Tuesday, 16 June 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS;

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Mr. Zourek's proposal concerning provision for the expression of dissenting opinions in the Commission's final report on the work of each session (additional item) (A/CN.4/L.42, A/CN.4/L.43 and A/CN.4/L.44)

1. The CHAIRMAN invited the Commission to take up Mr. Zourek's proposal (A/CN.4/L.42)[1] concerning the expression of dissenting opinions in the Commission's reports, which it had been decided at the 184th meeting should be added to the agenda for the present session.[2] Two related proposals had also been submitted by Mr. Lauterpacht (A/CN.4/L.43)[3] and Mr. Pal (A/CN.4/L.44).[4]

2. Referring to the fourth paragraph of Mr. Zourek's note, he said that he was unable to understand the meaning of the assertion that it was essential to settle "once and for all" the manner in which dissenting members could express their opinions. At its third session, the Commission had adopted a rule applicable to the report on that and future sessions.[5] The decision had been challenged at the fourth session, but had been upheld.[6] If Mr. Zourek's intention was that the Commission should, just before the expiry of its members' term of office, take a decision which would be binding upon the new members to be elected, he must first explain why the earlier decision should no longer be regarded as valid.

3. Mr. ZOUREK said that he was not unaware of the decision taken by the Commission at its third session. Unless he was mistaken, however, that decision as formulated during the Commission's discussion only referred to cases in which a member of the Commission disapproved of a particular passage in the final report and not to cases in which a member wished to submit comments on complete drafts of international conventions. The words in his proposal referred to by the Chairman meant that the decision taken should remain in effect as long as no change was dictated by practical considerations. Since the Commission was a permanent body, its decisions must be binding upon future members unless they decided otherwise.

4. The need to express dissenting opinions in the final report which the Commission submitted annually to the General Assembly on the work done at each session had made itself felt since the beginning of the Commission's work. Each year, there were lengthy discussions on the question whether, and in what form, dissenting opinions should be expressed in the final report. The question arose in a particularly acute form in connexion with the preparation of draft rules of international law and votes

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[1] Document A/CN.4/L.42 read as follows:

"PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE COMMISSION'S FINAL REPORT ON THE WORK OF EACH SESSION

"*Explanatory Note*

"There are several reasons why it is necessary for the Commission's final report on the work of each session to include all the views of its members, particularly those on draft rules of international law and on questions of primary importance. In the first place, the Commission was set up as an auxiliary organ of the United Nations General Assembly and its members, while elected by the General Assembly in a personal capacity, should represent the main forms of civilization and the principal legal systems of the world (General Assembly resolution No. 174 (II) of 21 November 1947). It is therefore important that the opinions of members of the Commission, if not expressed in a decision, should find expression in its final report whenever they concern draft rules of international law or questions of principle. Moreover, the particular nature of the Commission's work makes it necessary to give a complete account of the opinions expressed and the arguments put forward in the Commission. The decisions taken by the Commission are, in fact, only proposals which in certain cases must be published as Commission documents (article 16, paragraph (g) of the Statute of the Commission) and must in all cases be presented to governments (article 16, paragraph (h) and article 21) and submitted to the General Assembly for a decision (article 16, paragraph (j), article 18, paragraph 2, article 20 and article 22). Finally, when preparing drafts on the codification of international law, the Commission is required, under its Statute, to submit with the draft articles, *inter alia*, conclusions relevant to: 'the extent of agreement on each point in the practice of States and in doctrine' and 'divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution' (article 20, paragraph (b)).

"It appears from the foregoing that the views of members of the Commission who are unable to concur in the majority opinion when a vote is taken should be expressed in the

on questions of principle. For the sake of convenience he used that expression to mean any question concerning a controversial point of international law or any question of procedure likely to be of decisive importance for the progress of the Commission's work.

5. He went on to explain why the question of dissenting opinions arose in the Commission each year in such an acute form. It was, first, because of the purpose and special nature of the work of the Commission, which had been set up to encourage the progressive development of international law and its codification. That type of work required long and careful preparation, including the collection and comparison of all opinions expressed in international doctrine and practice. It was for that reason, also, that the Statute of the Commission prescribed consultation with governments, with the organs of the United Nations and even with non-governmental organizations.

6. The composition of the Commission also explained the need for allowing dissenting opinions. The Commission was made up, not of government representatives, but of persons elected by the General Assembly for their competence in international law and representing, as a whole, the main forms of civilization and the principal legal systems of the world. The Commission was thus a scientific body as well as a subsidiary organ of the General Assembly.

7. The expression of dissenting opinions in the final report was further justified by the Commission's method of work. The drafts prepared by the Commission and the decisions taken by it were not final. The drafts had to be published as Commission documents, submitted to governments (article 16 (*h*) and article 21 of the Statute), reconsidered in the light of the comments of governments (article 16 (*i*) and article 22) and submitted to the General Assembly for a decision (article 16 (*j*), article 18, paragraph 2, article 20 and article 22 of the Statute). The decision on such drafts rested with the General Assembly. If it did not consider that it could recommend a draft to members with a view to the conclusion of a convention, it was free to convoke an international conference for that purpose and might also refer the draft back to the Commission for reconsideration or redrafting. That being so, it was of the highest importance that governments, the General Assembly and all other parties concerned should have at their disposal reports giving a complete and faithful account of the opinions expressed in the Commission.

8. Lastly, under its own Statute the International Law Commission was required to express dissenting opinions in certain cases, precisely because of the special nature of the work of codification. When the Commission prepared draft articles for submission to the General Assembly it was required, under article 20 of its Statute, to submit such articles with conclusions relevant to "the extent of agreement on each point in the practice of States and in doctrine" and "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". That provision could in no way be interpreted as rendering the expression of dissenting opinions unnecessary. It applied only to draft rules of international law and then only to drafts submitted to the General Assembly. Even if the provisions of article 20 were observed, it might easily happen that a member of the Commission did not consider the account of disagreements and arguments to be sufficiently complete or accurate.

9. The need to express dissenting opinions being sufficiently justified, the next question was how the opinions of those who had been unable to support the majority view should be expressed. He proposed, as the only practical means of settling the question, that the Commission should recognize:

(*a*) That every member had the right to attach a statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if all or part of that decision did not express the unanimous opinion of members of the Commission;

(*b*) That every dissenting member had the right to give a brief explanation of his views in a footnote if, in cases other than those he had referred to, a decision had been taken on a question of principle.

10. In the case of draft rules of international law, dissenting opinions should be attached to the text. In the case of decisions on questions of principle affecting the Commission's work, a brief explanatory footnote

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final report, which should give a complete and accurate account of the debate. Thus, it is only necessary to work out an appropriate procedure for including dissenting opinions in the final report.

"Unlike the International Court of Justice, in which the question of dissenting and individual opinions has been settled and appears to present no difficulty, the International Law Commission has not yet found a satisfactory solution for the same problem. With a few rare exceptions, the practice followed so far has been to include in the final report on each session only the majority decision and the arguments in favour of it, while almost entirely omitting the arguments of other members, many of whom have often been unable to concur in the majority opinion.

"To meet the need described above, it is essential to settle, once and for all, by a formal provision, the manner in which dissenting members can express their opinions on the whole or part of a draft prepared by the Commission or on a question of principle examined by it.

"How then can this object be achieved? Considerations arising from the scientific and special character of the Commission's work, as well as practical arguments, militate in favour of recognizing the right of members who dissent from the Commission's decision in the cases mentioned above:

"(*a*) To attach a statement of their dissenting opinion on a draft rule of international law if the whole or part of the Commission's decision does not express the unanimous opinion of members;

"(*b*) To give a brief explanation of their views in a footnote if, in cases other than those referred to above, a decision has been taken on a question of principle affecting the Commission's work.

"The proposed solution would have undoubted advantages, for the expression of dissenting opinions by those who hold them would in no way commit the Commission as such, since the dissenting opinions could be attached as an annex. Furthermore, such a procedure would:

"(1) Be much more consistent with the Commission's aims;

would be sufficient. It was for purely practical reasons that he suggested using two different systems. In the case of well defined and separate questions it was much more convenient for the reader to be able to refer to footnotes, rather than be obliged to look for the dissenting opinion in another part of the report.

11. He reminded the Commission that the right to attach dissenting opinions had been fully recognized in international law on arbitration. Examples were provided by the provisions to that effect contained in Article 57 of the Statute of the International Court of Justice and in Articles 74, paragraph 2, and 84, paragraph 2, of the Rules of the Court. The Commission itself had just adopted article 25 of the draft on Arbitral Procedure, authorizing any member of an arbitral tribunal to attach a separate or dissenting opinion. He referred to arbitration in that connexion, although well aware that the activities were entirely different, because the history of international arbitration provided many lessons on that very point. There, too, there had been some hesitation, which was understandable when it was considered that the arbitral award was obligatory and must provide a final settlement of an international dispute. Thus article 52, paragraph 2, of the Convention of 1899 on the Pacific Settlement of International Disputes provided that members of a tribunal who were in the minority might record their dissent. On the other hand, there was no such provision in the Convention of 1907 on the same subject or in the conventions on arbitration and prize courts. It had been maintained at the time that the expression of dissenting opinions should not be permitted, so as not to raise doubts on the merits of the award or undermine the confidence of nations in arbitration.

12. The same hesitation had been noticeable in the preparation of the Statute of the Permanent Court of International Justice. The drafting committee of the Advisory Committee of Jurists had made provision for the insertion of dissenting opinions with reasons, except those held by judges of the same nationality as the parties. The Advisory Committee itself, not wishing to create inequality between the judges, had provided in its draft only for the possibility of recording opposition and reservations but without any explanation. The League of Nations Council had amended the draft, however, giving judges the right to attach their dissenting opinions to the decision and the first Assembly of the League of Nations had retained the text adopted by the Council. Later, when advisory functions had been assigned to the Court, dissenting opinions had also been permitted under the procedure adopted.

13. The main argument which had brought about that change of attitude after the initial hesitations, in spite of the solid arguments advanced against the admission of dissenting opinions in arbitration, had been the great

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" (2) Facilitate the examination of drafts by governments and by the Assembly;

" (3) Obviate the need for useless and sometimes laborious discussions in future;

" (4) Enhance the scientific value of the Commission's final reports, and lastly,

" (5) Conform to the provisions of the Commission's Statute which require it to give an account, in its commentaries, of the divergencies and disagreements which exist in the practice of States and in doctrine, as well as arguments invoked in favour of one or another solution (Article 20, paragraph (b) of the Commission's Statute).

" In view of the foregoing, it is proposed that the resolution annexed hereto be adopted.

" ANNEX

" PROVISION FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE FINAL REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF EACH SESSION

" *The International Law Commission,*

" *Considering* that it was set up with the object of promoting the progressive development of international law and its codification (article 1 of the Statute of the Commission);

" *Considering* that it is composed of legal experts selected to represent the chief forms of civilization and the basic legal systems of the world;

" *Considering* it essential that documents submitted to governments by the Commission should give a complete and accurate account of the various views expressed in the Commission and the main arguments invoked in favour of one or another solution;

" *Considering* that the General Assembly, to which drafts are submitted for examination and decision, is entitled to be informed of the divergencies and disagreements which exist in the Commission and of the arguments invoked on either side;

" *Considering*, therefore, that the final report submitted to the General Assembly on the work of each session should express the views of all members, particularly with regard to draft rules of international law and questions of principle;

" *Recognizes*

" (*a*) that any member of the Commission may attach a statement of his dissenting opinion to any decision by the Commission, on draft rules of international law, if the whole or part of the said decision does not express the unanimous opinion of the members of the Commission;

" (*b*) that any dissenting member may briefly explain his views in a footnote if, in cases other than those covered by sub-paragraph (a) above, a decision has been taken on a question of principle affecting the work of the Commission."

[2] See *supra*, 184th meeting, paras. 34-41.

[3] Document A/CN.4/L.43 read as follows:

" *Proposal by Mr. Lauterpacht*

" Members of the Commission are entitled to record, in footnote, their dissent from any report adopted by the Commission or any part thereof. They are also entitled to append to their dissent a brief statement of reasons at a length agreed to by the President of the Commission. They may appeal from the decision of the President to the Bureau whose decision shall be final."

[4] Document A/CN.4/L.44 read as follows:

" *Proposal by Mr. Pal*

" Members of the Commission are entitled to append to the report adopted by the Commission their dissent, if any, with a brief statement of reasons therefor."

[5] See *Yearbook of the International Law Commission, 1951*, vol. I, 128th meeting, para. 56.

[6] See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, paras. 62 and 85.

importance of such opinions in the development of international law.

14. While emphasizing that there was an essential difference in nature and function between the Commission, on the one hand, and arbitral tribunals and the International Court of Justice on the other hand, he also affirmed that all the arguments which had secured the admission of dissenting opinions in arbitration militated *a fortiori* in favour of a similar practice by the International Law Commission. In addition, the example of international arbitration proved that the proposed course was not unknown or unexplored, but a course which had been considered most useful for the development of international law.

15. The practice so far adopted by the Commission had many disadvantages. It often created the false impression that a particular decision of the Commission represented the unanimous opinion of its members. It also had the disadvantage that members found themselves associated with decisions which their scientific convictions would compel them to reject. It was a practice which caused useless discussion and delayed the Commission's work since members, being unable to annex a complete statement of their dissenting opinions to the report, were obliged to explain themselves at length during meetings, so that those explanations could subsequently be referred to in the report.

16. Finally, the practice caused inequality among members of the Commission, since the opinions of dissenting members, who were often very numerous, were not expressed in the final report. The result was, in fact, that members of the Commission were refused the right of freedom of expression.

17. The advantages of the system he recommended were undeniable. First, the dissenting opinions would commit only their authors and could be annexed to the final report. Secondly, the reports would thus be more consistent with the object and functions of the Commission and with the scientific nature of its work. The proposed practice would considerably increase the scientific value of the Commission's final report and would appreciably shorten the discussions. Lastly, it would greatly facilitate not only the examination of drafts by governments and by the General Assembly, but also revision by the Commission itself and would contribute, in general, to the development of international law.

18. Mr. LAUTERPACHT said that Mr. Zourek had indeed raised a question of principle, with which he was in general agreement, provided it could be made workable. He did not propose to join in a theoretical discussion on the wider issue of reconciling the fundamental right of freedom of expression with the necessity of preventing its abuse. Neither would he express any opinion on the relevance of the analogy drawn by Mr. Zourek between the Commission and the International Court of Justice. As the substantive issue had already been discussed at considerable length by the Commission at previous sessions, he formally moved that on the present occasion no member should speak more than once.

19. As he had stated at the fourth session, he found the existing rule about dissenting opinions disturbing.[7] A year's reflection had confirmed his conviction that it was intolerable to deny the right of freedom of expression to any member of the Commission. It was mere evasion to argue that all opinions expressed during the discussions were to be found in the summary records, since it was common knowledge that copies of those documents were not readily available to the general reader. Neither could it be assumed that governments read them carefully and regularly. Statements of dissent, if expressed at reasonable length, should, as a matter of form, receive the same kind of prominence as the views of the majority. Indeed, the authority of the latter would thereby be strengthened.

20. He was perfectly aware that steps should be taken to prevent abuse. Leaving aside the questions of distortion, inaccuracy or self-advertisement, he would deal solely with the practical problem of length. He entirely agreed with Mr. Pal's qualification on that point. Unless dissenting opinions were kept brief, the minority might well be in a position to abuse its rights. There remained the question of who was to decide whether the statement of reasons was sufficiently brief, and as members would note, he had suggested that the decision should lie with the Chairman or, in the event of disagreement, with the officers of the Commission acting corporately. He was not, however, finally committed to that proposal, and was prepared to consider other alternatives, such as conferring the task upon the general rapporteur.

21. He wished to modify his proposal (A/CN.4/L.43) by substituting the words "in a note following the report" for the words "in footnote", as he believed that the insertion of dissenting opinions in a footnote was inconsistent with their importance.

22. The CHAIRMAN suggested that even if Mr. Lauterpacht's motion, that no member of the Commission should speak more than once on the present occasion, were carried, Mr. Zourek should be allowed to reply to comments on his proposal.

23. Mr. LAUTERPACHT considered that Mr. Zourek had already fully deployed all his arguments.

24. Mr. ZOUREK said that he would not ask to speak unless absolutely necessary.

25. Mr. KOZHEVNIKOV said that he would have no objection to Mr. Lauterpacht's motion.

Mr. Lauterpacht's motion was carried.

26. Mr. PAL, observing that he had not attended the third session, at which the Commission had taken its decision about dissenting opinions, expressed the view that as the Commission was a continuing body its decisions must be regarded as final. It would be useless to re-open discussion on them at every session.

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[7] *Ibid.*, para. 82.

27. He found Mr. Lauterpacht's proposal acceptable, but felt that members could be trusted to be brief in expressing their dissenting opinions.

28. Mr. ALFARO recalled that, after long discussion, the Commission had at the third session adopted the rule that when a member wished his dissenting opinion to be recorded in the report, that should be done by means of a statement to the effect that he had voted against a certain passage for the reasons given in the relevant summary record, to which due reference should be made.

29. Mr. Zourek's arguments seemed to be based on a false analogy between the Commission and a court or an arbitral tribunal. The latter had to settle grave matters, sometimes involving human life, and their members had therefore to enjoy the right to express dissenting opinions. It was not the Commission's task, however, to present to the world the personal views of its members, but to discuss certain questions and to submit agreed texts or decisions thereon to the General Assembly. To allow a statement, however brief, of dissenting views could only give rise to friction, dissatisfaction and loss of time. He could not therefore support the third preambular paragraph of Mr. Zourek's proposal, since the General Assembly was not concerned to ascertain either from the documents submitted to governments by the Commission or from the Commission's own reports, the views held by individual members. For that, reference should be made to the summary records, for which, for that particular purpose, no substitute could be devised. It was quite impossible to state briefly and adequately the reasons for a dissenting opinion. Mr. Zourek's own proposal would therefore fail to fulfil the purpose he had in mind.

30. Though he agreed with the principle enunciated by Mr. Lauterpacht so far as tribunals and judicial bodies were concerned, he had the gravest doubts whether it applied to a technical body like the Commission. For the sake of efficiency and harmony, therefore, the Commission should confirm the decision taken at the third session.

31. Mr. HSU said that he would vote against all three proposals for the reasons adduced by Mr. Alfaro. The rule adopted at the third session met all requirements. Members who wished to express views contrary to those held by the majority had every opportunity of doing so during the discussions.

32. Mr. YEPES said that, being a partisan of free and untrammelled discussion, and considering that the General Assembly should be fully informed about the Commission's work, he found Mr. Lauterpacht's text acceptable, provided it were amended to read as follows:

> "Members of the Commission are entitled to record, in footnotes to the report to the General Assembly, their dissent from all or part of the principles adopted by the Commission and to add, if they so desire, the shortest possible summary of their reasons. Such footnotes shall be submitted to the Commission for approval at a plenary meeting. They may not exceed twenty lines in length."

33. Mr. Zourek's proposal would not give him entire satisfaction. There were other arguments, in addition to those adduced by Mr. Zourek, in favour of recording dissenting opinions. For instance, had the Commission's report covering the work of its third session (A/1858) been more explicit in conveying the views of those who had not voted with the majority concerning reservations to multilateral conventions, the General Assembly might have taken a very different decision, because it would have been able to consider the legal arguments put forward by the minority against the draft. Mr. Lauterpacht, in his report on the law of treaties, was mistaken in thinking that the Commission's decision on that issue had been unanimous; in actual fact, strong reasons had been adduced against the arguments of the majority.

34. Mr. KOZHEVNIKOV said that Mr. Zourek's proposal on what was an extremely important issue was entirely acceptable to him, both from the point of view of substance and from that of method. It would ensure equal treatment for all members of the Commission — a principle which was violated by the decision taken at the third session. It would also contribute to the objectivity and accuracy of the Commission's reports, thereby facilitating the work of the General Assembly and governments. At present, the reports did not give a faithful picture of its discussions. Finally, the scientific value of the report would be enhanced.

35. He had been surprised to hear it suggested that the right to express dissenting opinions might be abused.

36. Mr. AMADO said that when the draft on arbitral procedure was finally prepared for submission to the General Assembly, he would ask for the insertion of footnotes of some four lines each stating why he had voted against a number of articles. It would be impossible for him to express subtle shades of meaning in a brief statement. Though he had sympathy and respect for Mr. Zourek's views, he agreed with Mr. Alfaro as to what the Commission was authorized to do under its Statute. Members expressed their opinions during the discussion in order to enlighten, and if possible convince, others, and with a view to reaching general agreement. The results were recorded in reports submitted to the General Assembly, which was not interested in the views of individual members. Although he had little confidence in the summary records — in which speakers were not reported in full detail, but were to some extent interpreted — he would be entirely satisfied with a brief footnote of the kind he had mentioned, and would accordingly oppose all three proposals before the Commission.

37. Mr. SCELLE endorsed Mr. Alfaro's remarks. The draft on arbitral procedure would be accompanied by the General Rapporteur's commentary, in which the disagreement of certain members could be recorded with appropriate references to the summary records. As dissenting opinions often required far more space than the final decision, it would be impossible to accept, as

proposed by Mr. Zourek, long statements at the mere request of individual members.

38. Mr. SPIROPOULOS, from the practical standpoint, considered that the decision taken at the third session should be upheld for the reasons so ably expounded by Mr. Alfaro. It was perfectly true that judges of the International Court of Justice had the right to append to the Court's decisions a dissenting opinion, but it must be remembered that the deliberations there took place in private, and that no records were kept. The Commission was not a judicial body, but an assembly of jurists preparing texts that were usually intended for incorparation in a convention. Surely no precedent existed for annexing dissenting opinions to the draft of an international convention.

39. If Mr. Yepes' amendment to Mr. Lauterpacht's proposal were accepted, the annex containing dissenting opinions would be longer than the body of the report. As for Mr. Yepes' claim that the General Assembly's decision concerning reservations to multilateral treaties might have been different had it been more fully informed about the views held by individual members of the Commission, surely he realized that that decision had been inspired by political considerations alone.

40. He had been the only member of the Commission to support the request made by Mr. Koretsky at the first session that a statement of his dissenting opinion be inserted in the report.[8] Subsequent experience had taught him prudence, and he saw no reason for abandoning the rule adopted at the third session. Anyone who wished to know in detail what views had been expressed during the discussion need only refer to the summary records.

41. Mr. SANDSTRÖM also supported Mr. Alfaro's views.

42. Faris Bey el-KHOURI said that the Commission was simply a subordinate organ of the General Assembly, and directly related to its Sixth Committee. As to dissenting opinions, they were either right or wrong. If they were wrong, surely no honour attached to expressing them; if they were right, then the holder had obviously failed to convince his colleagues. At the previous session[9] he had suggested that in order to meet the views of certain members the Commission's report should give the detailed figures of the votes. In his opinion, that would amply suffice, since the opinions of individuals were in themselves of no interest to anyone.

43. Mr. LIANG (Secretary to the Commission) commenting on Mr. Yepes' observations on the Commission's report covering the work of its third session (A/1858), said that that report had dealt with several questions, which had been presented differently. On the subject of reservations, the report embodied the Commission's reasoned conclusions. On the subject of the definition of aggression, on the other hand, it had described the course taken by the discussions. Thus the report as a whole contained heterogeneous parts, one part presenting the reasoned conclusions of the Commission, and another part presenting an account of the course taken by the debate. With regard to future reports, if the Commission so wished it would be feasible in each case to add a summary of the discussions to the statement of conclusions, and such a summary could include a statement of dissenting opinions.

44. Mr. ZOUREK did not consider that any valid arguments had been adduced against his proposal. Reference had been made to practical difficulties, and to the possible length of the dissenting opinions. He would submit that the criterion must be content, not length. Nor could he see to what kind of abuse his proposal would open the door. After all, only the author of the dissenting opinion would be committed, and there was no good reason why the exact form in which such opinions were expressed should be prescribed.

45. It had been argued that the Commission was neither a court of justice nor an arbitral tribunal. He had himself been careful to emphasize the essential difference between the Commission and arbitral tribunals, but he had also stressed that all the arguments which had secured the admission of dissenting opinions in international arbitration applied *a fortiori* to adoption of the same practice by a codification commission. He observed that no one had advanced any argument against that thesis.

46. Mr. Alfaro had said that arbitral tribunals dealt with very serious issues. He (Mr. Zourek) thought that arbitral tribunals dealt with specific cases which might often be of extraordinary gravity, but in preparing drafts of collective conventions or general rules the Commission was doing work that was even more important for the development of international law. He was not convinced that dissenting opinions were of no general interest, as various members maintained. It was possible that the General Assembly was not interested in such opinions, but that might be doubted so long as the Assembly itself had not taken any position on the matter. Even if such were the case, however, it did not in any way imply that governments and scientific bodies were not interested either.

47. He was grateful to Mr. Scelle for admitting that the Commission's report covering the work of its fourth session had failed to reflect adequately the divergencies that had existed then in the Commission. That was far from being so with the reports submitted to the General Assembly by its Committees. The reports of the Sixth Committee, with which he was familiar, faithfully reflected all currents of opinion expressed in the Committee.

48. The Commission could not be compared with a diplomatic conference, which was a body which had to take a decision in one sense or another; moreover, since the participating governments had the faculty of

[8] See, however, *Yearbook of the International Law Commission, 1949*, 37th meeting, para. 29.

[9] See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, para. 72.

entering reservations, the issue of dissenting opinions did not arise. Faris Bey el-Khouri had implied that minority opinions were not worth expressing. He must beg to differ on that score. The Commission was engaged on long-term work, and opinions which failed to win acceptance at one stage might prove convincing at a later one, or might find favour with other organs or other people.

49. As to the summary records, he would merely point out that they were not generally accessible, and were too succinct to display all the arguments adequately.

50. The decision adopted at the third session did not cover all cases. Moreover, if memory served him aright, it had been adopted only by seven votes to five, three members being absent.

51. It was hardly enough to pay lip-service to the principle, or to stress unduly the dangers of its implementation. As he had already said, no valid argument had been advanced against the adoption of the principle that dissenting opinions should be recorded in the Commission's reports.

52. The CHAIRMAN informed the Commission that Mr. Lauterpacht and Mr. Pal had agreed on a joint text, which read as follows:

> "Members of the Commission are entitled to append to the report adopted by the Commission their dissent, if any, with a brief statement of reasons therefor, at a length agreed to by the President of the Commission. They may appeal from the decision of the President to the Bureau, whose decision shall be final."

53. He would put the three proposals to the vote in order of their submission: Mr. Zourek's (A/CN.4/L.42), Mr. Yepes' (see *supra*, para. 32) and finally, the proposal submitted jointly by Mr. Lauterpacht and Mr. Pal.

Mr. Zourek's proposal (A/CN.4/L.42) was rejected by 7 votes to 3, with 3 abstentions.

Mr. Yepes' proposal was rejected by 6 votes to 2, with 5 abstentions.

The joint proposal was rejected, 6 votes being cast in favour and 6 against, with 1 abstention.

54. Replying to Mr. ALFARO, the CHAIRMAN confirmed that the Commission's decision taken at its third session remained in force.

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

Mr. Amado, First Vice-Chairman, took the Chair.

55. The CHAIRMAN said that his first task in taking the Chair must be to pay tribute to the admirable work done by Mr. François as Special Rapporteur on the régime of the high seas. His fourth report on that subject (A/CN.4/60) was devoted to the continental shelf and related subjects, and revealed vast knowledge and impartiality. He would call on the Special Rapporteur to introduce the item.

56. Mr. FRANÇOIS (Special Rapporteur) thanked the Chairman for his tribute, and recalled that at its fourth session the Commission had decided to invite those governments which had not yet submitted their comments on the "Draft Articles on the Continental Shelf and Related Subjects" to do so within a reasonable time (A/2163, para. 46). By 4 August 1952 replies had been received from fourteen governments, and as a result of the Commission's appeal four more governments had sent in replies. The replies of the Belgian and Egyptian Governments, which had not arrived at the date of his report, would be found in document A/CN.4/70.

57. The fourth report on the régime of the high seas was divided into four chapters, Chapter III contained his conclusions and Chapter IV the revised draft articles on the continental shelf and related subjects. Suggested modifications in the text were underlined.

58. He would suggest that the simplest way of tackling the problem would be for the Commission to take Chapter III as the basis for its discussion, examining his conclusions paragraph by paragraph.

59. Mr. YEPES also wished to express his appreciation of the Special Rapporteur's work, which offered the Commission a digest of the opinions expressed by governments and a number of publicists on the draft prepared at previous sessions.

60. As to the procedure to be followed, he would suggest that the Commission study the draft articles *seriatim*, taking the Special Rapporteur's conclusions into account in each case.

61. Mr. KOZHEVNIKOV considered that there should first be a general discussion.

62. Mr. FRANÇOIS was prepared to accept Mr. Yepes' proposal. As to Mr. Kozhevnikov's proposal, he would remind him that in the case of the draft on arbitral procedure, the Commission had decided not to start with a general discussion, but to consider general questions in connexion with the specific article to which each related.

63. Mr. KOZHEVNIKOV, while not suggesting that his memory was infallible, said he seemed to recall that at the fourth session the Commission had begun its work on the régime of the high seas by a general exchange of views.

64. The CHAIRMAN said that, since Mr. Kozhevnikov seemed willing not to press his proposal, he would take it that the Commission favoured the procedure suggested by Mr. Yepes.

It was so agreed.

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

Article 1

65. Mr. FRANÇOIS drew attention to the words "*the* territorial *sea to a depth of 200 metres*" underlined in article 1. At the fourth session, the Commission had

decided to use the term "the territorial sea" instead of "territorial waters". The inclusion of the words "to a depth of 200 metres" was a more important change. The Commission's definition of the "continental shelf" had been widely criticized for not laying down a fixed limit, and the view had been expressed that a depth of 200 metres should be adopted. (*cf.* paras. 5 and 6 of comments). That was why he had proposed the modification.

66. Mr. YEPES said he had originally favoured a geological definition of the continental shelf, but had finally come round to the view that a juridical definition was preferable. The reasons for his change were in part stated in paragraphs 1 and 2 of the comment on article 1. Furthermore, a number of governments had expressed their approval of the Commission's attitude, namely, those of the Netherlands, the Philippines and the United States of America. He accordingly suggested that exploitability should be retained as the criterion for determining the width of the continental shelf and not depth.

66a. It would be most unsatisfactory for the Commission to reverse its earlier decision and to revert to a geological difinition, as now proposed by the Special Rapporteur.

67. Mr. FRANÇOIS said that Mr. Yepes was mistaken in thinking that the proposed modification to article 1 was equivalent to substituting a geological definition for a juridical one. It was simply a case of fixing the limits of the exploitation of the natural resources of the sea bed and sub-soil by a flexible or a rigid criterion.

68. Mr. HSU supported Mr. François. A limit of 200 metres was sufficiently liberal, and could always be extended should future circumstances warrant it.

69. He wished, however, to raise another point with regard to article 1. Why had the term "continental shelf" been preferred to the simple and easily comprehensible term "submarine areas", which also figured in the text of article 1?

70. The CHAIRMAN noted that Mr. Kozhevnikov had gauged the feelings of the Commission correctly in proposing that there should first be a general discussion. Since no such discussion was in fact being held, he must request members to restrict their comments to the modification proposed to article 1.

71. Mr. SANDSTRÖM considered that the text of article 1 adopted by the Commission at the fourth session should be retained. A dangerous tendency was prevalent gradually to extend the rights enjoyed by riparian states in the territorial sea. The Commission had given a rational definition of the right of exploitation of the natural resources. He was opposed to the specification of a limit.

72. Mr. YEPES drew attention to the definition of the continental shelf adopted by the Commission at the fourth session in paragraph 5 of the commentary on article 1, whereby all States were granted equal treatment. If a geological definition were now adopted, States like Chile and Peru, which had no continental shelf in the geological sense of the word, would be placed at a serious disadvantage.

73. Mr. SCELLE was also opposed to fixing a limit. How would it be possible to prevent a State from continuing its exploitations once it had reached a depth of 200 metres? Indeed, from his point of view the only justification for the conception of the "continental shelf" was that there might be riches on the sea-bed of which humanity as a whole ought not to be deprived.

74. The CHAIRMAN said that the discussion would be continued at the next meeting, when he would himself take the opportunity of supporting the Special Rapporteur's point of view.

The meeting rose at 1 p.m.

196th MEETING

Wednesday, 17 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

Article 1 (continued)

1. Mr. LAUTERPACHT said he had not fully understood the precise nature of the objection raised by

Mr. Sandström at the previous meeting to the Special Rapporteur's proposal to amend the original draft of article 1 by stipulating a definite depth.

2. Mr. SANDSTRÖM explained that in his opinion the original text was more rational. As explained by Mr. S. S. Nehru, in a statement quoted in the Special Rapporteur's report (A/CN.4/60, mimeographed English text, p. 28; printed French text, No. 66), the possibility of exploiting natural resources at a depth greater than 200 metres must be envisaged.

3. His second objection was that to allow coastal States to exploit the natural resources of the subsoil of the submarine areas contiguous to the coast would encourage a tendency to encroach upon the rules governing the régime of the high seas and to extend territorial waters. To fix a limit referring to the depth, and thereby a definite area where the control was to be exercised, would reinforce that tendency.

4. Mr. LAUTERPACHT said he was still unable to understand Mr. Sandström's reasoning. If Mr. Sandström's concern was to limit the sovereign rights of the coastal State, he saw no difference between giving States the right to exploit natural resources according to a fixed depth of the superjacent waters or according to a limit defined in more general and necessarily very elastic terms. In both cases they would be exercising sovereign rights.

5. Paying tribute to the learned report prepared by the Special Rapporteur, he said that he was in agreement with the proposed change to article 1. An exact limit had the merit of clarity, which was extremely desirable, since in matters pertaining to the continental shelf some governments were inclined, in addition to legitimate assertions of right, to make others.

6. The change proposed by the Special Rapporteur, however, raised a number of problems. There was, for instance, the question of what was to be done in cases where there was a narrow channel more than 200 metres in depth contiguous to the coast and shallow waters further out. If the 200-metre limit were accepted, Norway, for example, would have no continental shelf at all. The Special Rapporteur had suggested that in that specific case an equitable solution would be to draw median lines such as to apportion the relevant areas in the North Sea between Norway and the United Kingdom. The Commission ought to consider suggestions on those and similar lines.

7. Another difficulty arose where there was no shelf at all: for example, in the Persian Gulf. The Special Rapporteur might argue that that was not a problem under his definition of the continental shelf, and that the area would accordingly be delimited according to the provisions of article 7. In his (Mr. Lauterpacht's) opinion that would provide no solution if the Special Rapporteur were to insist on the new procedure as proposed in article 7, which had now been amended in such a way as to substitute a conciliation procedure for the settlement by arbitration proposed in the draft adopted at the third session.

8. The United Kingdom Government, in its observations, was definitely opposed to allotting to coastal States a submarine plateau separated from their coastline by a channel over 200 metres in depth. Nevertheless, the Commission might perhaps consider a less rigid formula reading:

> "While the depth of 200 metres as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in cases in which, in the proximity of the coast, the separation of the continental shelf from the contiguous sea by a depth greater than 200 metres does not represent the general geographical configuration of the submarine area in question."

9. Mr. KOZHEVNIKOV considered that, although the first few articles in the draft were inter-related, it would be well for the time being to confine the discussion to article 1.

10. The definition contained in that article as at present drafted required in his opinion a more solid basis which, apparently, was to be found in the natural geographical factors. He would therefore propose an alternative text reading:

> "As here used, the term continental shelf means the sea-bed and subsoil of the submarine areas contiguous to the coast, but lying outside the area of the territorial waters, up to the line where the steep slope of the sea-bed begins."

11. He had used the expression "territorial waters" because he did not regard as final the Commission's decision at the fourth session to abandon it for the expression "territorial sea".

12. Mr. FRANÇOIS (Special Rapporteur) said he could very well understand Mr. Sandström's objections. For the same reasons the United States Government had, in the "liquor treaties", preferred a flexible to a rigid limitation of the zone, in which ships could be examined. The difference between the régime of the continental shelf and that of the territorial sea, however, was so great that the danger of the one influencing the other was slight.

13. Taking up the points raised by Mr. Lauterpacht, he pointed out that the problem of contiguity, when there was a deep channel near the coast, would remain whether or not a depth of 200 metres were fixed. The problem was really one of interpretation as to what was meant by "contiguous to the coast", a point which should be dealt with after the Commission had decided whether or not to stipulate a specific depth.

14. Mr. Kozhevnikov's proposal would imply a return to the geological definition of the continental shelf, since it referred to the slope of the sea-bed in the geological sense. The Commission had rejected that conception, because in many parts there was no such declivity, and it had been felt that it would be unjust not to accord to coastal States the right to exploit natural resources in such cases. As he had stated in his comments (*Ibid.*, p. 101 or para. 22), no government

had expressed a contrary opinion about the Commission's decision not to limit itself to the geological concept; indeed, certain governments had explicitly approved the decision. A number of recognized authorities in the field, including Gidel, had also rejected the geological conception.

15. Mr. YEPES asked the Special Rapporteur to comment upon his (Mr. Yepes') statement at the previous meeting, that the Commission's original decision should be maintained.

16. Mr. FRANÇOIS said that Mr. Yepes had argued that the new text should be rejected because it would constitute a return to a geological as opposed to a juridical definition. As he had himself explained at the previous meeting, he had always been in favour of a juridical definition, since the geological concept was based on the configuration of the sea-bed, and would mean that in the absence of certain geological conditions there would be no continental shelf. All he had sought to do in proposing a new text for article 1 was to substitute a fixed limit for an indefinite one. He failed, therefore, to see the pertinence of Mr. Yepes' argument.

17. Mr. YEPES said that he had already explained the way in which his views on the subject had developed. The geological definition was based upon depth, whereas the juridical definition would be made elastic in order to take into account technical progress, which might eventually enable States to exploit natural resources below 200 metres. Such a definition was more flexible, and should be maintained, and he therefore proposed that article 1 be amended to read:

> "As here used, the term 'continental shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the continental or island coasts of a State, but outside the area of the territorial sea, where the depth of the superjacent waters permits exploitation of the natural resources of the sea-bed and subsoil."

18. It might also be preferable to say "submarine plateau" or "submarine platform" instead of "continental shelf".

19. His text explained what was meant by areas contiguous to the coast, a point of particular importance where islands lay near the coastline.

20. Mr. SPIROPOULOS considered that it would be useless for the Commission to embark upon an interminable discussion on the respective merits of the geological and juridical definitions.

21. Mr. LAUTERPACHT said that it would hardly be possible to disregard the distinction between juridical and geological definitions, though it was not necessary to accept Mr. Yepes' view that the former was flexible and the latter definite and precise. A geological, or any other concept, once incorporated into a legal rule, became a legal concept.

22. The CHAIRMAN, speaking in his personal capacity, said that Mr. Yepes had reinforced the arguments put forward by the Special Rapporteur and endorsed by numerous governments and legal authorities, in favour of rejecting the geological definition. Moreover, no two geologists agreed upon the definition of the continental shelf.

23. While waiting for the texts submitted by Mr. Lauterpacht, Mr. Kozhevnikov and Mr. Yepes to be circulated, he suggested that the Commission should consider other questions connected with article 1, perhaps starting with that raised by Mr. Hsu at the previous meeting about the use of the expression "continental shelf".

24. Mr. ALFARO said that article 1 was of great complexity, and involved a number of issues which should be dealt with separately. The Commission would have to take a decision on terminology. In that connexion, he noted that no suggestion had yet been made concerning the possible use of the expression "submarine shelf". The Commission should decide once and for all whether a geological or a juridical definition was to be adopted. It would then have to take up the crucial problem of the manner in which the extent of the continental shelf was to be determined, and, finally, how it was to be delimited between neighbouring States. He therefore asked the Chairman for a ruling on the order in which those points should be taken.

25. The CHAIRMAN observed that the Commission would also have to decide whether it was to use the expression "territorial waters" or the words "the territorial sea".

26. Mr. PAL, observing that he approached item 2 with some diffidence as he could not claim any special knowledge of the subject, said that it was not clear to him whether the Commission was devising rules to govern an area precisely defined by reference to certain geological conditions, of whether it intended to declare a certain area to be the continental shelf, independently of the existence of anything in the geological sense, to which those rules would then apply.

27. Mr. SPIROPOULOS considered that the most important point at issue was the extent of the continental shelf, and urged the Commission to confine itself to practical considerations rather than to the somewhat theoretical distinction between juridical and geological definitions.

28. Mr. LAUTERPACHT agreed.

29. Faris Bey el-KHOURI said that it was quite impossible to delimit the continental shelf by depth, since, given the configuration of the sea-bed, the boundaries of the continental shelf would be as highly indented as the coasts of Norway and Greece. It would therefore be preferable to maintain a flexible formula which could be adjusted to the circumstances of each case.

30. Mr. FRANÇOIS observed that Faris Bey el-Khouri was virtually reintroducing a proposal which had been rejected at the third session, and which, moreover, had no support among governments or legal authorities. It

would be quite useless, therefore, to discuss it once more. Both his original text and the new version of article 1 were based on the criterion of depth. Faris Bey el-Khouri's arguments were therefore equally applicable to the former.

31. Mr. AMADO suggested that Faris Bey el-Khouri's views were more relevant to the régime of the territorial sea.

32. Mr. ZOUREK said that Mr. Pal had raised an important point. Was the régime under preparation by the Commission to apply regardless of whether a continental shelf in the accepted sense of the term existed or did not exist? If it was, that expression itself should be abandoned for one which would describe more accurately adjacent submarine areas.

33. Mr. FRANÇOIS said that Mr. Pal was re-opening the whole issue of whether or not the Commission should revert to the geological concept. If its former decision were reversed, his whole draft would require serious modification.

34. Mr. SANDSTRÖM said that the expression "continental shelf" had been retained because it was the term customarily used.

35. Mr. SPIROPOULOS said that the reply to Mr. Pal's question was to be found in article 1, which gave a definition of what the Commission meant by the "continental shelf".

36. Mr. PAL explained that when putting his question he had not been aware that the Commission had already decided not to base article 1 on any geological condition. Article 1 as drafted did not make it clear whether, in order to be a continental shelf, the area specified must first of all be a shelf in the geological sense and then was to be limited to the specified depth, or whether, independently of its geological character, any area up to the specified depth would suffice.

37. The CHAIRMAN explained to Mr. Pal, who had not attended earlier sessions, that the problem of the continental shelf had arisen in a particularly acute form as a result of President Truman's declarations, and certain claims made by Latin-American States to the natural resources of the sea-bed. The need for delimiting the rights of coastal States in that respect had therefore become particularly pressing. The new text proposed by the Special Rapporteur took into account the observations on the Commission's original draft made by governments and legal experts.

38. Mr. HSU considered that Mr. Pal had every reason for raising a very pertinent question. Had the Commission been willing to abandon the expression "continental shelf", such a misunderstanding could not have arisen. The expression was a totally misleading one, and certainly would not be understood by the layman. Indeed, though possibly quite intelligible to western lawyers, its use in the east would certainly lead to confusion. The concept of the continental shelf had now become far wider than that originally discussed by the Commission. A more comprehensive and accurate term, whose meaning would be immediately apparent without lengthy explanation, was now needed.

39. Mr. LIANG (Secretary to the Commission) said that the words "submarine areas" did not offer a solution, as they had a far wider connotation than the term "continental shelf". Moreover, they failed to convey the element of proximity to the coastal State.

40. He could not agree that a definition based upon certain geological elements was not a juridical one. Any provision concerning the definition of the continental shelf in a draft of the kind under preparation would ultimately have to be cast in legal form.

41. Mr. FRANÇOIS drew Mr. Hsu's attention to paragraph 3 of the comment to article 1. The term "continental shelf" was in current use and no one had yet succeeded in finding a better. He entirely concurred with the comments made by G. Gidel on the subject (*Ibid.*, p. 16 or No. 33).

42. The CHAIRMAN agreed with the Special Rapporteur, and pointed out that it was neither possible nor desirable for lawyers to take popular fallacies or popular misconceptions into account.

43. Mr. KOZHEVNIKOV also thought that the term "continental shelf" was satisfactory, since it more clearly conveyed the restrictive nature of the definition. The term "submarine areas" might be taken to mean any areas. The term was adequately defined in the last clause of his proposal.

44. He agreed with Mr. Lauterpacht and the Secretary that once the Commission accepted a certain definition of a geographical concept, that definition acquired juridical value.

45. Mr. HSU said that he had raised the issue because it had already been raised by governments. As to Mr. François's point that the expression "continental shelf" had been hallowed by usage, he would submit that in point of fact the Commission was trying to apply the term "continental shelf" to something which was not a continental shelf. It was a case of choosing the lesser evil, and the term "submarine areas" had the advantage that it was susceptible to qualification.

46. Mr. ALFARO drew attention to paragraph 3 in the comments on article 1 in Part I of Chapter III of the Special Rapporteur's report (*Ibid.*, p. 101 or para. 24), where reference was made to various proposals for a suitable term. In his work on the subject, Azcarraga used the term "submarine shelf", which he (Mr. Alfaro) thought by far the best and most scientific. That term served, so to speak, as the touchstone of the definition. The term "continental shelf" did not immediately convey the idea that reference was being made to areas below the surface of the sea.

47. If, however, usage was too well-established to permit of change, he would urge the adoption of Mr. Yepes' pertinent qualification: "[areas] contiguous to the continental or island coasts".

48. Mr. YEPES agreed with Mr. Alfaro, and considered the term "submarine shelf" (in French "*plateforme sous-marine*", in Spanish "*plataforma submarina*") to be ideal. It was the very expression which had been used in the Declaration made on 8 November 1950 by the President of Brazil, a declaration drafted by Mr. Raeul Fernades, a jurist of great authority who had rendered distinguished services to international law.[1]

49. Mr. LAUTERPACHT feared that the term "submarine shelf" was not self-explanatory in English. He was inclined to favour the term "submarine areas", but would be prepared to accept the term "continental shelf" despite the fact that it required qualification.

50. Mr. FRANÇOIS considered that the term "continental shelf" was preferable, because it expressed the notion of contiguity to the coast. A "submarine shelf" might be in the middle of the ocean.

51. The CHAIRMAN appreciated the point made by Mr. Lauterpacht, but could see no alternative to the term "continental shelf".

52. Mr. HSU maintained his preference for the term "submarine areas", and pointed out that there were also vast areas in the Far East where the seas were shallow.

Mr. Alfaro's proposal that the term "submarine shelf" ("plateforme sous-marine", "plataforma submarina") be substituted for the term "continental shelf" in article 1 was rejected by 5 votes to 3 with 4 abstentions.

53. Mr. ZOUREK considered that the discussion had been particularly useful, since it had clarified the point that any definition adopted by the Commission would assume a juridical character. The text of article 1 had been drafted in the light of the eventual exploitation of the natural resources of the seabed. It was now proposed to fix the limiting depth at 200 metres — a figure which was somewhat arbitrary, since the abyssal declivity often set in only at a depth of between 400 and 500 metres. It was reasonable to suppose that certain types of exploitation might become possible at such depths, and it would be inconvenient if such exploitation were to be precluded simply because the depth exceeded the limit by a matter of a few metres. The only proposal which avoided that difficulty was Mr. Kozhevnikov's, and he would accordingly vote for it.

54. Mr. FRANÇOIS did not consider that Mr. Kozhevnikov's proposal provided a solution to the problem, because in many regions there was no "steep slope". There were cases where two countries were separated by a stretch of water which covered a continuous continental shelf. According to Mr. Kozhevnikov's proposal, it might be concluded that in such a case there would be no continental shelf.

55. Mr. ZOUREK considered that the text of article 1 could be criticized on the same grounds as Mr. Kozhevnikov's proposal, namely, that it offered no solution for cases where there was no steep slope. Where, according to the text, would the continental shelf be said to begin in cases where the depth of the sea was relatively slight? His (Mr. Zourek's) answer would be that in cases where there was no continental shelf in the geological sense, other solutions would have to be envisaged to protect the interest of coastal States.

56. Mr. KOZHEVNIKOV said that the Special Rapporteur's arguments had not convinced him. It was impossible to devise a definition that would meet all possible cases.

57. Mr. LAUTERPACHT considered that Mr. Zourek's point on the Special Rapporteur's text of article 1 merited consideration. The Persian Gulf offered an example of a sea where there was no steep slope to the sea-bed. The main objection to Mr. Kozhevnikov's proposal was that it fixed no limit, and he would submit that unless such limit were fixed the Commission's work would carry no legal weight. He therefore hoped that the Special Rapporteur's suggestion that a depth of 200 metres be mentioned would be accepted.

58. He failed to see any difference between Mr. Yepes' proposal and the text adopted at the third session.

59. Mr. YEPES agreed with Mr. Kozhevnikov that the definition must not be based on a rigid criterion, but felt that his proposal was far too vague to be acceptable. What was a steep slope? How was the word "steep" to be defined? Actually the seabed lay at different levels. He conceded to Mr. Lauterpacht that his proposal followed the lines of the Commission's decision, taken at the third session. He had, however, included the notion of areas contiguous to the continental or island coasts of a State, and had started from the premise that it was possible to know how far the resources of the sea-bed could be exploited, whereas it was impossible to know where the steep slope began.

60. Mr. ALFARO suggested that the term "*insulaire*" in the French text of Mr. Yepes' proposal might be better rendered in the English by the word "insular" than by the word "island".

61. Mr. LAUTTRPACHT did not agree that it was easy to tell how far the bed of the sea could be exploited. He would ask Mr. Kozhevnikov and Mr. Yepes to ponder what the situation would be if one State claimed that the sea could be exploited at a point 200 miles away from its coast, whereas others claimed that it could not be exploited beyond 10 or 12 miles. Unless members were prepared to concede that an international authority should decide whether a continental shelf did or did not exist for practical purposes, the Commission's proposals would be valueless.

62. Mr. KOZHEVNIKOV said that from certain points of view the question was entirely academic. No definition would be clear and satisfactory in all respects. There was nothing new about his own proposed

[1] See *Laws and regulations on the régime of the high seas*, vol. I (United Nations publication, Sales No.: 1951.V.2), p. 299.

definition. Its point was to try and express the concept of the continental shelf in juridical terms.

63. Mr. YEPES, answering Mr. Lauterpacht, recalled that at the third session the Commission had taken the view that exploitability was a matter of fact. For example, once the water became too deep, it was impossible to look for coal on the bed of the sea.

64. Should cognate doubts and disputes arise, he would be perfectly prepared to envisage recourse to the International Court of Justice.

65. Mr. SPIROPOULOS said that no court could interpret the term "steep slope". It was a geographical, not a legal term.

66. Mr. FRANÇOIS drew attention to his comments on the expression "contiguous to the coast" as used in article 1 (*Ibid.*, pp. 103-104 or paras. 36-38). Both the Norwegian and United Kingdom Governments had raised certain objections. His own view was that the expression "continuous to the coast" did not preclude submerged areas separated from the coast by a narrow channel more than 200 metres in depth from being considered in certain circumstances as "contiguous to the coast". In cases of opposite coasts, the median line might then offer a fairer boundary. The Commission should consider the issue.

67. The CHAIRMAN recalled that the Commission had already gone into the matter at some length. It was a fundamental concept of maritime international law that contiguous zones formed part of the high seas. States had extended their jurisdiction from their territorial waters to the contiguous zones for a number of reasons — the application of sanitary and customs regulations, for instance. In the days of prohibition, the United States of America had taken certain measures to prevent the smuggling of alcoholic liquors. Countries like the United Kingdom, which traditionally dominated the seas, were very much concerned less contiguous zones should lose their character of areas of the high seas. That was the crux of the problem raised by the Special Rapporteur. His (Mr. Amado's) feeling was that no comments by the Commission would really affect the issue.

68. Mr. LAUTERPACHT said that the question of contiguous zones was wholly different from that of the interpretation to be placed on the expression "contiguous to the coast".

69. He had already referred earlier to the other difficulty, namely, that some seas were nowhere deeper than 200 metres.

70. Mr. LIANG (Secretary to the Commission) noted that the theory and practice of contiguous zones had by usage acquired a certain measure of stability in international law. But that was not the case with the continental shelf. That was why, when he had spoken before the Commission had voted on the term, he had referred to proximity, and not to contiguity. Article 2 made clear that the continental shelf was subject to the exercise by the coastal State of sovereign rights of control and jurisdiction for the purpose of exploring it and exploiting its resources. But contiguous zones were subject to a wider jurisdiction. The expression "contiguous to the coast" might consequently give rise to misunderstandings, since it might be taken to refer to contiguous zones. He would suggest the use of the word "adjacent" instead of the word "contiguous".

71. Mr. SPIROPOULOS noted that new difficulties were constantly arising. The Commission was in trouble about the suggested 200-metre limit, because the level of the sea-bed varied. There was yet another problem to which he would draw attention. The depth of the sea might well vary at a given distance from the coast along a given stretch of coast-line. It was consequently necessary to draw up a general rule on the lines of Mr. Lauterpacht's proposal. It was possible that a single definition would solve a number of problems, but the solution might not necessarily be wise.

72. Mr. FRANÇOIS insisted that it was essential that the idea of contiguous zones should be kept absolutely distinct from the expression "contiguous to the coast".

73. As regards Mr. Lauterpacht's proposal, it was based on acceptance of the 200-metre limit, but would also be useful, with suitable drafting modifications, if the flexible limit were adopted.

74. As for the delimitation of the continental shelf in the case of adjacent States or States separated by shallow waters, that issue was covered by article 7.

75. Mr. LAUTERPACHT said that the discussion was leading him to the conclusion that the concept of contiguous zones might possibly serve as a point of departure for solving the difficulties raised by article 1. It might, for instance, be laid down that for the purposes of exploitation there should be a contiguous zone of, say, 15 or 20 miles, which zone the coastal State would have the right to exploit regardless of the geographical configuration of the sea-bed. He was not submitting a formal proposal, but merely thinking aloud.

76. The CHAIRMAN said that if the concept of contiguous zones were introduced into problems of the continental shelf, serious difficulties would arise with regard to shipping and fisheries.

77. On Mr. LAUTERPACHT's proposal,

It was agreed to defer the vote on the several proposals relating to article 1.

The meeting rose at 1 p.m.

197th MEETING

Thursday, 18 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

Article 1 (continued)

1. Mr. FRANÇOIS (Special Rapporteur) drew attention to his proposal, which he had couched as a comment to article 1. It read as follows:

"While the depth of 200 metres as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in special cases in which submerged areas in the proximity of the coast with a depth of less than 200 metres, notwithstanding the fact that they are separated by a narrow channel deeper than 200 metres from the part of the continental shelf adjacent to the coast, must be considered as contiguous to that part of the shelf."

2. Mr. Kozhevnikov's proposal[1] was too vague, since, as had been pointed out at the previous meeting, it would be difficult to define the term "steep slope". He (Mr. François) maintained that the best solution was that which the Commission had considered at its third session, but had abandoned at the last minute as a result of the discussions of the Sub-Commission then set up to examine the issue. The criticism of vagueness also applied to the text finally adopted at the third session.[2] Divergencies might occur not only in respect of the possibilities of exploitation, but also in respect of the different kinds of exploitation and the suitable depths, the latter of course varying with the type of natural resources. Petroleum could be sought at a shallow depth — 30 metres — but precious minerals could perhaps be sought at lower levels — 60 to 70 metres. If the text merely referred to the exploitation of the natural resources of the sea-bed and subsoil, he feared that difficulties might arise between States about how far the continental shelf extended. The Commission should endeavour to adopt a practical rather than a purely academic solution.

3. Mr. YEPES pointed out that the proposal he had submitted at the previous meeting was identical with the text of article 1 adopted by the Commission at the third session, except for the inclusion of the words: "continental or island" ("*continentales ou insulaires*").[3]

4. Mr. FRANÇOIS asked Mr. Yepes whether those words were really necessary. In his opinion, they did not enhance the clarity of the text.

5. Mr. YEPES said that he would be prepared to withdraw them if the Special Rapporteur would not accept them. He had included them because a number of countries — he would especially mention Brazil, Chile and Colombia — were concerned about the possibility that islands might be excluded from the continental shelf.

6. Mr. LAUTERPACHT drew Mr. Yepes' attention to comment 4 to article 1 which read: "The word 'continental' in the term 'continental shelf' as here used does not refer exclusively to continents. It may apply also to islands to which such submarine areas are contiguous."[4]

7. As to the several proposals before the Commission, he hoped that before voting on them, members would carefully consider the Special Rapporteur's proposal. Some members might hesitate to vote for the depth of 200 metres unless some consideration were shown for the objections raised by several governments, as, for instance, that of Norway.

8. Mr. PAL wished to submit the following text for article 1:

"'As used *herein*, the term "continental shelf" *means* the sea-bed and subsoil of the submarine areas contiguous to the coast but outside the area of the territorial sea to a depth of 200 metres.'

"Explanation: A submarine area falling within the area covered by the extension of the maritime frontier lines of a coastal state shall, for the present purposes, be taken to be contiguous to the coast

"(*a*) If any portion of it is connected with the coast by not exceeding 200 metres in depth outside the territorial sea;

"(*b*) If no portion of it is so connected, then if the

[1] See *supra*, 196th meeting, para. 10.

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

[3] See *supra*, 196th meeting, para. 17.

[4] See "Report of the International Law Commission covering the work of its third session", *op. cit.*, Annex.

separating deep water does not exceed... metres in depth and... miles in width."

9. He had drafted that text in the light of the discussion at the previous meeting, but would like to know what would be the precise relation between the articles and the comments thereon. In the case of the draft on arbitral procedure, the comments had not been put to the vote. Presumably the Special Rapporteur or the Secretariat were responsible for them, and not the Commission. He would suggest that, whenever necessary, explanations should be added to the text of articles, and be considered as explanations.

10. Mr. HSU thought that the Special Rapporteur's proposal was on the whole sound, but he was not sure about the meaning of the words "narrow channel", which might prove difficult to define. The general issue which he would like to raise, however, was whether the Commission was going to rely on comments in drawing up the rules. He believed that in the case of ancient and well-established rules, comment and interpretation were wholly legitimate. In the case of new rules, clarity was surely preferable to interpretation.

11. He agreed with Faris Bey el-Khouri that if the depth were fixed, the width should also be fixed. Indeed, he tended to the view that it would be better to return to the original formula, and take the criterion of exploitation as the basis for article 1. The Commission should not too greatly concern itself with the objections raised by governments, but should above all endeavour to formulate sound rules.

12. He was not opposed to the inclusion of the words "continental or island", as suggested by Mr. Yepes. Since, after all, the Commission proposed to state that the word "shelf" was not a shelf, there was no reason why it should not also say that the word "continental" did not mean continental.

13. Mr. SANDSTRÖM was disposed to agree with Mr. Hsu. The decision to fix the limit of depth had been prompted by misgivings lest the rights of coastal States become so extensive as to lead to interference with shipping and fisheries. He did not consider that the figure of 200 metres offered a sound solution, partly because of the existence of shallow seas to which reference had been made at the previous meeting. If the depth was to be fixed, the width of the continental shelf should also be specified, but what yardstick should be applied in that case? On what data should the Commission base its decision? In view of those difficulties, he believed that it would be best to revert to the original proposal, which simply admitted the right to exploitation.

14. Mr. FRANÇOIS reminded Mr. Pal that the Commission would in due course have to vote on the comments to be appended to the draft on arbitral procedure. With regard to the comments on the articles on the continental shelf adopted by the Commission at the third session, the same procedure would have to be followed at the present session.

15. With regard to the term "contiguous to the coast", he would point out that the difficulty of the continental shelf continuing beyond a deep channel would remain regardless of which alternative principle the Commission adopted — the 200-metre limit or the principle of exploitation.

16. As to the question of shallow seas — for instance, those in the Persian Gulf — he would point out that the depth of 200 metres had always been considered as a maximum. The continental shelf, therefore, would cover all areas of the sea-bed lying beyond the territorial sea at less than 200 metres. In the case of coastal States separated by such a stretch of shallow water, delimitation would have to be made along the lines, for instance, of the proposals made in article 7.

17. Mr. SANDSTRÖM could not accept the Special Rapporteur's argument about contiguity, which would be far easier to interpret in relation to a deep channel if article 1 referred merely to the exploitation of the natural resources without specifying the depth. If the article incorporated the 200-metre limit, a special provision would be necessary to deal with the case of deep channels.

18. Mr. LAUTERPACHT considered that the Special Rapporteur had given the correct answer in respect of shallow seas. It would appear that Mr. Sandström considered that the main reason for changing the Commission's decision of last year was that it had had the effect of making the continental shelf too extensive. He would submit that the real objection to the text previously adopted was that in that formulation, the limit of the continental shelf was indefinite. Governments might have no objection to a continental shelf the outward limit of which was fixed at 20, 30 or 50 miles from the coast so long as the limit was fixed. What was important was to prevent States from claiming the right of exploitation of the bed of the sea at a distance of, say, 200 or 500 miles from the coast.

19. Mr. Hsu had suggested a definition in terms of both depth and width. That was logically impossible — although one might be qualified by the other. Furthermore, he (Mr. Lauterpacht) would urge members to give the most serious consideration to the Special Rapporteur's views and to exercise the greatest caution before overruling them, since they were based on a serious and far-reaching study of the problem in all its aspects.

20. The CHAIRMAN, speaking as a member of the Commission, emphasized the importance of maintaining the principle of the freedom of the seas. What would happen if machinery were erected in the middle of the sea? Such a possibility would have to be envisaged if the concept of the continental shelf were divorced from the concept of contiguity to the coast. What would be the position with regard to shipping and fisheries?

21. Mr. FRANÇOIS was unable to accept the suggestion that the continental shelf should be defined in terms of distance from the coast. As far as Mr. Kozhevnikov's proposal was concerned, he (Mr. François)

stated that the depth of 200 metres mostly coincided with the steep slope he (Mr. Kozhevnikov) had mentioned. The only material difference between Mr. Pal's proposal and his (Mr. François') own was a difference in the comments.

22. Mr. KOZHEVNIKOV proposed that in order to ensure a proper and logical ordering of the debate, the Commission should decide not to examine the comments for the time being.

It was so agreed.

23. Mr. ALFARO considered that the continental shelf should be defined, not as contiguous to the coast, but as a projection or prolongation of the coast into the sea, and that the Special Rapporteur's proposal should be amended in that sense. Mr. Pal's formula, which used the word "means" instead of the words "refers to" was a happy one. It might perhaps be further improved by the use of the word "designates", the definition of the term "continental shelf" then reading: "the term 'continental shelf' designates the sea-bed and subsoil of the submarine areas which form a prolongation of the coast and which lie outside the area of the territorial sea".

24. He was opposed to Mr. Kozhevnikov's proposal because it was too vague.

25. Faris Bey el-KHOURI said that the Commission was hesitating between three criteria: those of depth, width and exploitability. He considered that the definition should take in all three elements, and would therefore suggest that the last clause of article 1 be amended to read: "not exceeding a distance of 10 miles from the territorial waters". The Chairman had made a pertinent observation with regard to the high seas. As for exploitation, it was a new thing, and the door should be left open for future technical development. It would be unwise for the Commission to lay down drastic rules which would compromise their own future applicability.

26. Mr. SPIROPOULOS compared the present discussion to the arguments at the beginning of the century about aerial space and the sovereign rights of States. It had been claimed that the 200-metre limit was very liberal, since at the present time exploitation was for technical reasons limited to the 30-metre level. He himself could not believe that it was possible to impose any limit at all. True, it was essential to maintain the freedom of the seas, but it was also essential to permit humanity to exploit the riches of the sea-bed. He agreed with Mr. Hsu and Faris Bey el-Khouri that distance would be a better criterion than depth. The question was, how to fix the distance? What would be the approximate average breadth corresponding to a depth of 200 metres? States claimed all kinds of distances for their territorial waters; for instance, the Soviet Union claimed 12 miles.

27. He would be prepared to accept the text of article 1 subject to the last clause being amended to read: "up to the distance of... metres from the territorial sea".

28. Mr. KOZHEVNIKOV pointed out to Mr. Spiropoulos that the Soviet Union did not claim a 12-mile zone for its territorial waters. It already exercised its rights over 12 miles in accordance with the provisions of international law.

29. Mr. FRANÇOIS, answering Faris Bey el-Khouri, recalled that the question of breadth had been discussed by the Commission at the third session. Comment 7 on article 1 read as follows: "The Commission considered the possibility of fixing both minimum and maximum limits for the continental shelf in terms of distance from the coast. It could find no practical need for either and it preferred to confine itself to the limit laid down in article 1." Further, he would draw attention to the relevant comments of governments and experts (A/CN.4/60, mimeographed English text, p. 103; printed French text, para. 32). Chile, Norway and Yugoslavia advocated a zone of stated breadth, but that point of view was explicitly opposed by others, for instance by the United Kingdom Government. Mr. Lauterpacht had suggested that members should have confidence in the Special Rapporteur. All he (Mr. François) would ask was that they should carefully study the comments of governments, since the attitude of governments, as well as that of experts, must be taken into account. Thus, the French Government criticized the definition of the continental shelf on the grounds of vagueness, and advocated a fixed limit of depth (*Ibid.*, p. 20 or No. 7); the Netherlands and Yugoslav Governments (*Ibid.*, p. 18 or Nos. 42 and 44) expressed the same view, whereas Gidel held that the continental shelf as now defined would necessarily be uncertain and variable.

30. Mr. Spiropoulos had asked at what average distance from the coast the depth of 200 metres occurred. There was no answer to that question. A sea might be 200 metres deep three or four miles, or 100 or 300 miles, from the coast.

31. Mr. SPIROPOULOS, referring to comment 7, pointed out that the Commission had rejected the concept of distance because it had adopted a text in which there was no reference to depth. That was made perfectly clear in comment 6, which read in part as follows: "The Commission felt, however, that such a limit would have the disadvantage of instability. Technical development in the near future might make it possible to exploit the resources of the sea-bed at a depth of over 200 metres.... Hence, the Commission decided not to specify a depth limit of 200 metres in article 1."

32. He agreed that it was not easy to arrive at a correct figure for distance, but that difficulty applied equally to the suggested figure of a depth of 200 metres, which was purely arbitrary. Why not 300 metres?

33. The CHAIRMAN pointed out that the Special Rapporteur had changed his mind in the light of the comments of governments, which had taken the advice of geologists and oceanographers.

34. Mr. SANDSTRÖM said that the Commission

should keep in mind the connexion between the rights granted to a coastal State in respect of the continental shelf and the rights that same State enjoyed in territorial waters. The United Kingdom desired coastal States to enjoy sovereign rights over the continental shelf. It followed, therefore, that it must insist on a fixed limit. Otherwise it would be impossible for sovereign rights to be exercised.

35. Faris Bey el-KHOURI pointed out that he had not advocated the adoption of the concept of distance to the exclusion of the concept of depth. He had suggested that the definition should embrace three elements: distance, depth and exploitability. Actually, it would be far easier to measure distance from the limit of the territorial waters than it would be to measure depth.

36. Mr. SCELLE said that as the Commission was seeking to define something which did not exist, its efforts would never meet with success. Moreover, if it decided to define the continental shelf by reference to a specific limit, whatever figure was selected was bound to be purely arbitrary.

37. He saw no reason why the Commission should not seek guidance from domestic law and practice concerning the exploitation of natural resources. It was entirely irrelevant which State laid claim to exercise rights over its continental shelf, since all States were equal before the law. All that was necessary was to establish how submarine resources could be exploited for the benefit of the world community as a whole. In his view, the solution lay in establishing a legal system whereby the subsoil of the high seas could not be exploited beyond the limits of the territorial sea unless there was no break between the exploitation of the two zones, and unless an appropriate concession had been granted to the interested State by, say, the Economic and Social Council.

38. There was nothing radical about his proposal, whereas to abandon the centuries-old principle of the freedom of the high seas would be a revolutionary innovation.

39. Mr. FRANÇOIS said that Mr. Scelle had revived the arguments he had put forward at the third session.[5] They had not found support either among governments or recognized authorities on the subject, and it was to be hoped that the Commission would not think it necessary to re-open discussion on such fundamental issues of principle.

40. Mr. SCELLE had no illusions about the possibility of his thesis being accepted, and did not intend to make a formal proposal.

41. The CHAIRMAN said that, much as the Commission respected Mr. Scelle's authority and learning, it could not close its eyes to the fact that States were unlikely to share the views he had just expressed.

42. Mr. KOZHEVNIKOV said that a definition of the continental shelf based on distance was not in conformity with the natural properties of the shelf.

43. Mr. HSU thanked Mr. Scelle for having directed the Commission's attention to basic principles. The problem was to reconcile the conflict between the principle of the freedom of the seas and the interest of the world community in exploiting natural resources, and it would not be solved by defining the continental shelf in terms of depth or distance. Furthermore, it was undesirable to create yet another maritime zone. The best criterion, therefore, in his opinion, remained the possibility of exploiting the bed of the sea. It was a matter of adjusting claims between States and of demarcation in cases of disagreement.

44. Mr. LAUTERPACHT said that Mr. Spiropoulos was probably mistaken in thinking that the limit of 200 metres was an arbitrary one. It was generally considered to coincide with the geographical conception of the continental shelf and with the boundary of the actually exploitable area.

45. The CHAIRMAN confirmed that scientists seemed generally agreed that the limit of the continental shelf was where it fell steeply away from a depth of about 200 metres. Clearly, governments would have consulted geologists on the matter before making their observations.

46. Mr. Kozhevnikov's comments on Faris Bey el-Khouri's proposal were very pertinent. He (the Chairman) was also unable to agree to the proposal that States should be granted rights for another ten miles beyond the limit of their territorial sea. Personally, he would very much regret it were the Commission to reject the text proposed by its Special Rapporteur, who was a recognized authority in the field and a man of sound judgement.

47. Mr. YEPES said that the only criterion which could be used in defining the continental shelf was that of exploitability. The criterion of depth was impossible of application, and the criterion of distance would provoke grave objections on the part of certain governments, especially that of the United Kingdom. The Commission should therefore revert to the text adopted at the third session.

48. He could not allow Mr. Scelle's statement to pass without comment. The continental shelf most emphatically did exist. It was not only a geological feature, but also a concept recognized in customary international law. President Truman's declaration of 1945, though a revolutionary way of giving expression to customary law, had not been challenged by any government, and would have far-reaching repercussions. The same applied to the measures on the same lines taken by other American governments such as those of Mexico, Argentina, Chile, Peru and Brazil.

49. Mr. ZOUREK said that the criterion of distance would not meet the Commission's purpose, which was to regulate the exploration and exploitation of the natural resources of submarine areas. On the other

[5] *Ibid.*, Chapter VII, footnote 22.

hand, some clear definition of the continental shelf must be adopted, and he saw no reason why it should not be the geological definition, which was clear and unquestionable. The freedom of the seas would be sufficiently safeguarded by articles 3 and 4.

50. Mr. LAUTERPACHT suggested that all the proposals before the Commission should be treated as amendments to the Special Rapporteur's text.

It was so agreed.

51. The CHAIRMAN put to the vote Mr. Kozhevnikov's text.[6]

Mr. Kozhevnikov's text was rejected by 8 votes to 2 with 3 abstentions.

52. The CHAIRMAN put to the vote the final text of Faris Bey el-Khouri's proposal, consisting in the addition at the end of the Special Rapporteur's text of the words "within a distance not exceeding... miles from the territorial sea of the coastal State".

Faris Bey el-Khouri's proposal was rejected by 7 votes to 4, with 2 abstentions.

Mr. Yepes' proposal[7] was rejected by 7 votes to 4, with 2 abstentions.

The Special Rapporteur's text[8] was adopted by 7 votes to 4, with 2 abstentions.

53. Mr. KOZHEVNIKOV was still convinced that his proposal was the more rational, but as certain elements in the Special Rapporteur's text were in conformity with his views, he had joined with other members of the Commission in voting for it.

54. Mr. ZOUREK said that he had voted in favour of the Special Rapporteur's text, though he believed that the geological criterion was the only sound one. The Special Rapporteur's text, however, derived from a similar concept which might, in process of time, undergo the necessary modification.

55. Mr. FRANÇOIS observed that he had, in his second draft, transposed the reference to mineral resources from article 1 to article 2. He would, however, suggest that discussion on that matter be deferred for the moment, because it was closely related to the question of sedentary fisheries. He would therefore propose that, that element apart, the Commission shoud now take up article 2.

It was so agreed.

Article 2

56. Mr. FRANÇOIS reminded the Commission that during the discussion on his first draft it had been decided that article 2 should confer upon coastal States rights of control and jurisdiction for the purposes of the exploration and exploitation of the natural resources of the continental shelf.[9] That decision had been criticized by the governments of Chile, France, Iceland, the Union of South Africa and the United Kingdom, all of which considered that coastal States should exercise sovereignty over the continental shelf, though with the exception of Chile, they did not claim sovereignty over the superjacent waters and the air above. The Swedish Government and certain others had endorsed the Commission's views. The Brazilian and Danish Governments believed that coastal States should exercise "exclusive" jurisdiction, whereas the United States Government would be satisfied if that were brought out clearly in the commentary.

57. Those governments which believed that coastal States should exercise sovereignty over the continental shelf had argude that control and jurisdiction amounted to the same thing, the more so if the latter term were reinforced by the qualification "exclusive".

58. Taking those observations into account, he had proposed that the original text be modified by the insertion of the words "sovereign rights" before the words "control and jurisdiction".

59. Mr. YEPES proposed an alternative text for article 2, reading:

> "The coastal State possesses the same rights of sovereignty over the continental shelf as it exercises over its land area. The exercise of these rights is independent of any effective or fictional occupation by the coastal State."

60. He had sought to eliminate the controversial expression "control and jurisdiction". The meaning of the word "sovereignty", on the other hand, was perfectly clear. As Sir Cecil Hurst had argued in an article entitled "Whose is the Sea Bed?" published in the *British Year Book of International Law*, Vol. IV (1923-1924), p. 34-43, the distinction between sovereignty on the one hand and jurisdiction and control on the other had become so slight as to have been reduced to a mere question of terminology.

61. Mr. KOZHEVNIKOV asked the Special Rapporteur for an explanation of the expression "sovereign rights", and the reason for its introduction into article 2.

62. Mr. SANDSTRÖM failed to understand the meaning of the expression "sovereign rights", which was not a usual one and would add nothing to the text. If any addition were needed, it should be the word "exclusive" before the word "control", but in his opinion the text approved by the Commission at its third session was preferable.

63. Mr. ALFARO had no objection to the expression "sovereign rights", which would dispel the doubt as to whether States exercised full sovereignty over the continental shelf or only the rights of control and jurisdiction. Sovereignty consisted of a whole series of powers

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[6] See *supra*, 196th meeting, para. 10.

[7] *Ibid.*, para. 17.

[8] Document A/CN.4/60, Chapter IV.

[9] See *Yearbook of the International Law Commission, 1951*, vol. I, 114th meeting, paras. 1-17.

and attributes exercised by States within their own territory, from which two — the rights of control and jurisdiction — had been selected.

64. Mr. LIANG (Secretary to the Commission) considered that there was a substantive difference between sovereignty and control and jurisdiction. As the United Kingdom Government had argued (*Ibid.*, p. 35 or No. 77), if the expression "sovereignty" were used, a crime committed in a tunnel under the continental shelf would come within the jurisdiction of the coastal State. If the expression "control and jurisdiction" were maintained, there might be some doubt about that point.

65. On the other hand, he did not agree with the United Kingdom Government that the expression "control and jurisdiction" was "new and undefined" but did feel that the meaning of the expression "sovereign" as used in the present context was not clear.

66. The expression "sovereign rights" would not circumvent the difficulty, for it would certainly not satisfy governments like that of the United Kingdom or conform with the views of legal authorities such as Sir Cecil Hurst.

67. Mr. LAUTERPACHT said that the words "sovereign rights" were neither elegant nor self-explanatory. He also had doubts about the expression "exclusive right or control and jurisdiction". If explanatory, it was inappropriate; and if it constituted a qualification meaning that States were only being granted rights for exploration and exploitation of the mineral resources of the continental shelf which for the rest would remain *res nullius*, it was unacceptable. He would prefer article 2 to read: "The continental shelf is subject to the sovereignty of the coastal State."

68. In essence, his text was not far removed from the first sentence of Mr. Yepes' proposal, but it had the advantage of not referring to the undefined concept of sovereignty exercised over land areas. The second sentence of Mr. Yepes' proposal seemed to belong more properly to the commentary on article 2.

69. He would be interested to know whether the Special Rapporteur insisted on retaining the word "mineral". Was there any reason for excluding other resources?

70. Mr. SCELLE asked whether article 2 would confer upon coastal States the right to destroy or render unexploitable by others the natural resources of their continental shelf.

71. Mr. HSU said that his view that coastal States should not exercise full sovereignty over the continental shelf had not changed. He would be opposed, therefore, to any reference to sovereign rights or sovereignty in article 2. If the Commission's purpose was to maintain its decision that the rights should be confined to the exploration and exploitation of natural resources, he saw no reason for departing from the original text.

72. Mr. ALFARO asked whether, if States were accorded full sovereignty over their continental shelf, they would have the right to sell, cede or transfer the whole or any part of that area.

73. Mr. LAUTERPACHT asked whether, if States exercised limited sovereignty over the continental shelf, they would lose their rights by failing to explore or exploit its natural resources, and would be debarred from using the continental shelf for purposes of communications, such as tunnels.

74. Mr. PAL was not in favour of coastal States exercising absolute sovereignty over the continental shelf. Article 2 as it stood did not seem to him sufficiently explicit. He therefore proposed that it read:

> "The coastal State has sovereign rights of control and jurisdiction over the continental shelf in respect only of its mineral resources and of the exploration and exploitation of the same."

He would be prepared to substitute the word "exclusive" for the word "sovereign", which he had borrowed from the Special Rapporteur's text.

75. Mr. SCELLE said that if coastal States were not to exercise unlimited sovereignty over the continental shelf they must be subject to the control of some supra-national authority to ensure that the natural resources of the sea-bed were not lost to the international community. He was therefore opposed to all the alternative versions suggested for article 2.

76. Members of the Commission were aware of his views on the whole subject. He proposed to abstain from the vote on most of the articles in the draft, but in the case of article 2 would cast an adverse vote, in the belief that it was positively harmful, contrary to international law and inconsistent with the purpose the Commission had in mind.

77. Mr. LIANG (Secretary to the Commission) observed that there could be no doubt that the rights conferred by article 2 were not unlimited.

78. The theory that coastal States should exercise full sovereignty over the continental shelf raised various issues of principle. For instance, how did a State acquire sovereignty over a particular area? If the principle of propinquity held good, was occupation necessary? If the continental shelf formed part of the high seas, the principle of occupation might be invoked. The second sentence in Mr. Yepes' proposal was therefore perfectly germane to the issue. Hitherto, the Commission had held the view that coastal States should exercise sovereignty over the continental shelf solely for the purpose of exploiting its natural resources. If that view were rejected and replaced by the theory of absolute sovereignty, the whole nature of the draft would be altered, and a number of problems not thoroughly investigated at the third session would have to be examined. It was true that the majority of governments which had commented on the draft were in favour of the latter theory, but it must be remembered that they were not numerous, and that it would first have to be established whether their views were representative.

Lawyers were divided on the matter, and it was difficult to establish which theory prevailed.

79. Mr. SPIROPOULOS considered that there was no need for the Commission to discuss article 2 at great length. It should accordingly decide as soon as possible on Mr. Yepes' proposal, which was consistent with the views of the United Kingdom Government. If the proposal were rejected, the Commission could then consider the alternative solution offered by the Special Rapporteur.

The meeting rose at 1.05 p.m.

198th MEETING

Friday, 19 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

Article 2 (continued)

1. Mr. FRANÇOIS (Special Rapporteur) wished first to comment briefly on the various proposals submitted on article 2, and to reply to the questions which had been put to him at the previous meeting.

2. Mr. Kozhevnikov had asked what he meant by "sovereign rights of control and jurisdiction". The answer was that that term meant all the rights of control and jurisdiction exercised by a sovereign State over its territory. The same notion was conveyed by the expression "exclusive rights of control and jurisdiction". It might be argued that to use the term "sovereignty" would suggest the enjoyment of rights over the waters and air space above the continental shelf. That, however, was expressly excluded by articles 3 and 4. The term "sovereignty" implied that the coastal state could cede to another state its rights in respect of exploitation and exploration.

3. It could be argued, as the Swedish Government had done (A/CN.4/60, mimeographed English text, p. 36; priated French text, No. 79), that where there was no exploration or exploitation the coastal state had no rights over the continental shelf except the right to prevent its exploitation or exploration by others, but he considered that it was impossible so to restrict the concept, and was himself inclined to support the Israeli Government's argument (*Ibid.*, p. 34 or No. 75). If the last clause of article 2 ("for the purpose of exploring it and exploiting its mineral resources") were interpreted as connoting some sort of control over the efficacy of exploration and exploitation operations, he would be opposed to its inclusion. In that respect, States must have the same rights as they enjoyed over the natural resources of their land areas.

4. What other rights could be exercised over the continental shelf? In advocating the use of the term "sovereignty", the United Kingdom Government (*Ibid.*, p. 35 or No. 77) held that it would leave no doubt that a crime committed in a tunnel under the continental shelf would come within the jurisdiction of the coastal state. Thus, should any doubt subsist in relation to the expression "sovereign rights of control and jurisdiction", the use of the term "sovereignty" would be preferable, since it was impossible to envisage plurality of jurisdiction over the continental shelf. But caution was necessary, since it was essential to avoid giving the impression that the coastal State might enjoy rights over fisheries or wrecks on the bed of the sea. Fish, which spent long periods at the bottom of the sea, and wrecks could not be regarded as natural resources. Mouton made a distinction between the seabed and the subsoil. He (Mr. François) was prepared to concede the validity of the distinction, provided it were interpreted as meaning that sovereignty would be enjoyed by the coastal State over the subsoil of the continental shelf, rights over the sea-bed being limited to exploitation and exploration of natural resources.

5. In view of the above-mentioned considerations, he wished to submit an amendment to article 2 in the following terms:

> "The continental shelf is subject to the sovereignty of the coastal State. On the sea-bed, however, the coastal State has only the rights of control and jurisdiction for the purpose of exploring it and exploiting its natural (or mineral) resources."

6. Mr. YEPES, referring to the proposal he had submitted at the previous meeting, said that he had come to the conclusion that the second sentence raised a

number of difficulties. He would therefore withdraw that sentence while reserving the right to have it included in the comments.

7. In order to simplify procedure, he would suggest that Mr. Lauterpacht's proposal and his own should be combined to form one article, which would then read:

> "The continental shelf is subject to the sovereignty of the coastal State. The coastal State possesses the same rights of sovereignty over the continental shelf as it exercises over its land area."

8. He preferred the term "sovereignty" to the term "sovereign rights of control and jurisdiction", since the latter was confusing, and implied a compromise solution. Although, he was a convinced opponent of the notion of absolute sovereignty, he considered that in the present instance that was the appropriate term to use. In fact, he agreed with the comments made by the United Kingdom, France and the Union of South Africa (*Ibid.*, pp. 35-36 or Nos. 77, 80 and 8).

9. He was unable to accept the Special Rapporteur's proposal that the term "mineral" be used instead of "natural" to qualify the term "resources". "Mineral" would impose what would be both a useless and a dangerous limitation. "Natural resources" was the correct term and must be used.

10. Mr. LAUTERPACHT felt that Mr. François and Mr. Yepes had clarified the situation, but wished to mention certain considerations affecting the sovereignty of the coastal State, to which Mr. François had not referred. If the Commission laid down that the continental shelf was subject to the sovereignty of the coastal State, it would merely be codifying existing practice. The United States Government, for instance, had, in the Presidential Proclamation of 28 September 1945 (Truman Proclamation), referred to the continental shelf as "appertaining" to that country. The same idea was expressed in the series of proclamations by Arab States concerning the Persian Gulf. The first existing instrument dealing with the continental shelf was that negotiated between the United Kingdom and Venezuela in 1942, where the term "annexation" was used.[1] Consequently, short of following Mr. Scelle's suggestion that existing practice be disregarded, the Commission could hardly fail to accept the Special Rapporteur's proposal. The doctrine was that the continental shelf formed the prolongation of the territory of the coastal State in virtue of physical fact, and not by legal fiction. In cases where disputes concerning the continental shelf had been submitted to arbitration, it had been assumed without discussion that the consequence of proclamations by governments had been to give the coastal State full rights of sovereignty. Of course, it went without saying that those rights were subject to the limitations of international law in respect of the freedom of the seas. The interests of navigation and fisheries must be safeguarded, and reference thereto would have to be made somewhere in the draft. That consideration made it difficult to accept Mr. Yepes proposal, which stipulated that a State's rights of sovereignty over the continental shelf were the same as those exercised over its land area. He would submit that in the present instance sovereignty was, so to speak, a horizontal conception. It did not extend upwards, as did sovereignty over a land area. The superincumbent seas were excluded from it.

11. Another point to which he would refer was that the text adopted by the Commission at its third session was capable of a dual interpretation. It might be taken to mean either that the coastal State had exclusive control and jurisdiction only for the purpose of exploring and exploiting the natural resources of the continental shelf, or, alternatively, that the coastal State had full control and jurisdiction because of the necessity of fully exploring and exploiting the natural resources. He appreciated the reluctance that some members felt about conferring full sovereign rights over the continental shelf, and certainly the idea of international control in cases where exploitation was carried on ineffectually was attractive, but he feared that the Commission would only fulfil its intentions correctly by adopting the Special Rapporteur's formula, as expressed in the first sentence of his amendment submitted at the present meeting.

12. Mr. LIANG, Secretary to the Commission, said that the Secretariat, in compiling the volume[2] reproducing the proclamations of governments to which Mr. Lauterpacht had referred, had not been sure, in view of the protests directed against them by other governments, of the extent to which those declarations reflected the practice of States. In his own view, the most that could be claimed was that they indicated a tendency.

13. As to the choice between the terms "sovereignty" and "control and jurisdiction", he would recall that in cases where the latter expression had been explicitly included in a treaty, the interpretation of that expression as meaning sovereignty must be excluded.

14. Mr. Lauterpacht had stated in his book on "Private Law Sources and Analogies of International Law"[3] that leaseholds must be distinguished from a transfer of sovereignty. He, Mr. Liang, agreed with the view that where international leases conferred only control and jurisdiction, no sovereign rights could be claimed by the lessee State. He criticized the nineteenth century international law writers who considered those leases as "disguised cession of territory".

15. Mr. Lauterpacht's interpretation of the Truman Proclamation was only one of several interpretations that could be placed on it. One American writer had compared it with the United States declaration of 1856 on the Guano Islands.[4] The word "appertaining" was

[1] See *Laws and regulations on the régime of the high seas*, vol. I (United Nations publication, Sales No.: 1951.V.2), p. 46.

[2] *Ibid.*

[3] London, 1927.

[4] See *The Statutes at Large and Treaties of the United States of America, Thirty-Fourth Congress, 1855-1856* (Boston, 1856), p. 119.

used in both cases, but there was evidence that the United States Government had not intended to proclaim sovereignty over the Guano Islands. "Appertaining" did not mean "belonging to". He was under the impression that Gidel had stated that the United States Government had intentionally avoided the use of the word "sovereignty".

16. He made those general comments in order to emphasize that if the Commission wished to change its decision, it would have to justify the change in its comments, in order that the consequences thereof might be correctly estimated.

17. Mr. PAL submitted the following proposed wording for article 2:

"The coastal State has the sovereign rights of control and jurisdiction over the continental shelf in respect only of its mineral resources and of the exploration and exploitation of the same."

"Explanation: The term mineral resources includes deposits of sand on the surface of the bed."

18. He had followed the discussion with very great attention, the more so that, being a newcomer to the Commission, he had not envisaged the possibility of an extension of sovereign rights to the continental shelf.

19. Such an extension had never been contemplated before the issue of the several government proclamations to which reference had been made by preceding speakers.

20. His own proposal had been based on the assumption that the Commission did not envisage the extension of full sovereignty, but merely the granting of certain rights to the coastal State, and to the coastal State alone.

21. If, however, the Commission was going to found its attitude on the proclamations, then his proposal was invalid, since it was opposed to the extension of sovereignty over the continental shelf.

22. Mr. ALFARO did not consider that it was correct to argue that a coastal State had full sovereignty over the continental shelf. In his view, the term "control and jurisdiction" sufficed to permit a state to explore and exploit the natural resources of the shelf. He would draw attention to the Israeli Government's argument (*Ibid.*, p. 34 or No. 75) to the effect that control and jurisdiction seemed to be indistinguishable from sovereignty. He could not accept that view. In that connexion, the treaty between Panama and the United States of America on the Panama zone was pertinent, as it was clear from its terms that the United States of America was not sovereign over the zone, although it had been granted certain rights of control and jurisdiction therein.

23. Further, the Israeli Government suggested that the coastal State might desire to exercise rights of sovereignty in other directions, namely, in those of protection against abuse of rights by third States, and of national defence. He would submit that if a State had control and jurisdiction, it would be perfectly able to defend its rights. Nor was there any validity in the argument that a State must, by extending its sovereignty over the continental shelf, be able to acquire the possibility of exploring and exploiting it at some future date. The fact that a State did not exercise a right did not deprive it of that right.

24. In his view, the correct formula was "sovereign rights of control and jurisdiction".

25. Replying to the CHAIRMAN, he added that he preferred the word "sovereign" to the word "exclusive" in that connexion.

26. Mr. HSU recalled that at the previous meeting[5] he had stated that he was opposed to the extension of sovereign rights over the continental shelf. The theory of established practice was invalid. Nor was extension justified by proximity. He would remind the Commission that the claims advanced by certain States for the extension of the limits of their territorial waters had been strongly disputed. The subject was controversial, and involved a latent conflict with the doctrine of the freedom of the seas, about which, as a matter of fact, there was nothing sacrosanct; it was simply a method applied by States which could, if they so wished, decide to partition the ocean. But the initiative therein must be left to States themselves. It was not for the Commission to make recommendations the ultimate significance of which would be political.

27. He agreed with Mr. Alfaro's observations, although he would prefer to avoid any use of the word "sovereign", even though in the present context it were interpreted as meaning partial sovereignty. It would be wiser for the Commission to refrain from using a term which had a very definite colouring, and which called for interpretation.

28. Faris Bey el-KHOURI also held that the matter should be viewed from the political angle. Small States naturally wanted to enjoy rights over as wide an area of territorial sea as possible, for the simple reason that they wished to keep big States as far away from their coasts as they could. Thus, by providing for the extension of sovereignty to embrace the continental shelf, the Commission would be favouring small States, even though the exercise by them of those rights might be purely theoretical since they would lack the means of large-scale exploitation. But at least they would then be more inclined to accept the draft articles and no great harm would have been done from a juridical point of view. He consequently believed that the word "sovereignty" should be taken in its widest connotation.

29. The CHAIRMAN, speaking in his personal capacity, said that despite the brilliant expositions of the Special Rapporteur and Mr. Lauterpacht, he was still not convinced, and was inclined to side with Mr. Alfaro and the Secretary. He preferred the term "exclusive", which had been suggested by Mr. Sandström, to the term "sovereign".

[5] See *supra*, 197th meeting, para. 71.

30. Mr. LAUTERPACHT pointed out to the Secretary that the protests entered by governments against the proclamations expressed opposition, not to the claim that the continental shelf appertained to a certain coastal State, but to claims of rights over the superincumbent seas, which was a very different matter.

31. Mr. YEPES said that, having studied the Special Rapporteur's amendment, he was prepared to accept it.

32. The CHAIRMAN said that he would put to the vote the various proposals relating to article 2.

33. Mr. ALFARO considered that it would be better to defer the voting until the Commission had examined article 6.

34. Mr. FRANÇOIS thought that there was much to be said for Mr. Alfaro's suggestion, since articles 2 and 6 were closely linked. In any case, there was the question of "mineral" *versus* "natural" resources, and that issue was inseparable from the question of sedentary fisheries dealt with in article 6.

35. The CHAIRMAN suggested that the Commission might vote on the issue of principle, namely, whether it wished in article 2 to stipulate the exercise of sovereignty, or of control and jurisdiction.

36. Mr. LAUTERPACHT proposed that the first sentence of the Special Rapporteur's amendment be put to the vote. So far as he was himself concerned, he was prepared to accept the second sentence also, subject to certain drafting changes.

37. Mr. FRANÇOIS said that he would move the second sentence of his amendment[6] as a sub-amendment to Mr. Lauterpacht's proposal,[7] which was in point of fact identical with the text of his first sentence.

38. Mr. KOZHEVNIKOV and Mr. ZOUREK considered that the issue of principle should be put to the vote first, and that the second sentence of the Special Rapporteur's amendment should be considered in relation to the technical problems which it raised. Reference had been made earlier to the distinction between the sea-bed and the subsoil.

Mr. Lauterpacht's proposal reading: "The continental shelf is subject to the sovereignty of the coastal State" was adopted by 6 votes to 5, with 1 abstention.[8]

39. The CHAIRMAN explained that he had abstained from voting because he had not yet formed a definite opinion on the question of principle involved.

40. Mr. ZOUREK said that he would prefer the vote on the Special Rapporteur's sub-amendment to Mr. Lauterpacht's proposal to be deferred until after article 6 had been examined. He was not yet sufficiently enlightened on the question of natural and mineral resources.

41. Mr. LAUTERPACHT and Mr. FRANÇOIS said they were prepared to agree to Mr. Zourek's suggestion.

42. Mr. ALFARO reminded the Commission that he had originally suggested that the vote on article 2 be deferred until after the discussion on article 6. But now that the principle had been put to the vote, it was surely essential to consider the proposed limitation of the principle.

43. Mr. SPIROPOULOS could not see how article 2 was linked with article 6, and suggested that the Commission continue the voting.

44. The CHAIRMAN concurred.

45. Faris Bey el-KHOURI asked why the Special Rapporteur wished to restrict the enjoyment of sovereign rights over the sea-bed. Restrictions on the surface of the water were perfectly understandable, but what could a State do about the sea-bed, except explore and exploit it?

46. Mr. FRANÇOIS recalled that he had explained the necessity for restricting those rights in order to exclude fish and wrecks from their purview. It was very important indeed to ensure the application of the doctrine of the freedom of the seas in that respect.

47. Mr. ZOUREK pointed out that his difficulty was that the Special Rapporteur's amendment provided for a special régime for the sea-bed. The comments of M. W. Mouton (*Ibid.*, pp. 28-29 or No. 67) on the sea-bed and the subsoil would have to be carefully studied.

48. Mr. LAUTERPACHT said that most members of the Commission were obviously reluctant to continue with the vote. He felt that the second sentence of the Special Rapporteur's amendment (which was now a sub-amendment to his own proposal) took, so to speak, the edge off the rigid conception of sovereignty. He, for his part, was anxious to add a proviso to the effect that sovereign rights could not be extended to the superincumbent seas. It would be both more logical and more convenient if all statements relating to sovereignty were grouped in a single article.

49. Mr. LIANG (Secretary to the Commission) said that the Commission seemed to be on the way to establishing three different régimes: for the subsoil; for the sea-bed; and for the superincumbent waters. Due consideration should be given to the practical consequences of such a step. For his part, he failed to see what justification there was for distinguishing between the kind of rights to be exercised by States over the subsoil and over the sea-bed respectively.

50. Mr. SCELLE said that, despite the explanations given, he was still unable to grasp what difference there was between the sea-bed and the continental shelf.

51. Mr. FRANÇOIS pointed out that the sea-bed was the surface of the continental shelf. It was perfectly feasible to devise different rules for the surface and for the subsoil of the continental shelf.

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[6] See *supra*, para. 5.

[7] See *supra*, 197th meeting, para. 67.

[8] See, however, *infra*, 210th meeting, paras. 73-79.

52. Mr. LAUTERPACHT pointed out that an analogous distinction was drawn between the surface and the subsoil of land areas.

53. Mr. SCELLE disagreed. Mining operations, for example, were frequently carried on so near to the earth's surface as to render such a distinction meaningless.

54. Mr. LIANG (Secretary to the Commission) said that it was not clear to what the word "it" referred, in the second sentence of the Special Rapporteur's text.

55. Mr. FRANÇOIS said that the word "it" in the second sentence should be replaced by the words "the continental shelf".

56. The CHAIRMAN suggested that article 3 should form the second paragraph of article 2, but in amended form, reading: "The exercise of sovereignty by the coastal State over the continental shelf does not affect the legal status of the superjacent waters as high seas."

57. Mr. KOZHEVNIKOV observed that in the interests of consistency the principle already adopted by the Commission should be amplified. The whole text would then read:

> "The continental shelf is subject to the sovereignty of the coastal State for the purpose of exploring and exploiting its natural resources."

58. Mr. FRANÇOIS asked whether Mr. Kozhevnikov's proposal would mean that the sovereignty of States over the continental shelf would be absolute or that it would be exercised solely for the purpose of exploring and exploiting the natural resources.

59. Mr. ZOUREK said it was unnecessary to complicate matters by establishing three superimposed régimes to govern the continental shelf. For practical purposes, therefore, the second sentence in the Special Rapporteur's text should be omitted. The question of bottom fish and wrecks could be dealt with in another article.

60. Mr. PAL said that if the last sentence in the Special Rapporteur's comment on article 2, which read, "On the other hand the sand, constituting as it does the upper layer of the subsoil, should be regarded as covered by the term 'mineral resources'" (*Ibid.*, chapter IV, art. 2, last sentence of comment) were retained, some of the objections to the text would be removed.

61. Mr. FRANÇOIS observed that at first sight Mr. Zourek's suggestion seemed simple; but it would eliminate the qualification on the sovereignty of coastal States made in the first sentence. The result would be to extend to coastal States exclusive rights to, for example, bottom fish.

62. Mr. YEPES supported Mr. Zourek's suggestion. If, by definition, the continental shelf included the sea-bed, there was no need whatsoever to devise a separate régime for the latter.

63. Mr. SPIROPOULOS pointed out that States might wish to use the surface of the continental shelf for the construction of defence installations. According to the Special Rapporteur, however, the only kind of installations allowed would be those required for the exploitation of the mineral resources.

64. Mr. LAUTERPACHT said that in an effort to reconcile the various views expressed, he would propose the following wording to replace that suggested by the Special Rapporteur.

> "On the sea-bed the exclusive rights of the coastal States are limited to the exercise of rights of control and jurisdiction for the purpose of exploring and exploiting the mineral resources of the sea-bed and its subsoil."

65. Mr. SPIROPOULOS said that Mr. Lauterpacht's text would be acceptable. It was not essentially different from the Special Rapporteur's. On the other hand, he agreed with Mr. François that the meaning of Mr. Kozhevnikov's proposal was not clear.

66. Mr. KOZHEVNIKOV observed that his text contained nothing new. If the use of the word "natural" caused difficulty, he would be prepared to replace it by the word "mineral".

67. Mr. SCELLE asked how the exercise by coastal States of their special rights over the continental shelf was to be supervised. Normally, it was possible to ascertain by inspection on the spot whether rules of international law were being observed. It was hardly likely, however, that that would be possible in submarine areas. It would be virtually impossible to prevent any coastal State from using the continental shelf for purposes other than those laid down in Mr. Lauterpacht's proposal.

68. By extending the sovereignty of coastal States to the continental shelf, the Commission would be creating yet another source of contention between States. He was therefore categorically opposed to such a revolution in international law as would result from the recognition of sovereignty over a continental shelf, the limits of which in time would inevitably have to be extended when the present regulations became obsolete.

69. Mr. SPIROPOULOS said that an international lawyer reading the Special Rapporteur's text would interpret it as meaning recognition, subject to the rules of international law, of the absolute sovereignty of coastal States over the continental shelf. Mr. Kozhevnikov now appeared to be seeking to whittle down the principle already accepted. The addition he had proposed would serve only to confuse the meaning of the article.

70. Mr. KOZHEVNIKOV remarked that his amendment merely gave concrete expression to the principle already adopted, and, in his opinion, corresponded to the Special Rapporteur's intentions.

71. Mr. LAUTERPACHT appealed to Mr. Kozhevnikov to answer the question put by the special rappor-

teur, namely, whether his text meant that coastal States should only exercise sovereignty over the continental shelf for the purpose of exploring and exploiting its natural resources. Unless a satisfactory answer was forthcoming, the first sentence should perhaps be left as adopted.

72. Mr. KOZHEVNIKOV said that if his text were adopted, the comment would explain its meaning. The addition he had proposed did not affect the principle already accepted by the Commission.

73. Mr. LAUTERPACHT said that surely in that case Mr. Kozhevnikov's amendment was superfluous? His point could be made in the comment.

74. Mr. YEPES, referring to Mr. Spiropoulos' remarks, explained that he had voted in favour of the principle contained in the first sentence on the understanding that the sovereignty over the continental shelf which it conferred upon the coastal State would be subject to the rules of international law. That, however, was what the Commission had already decided in its draft Declaration of the Rights and Duties of States, which included an article to the effect that the sovereignty of States must be subject to international law and limited by it.[9]

75. Mr. LIANG (Secretary to the Commission) considered that the first and second sentences in the Special Rapporteur's text were contradictory since the general principle stated in the first sentence was invalidated by the second.

76. Mr. Lauterpacht's text would raise a problem of interpretation. Exclusive rights might be understood as tantamount to sovereignty.

77. Mr. LAUTERPACHT said in answer to the Secretary's argument that there was no contradiction in stating a general principle and then a series of exceptions to it.

78. He agreed, however, that the word "exclusive" in his text required explanation. If it were omitted, it would be impossible for coastal States to exploit sedentary fisheries.

79. The CHAIRMAN was unable to see why the first sentence of the Special Rapporteur's text should refer to the continental shelf, and the second to part of that shelf, namely, the sea-bed.

80. Mr. LAUTERPACHT said that no inconsistency was involved.

81. Mr. SCELLE said that the Commission was using the word sovereignty not in its usual connotation, but in a restricted sense. He was opposed to its being applied at all to the exercise of special powers. If sovereignty had any meaning it could only be the aggregate of powers exercised by a State.

82. There was an obvious contradiction between the first and second sentences of the Special Rapporteur's proposal. The issue dealt with in the second sentence was clearly analagous to concessions granted for the exploitation of mineral resources on land. No one had ever claimed that a concession entailed sovereign rights. It would be a major legal blunder to introduce the concept of sovereignty into such a provision.

83. Mr. ALFARO said that he would vote in favour of Mr. Lauterpacht's proposal, which was consistent with the Special Rapporteur's second draft of article 2. It was essential to safeguard the principle of the freedom of the seas, and therefore to qualify the sovereignty exercised by coastal States over the continental shelf.

84. It was extremely difficult to draw tenable distinctions between the sea-bed and the subsoil. He therefore felt that the continental shelf should be regarded as a single entity.

85. Mr. KOZHEVNIKOV proposed that while the Commission was awaiting the texts of the proposals submitted during the discussion, it might dispose of article 3, which should present no difficulties.

86. Mr. ALFARO seconded Mr. Kozhevnikov's proposal.

It was so agreed.

Article 3

87. Faris Bey el-KHOURI said he was unable to vote in favour of any provision restricting the sovereignty of States, since that concept did not lend itself to qualification. He wondered whether it might not be possible to bring the continental shelf within the régime of the territorial sea, and the superjacent waters within the régime of the high seas.

88. Mr. LIANG (Secretary to the Commission) said that at the fourth session, when discussing the territorial sea, the Commission had decided not to make any provisions about the air space above it. If the same course were to be followed in the case of the superjacent waters, the reasons for doing so would have to be stated in the commentary.

89. Mr. PAL proposed that article 3 should be amended to read:

> "The sovereignty of a coastal State over the continental shelf does not affect the legal status of the superjacent waters as high seas."

90. Faris Bey el-KHOURI accepted Mr. Pal's wording.

91. Mr. SPIROPOULOS thought that it would be difficult for the Commission to dispose of article 3 before it had taken its final decision on article 2.

92. Mr. ALFARO said that he was very anxious for article 3 to be accepted unanimously, since it would safeguard the general principle of the freedom of the seas.

[9] See article 14 of the draft Declaration in "Report of the International Law Commission covering its first session", *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), p. 9.

93. In view of Mr. Scelle's objections to the use of the word "sovereignty", perhaps the opening words of the article might read "The rights of the coastal State..."

94. Mr. LIANG (Secretary to the Commission) said that the use of the word "sovereignty" in article 3 would necessitate extended explanations.

95. Mr. KOZHEVNIKOV said that at first sight it seemed to him that the wording proposed by Mr. Alfaro would be inconsistent with other articles in the draft.

96. Mr. ZOUREK observed that whatever term the Commission decided to use to describe the rights of coastal States must be used consistently throughout the draft.

The meeting rose at 1 p.m.

199th MEETING

Monday, 22 June 1953, at 2.45 p.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

Article 2 (resumed from the 198th meeting)

1. The CHAIRMAN recalled that at the previous meeting the Commission had adopted Mr. Lauterpacht's proposal,[1] which now formed the first sentence of article 2. Mr. Yepes had withdrawn his amendment. The Commission had therefore now to consider Mr. Pal's[2] and Mr. Kozhevnikov's proposals. The text of the latter read as follows:

> "The continental shelf is subject to the sovereignty of the coastal State for the purpose of exploring and exploiting its natural resources."

2. Mr. PAL said that as a result of discussions with Mr. Lauterpacht, and in view of the Commission's decision at the preceding meeting, he had made several drafting changes in his proposal, which now read as follows:

> "The continental shelf is subject to the sovereignty of the coastal State.
>
> "This sovereignty of the coastal State over the continental shelf does not affect the legal status of the superjacent waters as high seas or of the air space above such superjacent waters.
>
> "On the sea-bed the sovereignty (exclusive rights) of the coastal State is (are) limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural (mineral) resources of the sea-bed and its subsoil."

3. The first paragraph was that already adopted by the Commission; the second and third were based on articles 3 and 4 as set out in the report.

4. Mr. LAUTERPACHT said that, since Mr. Pal's proposal was wholly in accordance with his views, he would withdraw his own proposal for paragraphs 2 and 3 of article 2.

5. Mr. FRANÇOIS (Special Rapporteur) said that he would be prepared to accept Mr. Pal's proposal provided that he used the word "mineral" instead of "natural". He would then withdraw his amendment to article 2 and the text proposed by him in the report.

6. Replying to Mr. LAUTERPACHT, he added that he would be prepared to agree that the question of "mineral" or "natural" be left in abeyance.

7. Mr. ZOUREK recalled that at the previous meeting he had proposed the deletion of the second sentence from the Special Rapporteur's amendment. Since that amendment had now been withdrawn and the Commission apparently wanted to include in the article some limitation of the sovereignty of the coastal State, he withdrew his own proposal.

8. Mr. SANDSTRÖM said that as he had been absent from the previous meeting he had been unable to follow the Commission's work and therefore wished once more to reiterate his opposition to the notion that a coastal State enjoyed sovereign rights over the continental shelf. He reserved his right to vote against the article.

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[1] See *supra*, 198th meeting, para. 38.

[2] *Ibid.*, para. 17.

9. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained from voting on that issue since he believed that even those governments which used the term "sovereignty" in relation to the continental shelf considered that rights of control and jurisdiction were equivalent to sovereignty.

Mr. Kozhevinikov's proposal was rejected by 6 votes to 2, with 5 abstentions.

10. Mr. ALFARO expressed his surprise that the Commission should be invited to consider a proposal which in point of fact included articles 3 and 4 in article 2. He could not recall that any decision to that effect had previously been taken.

11. The CHAIRMAN said that the idea had originated with an informal suggestion by him that the order of articles 2, 3 and 4 might be changed. That suggestion had not been followed up in view of a series of proposals and amendments which had been submitted at the previous meeting. Articles 3 and 4 would be discussed from the substantive point of view in due course. The Commission must now vote on Mr. Pal's proposal, which, for purposes of voting, consisted only of its second and third paragraphs, the first having already been adopted by the Commission.

12. Mr. KOZHEVNIKOV recalled that the Commission had voted on a matter of principle. Article 2 must therefore be drafted in the light of that principle. He would suggest that the Commission follow the logical order of work, first taking a decision on article 2, and then proceeding to examine articles 3 and 4.

13. Mr. FRANÇOIS agreed that if the Commission adopted the second paragraph of Mr. Pal's proposal, articles 3 and 4 would become redundant. No objections to that had so far been raised.

14. Mr. LAUTERPACHT suggested that for the time being it was unnecessary to discuss article 4.

15. Mr. CÓRDOVA said that the essence of Mr. Pal's proposal was that the sovereignty of the coastal State over the continental shelf did not affect the legal status of the superjacent high seas or of the air above those seas. That was an issue on which he had a certain point of view which he would like to express in connexion with the extension of the territorial sea, and he would therefore suggest that no decision be taken on the matter until the Commission had examined the question of the width of the territorial sea.

16. The only juridical justification for granting a coastal State some rights, or even sovereignty, over the continental shelf, was the assumption that the latter was a prolongation of the non-submerged territory of that State. No other juridical basis could be found for granting any rights to the coastal State and, of course, if the continental shelf was part of its territory, the coastal State should be recognized as having sovereignty over it. Once having correctly accepted that sovereignty, it only remained to apply to this submerged territory the same old and well-recognized principles which had always obtained in international law with regard to the sovereignty of the State over the soil, subsoil and fluid elements above and underneath its own territory. The only logical and juridical conclusion, therefore, should be that the coastal State had sovereignty over the soil, the subsoil of its continental shelf as well as over the waters and air which lay above it.

17. It was impossible to apply different principles to different parts of the same territory and to elements above and below it, just because one part was submerged and the other was not. The Inter-American Juridical Committee had recently made a study of the subject and had produced a draft, basing its article 1 thereof on the principle that sovereignty was applicable to the continental shelf and to the elements above and below.

18. Mr. ZOUREK felt that a proposal covering articles 3 and 4 was premature, and that the Commission should first conclude its examination of article 2, and then and then only consider whether the succeeding articles should be combined. As the situation was at present, the régime applicable to the continental shelf was being amalgamated with the régime applicable to the superjacent waters.

19. Mr. FRANÇOIS interpreted Mr. Córdova's views as implying the deletion of articles 3 and 4, on the grounds that the Commission had accepted the principle that the continental shelf was subject to the sovereignty of the coastal State. He would inform Mr. Córdova that those members of the Commission who had voted in favour of the principle of sovereignty had done so with the express reservation that the substance of articles 3 and 4 should be maintained.

20. As to the point raised by Mr. Zourek, he would be prepared to agree that the Commission should decide first on the principles laid down in articles 3 and 4, and then consider the possibility of amalgamating them as proposed by Mr. Pal. That procedure would be acceptable to him.

21. Mr. SANDSTRÖM pointed out that Mr. Córdova's objections clearly showed that the use of the term "sovereignty" was liable to cause confusion, since it necessitated the spelling out of a series of exceptions. That was one reason why he was opposed to the use.

22. Mr. LAUTERPACHT could see no valid reason for deferring consideration of Mr. Pal's proposal, the more so since it was acceptable to the Special Rapporteur.

23. With regard to Mr. Córdova's point, he fully agreed with him that in Mr. Pal's proposal, the legal status of the superjacent high seas or the air space above those seas was in no way affected by any decisions taken in respect of the continental shelf.

24. Mr. SANDSTRÖM had been gratified by Mr. Córdova's objections, and had taken them as confirming his own views. Actually, Mr. Córdova would still have raised the same objection had the Commission adopted the term "sovereign rights of control and jurisdiction". Abuses could not be prevented by terminology, and

he could do no better than suggest to Mr. Córdova that it would help the Commission in its work if he refrained from raising a matter which was now *res judicata*.

25. Mr. HSU also felt that consideration of Mr. Pal's proposal should be deferred until the Commission had discussed articles 3 and 4 from the point of view of substance.

26. Mr. ALFARO maintained his point of view. It was a tenet of sound legislation that every article should deal only with one principle, one rule, on situation. It was wrong to attempt to include in article 2 statements relating to the régimes defined in articles 3 and 4. One principle, namely, that of sovereignty, was applicable to the continental shelf; another principle, namely, that of control and jurisdiction, was applicable to the surface; and a third one, namely, that of the freedom of the seas, was applicable to the superjacent waters and the air space above them. The articles should accordingly be taken in their serial order.

27. Mr. CÓRDOVA emphasized that the problem of sovereignty over the continental shelf was closely linked with the problem of the territorial sea. If the Commission took a decision forthwith denying sovereignty over the superjacent waters, it would make it impossible or at least useless for him to present his point of view with regard to territorial waters.

28. According to the traditional rule of the cannon shot, a coastal State enjoyed sovereign rights over territorial waters up to a distance of three miles, those rights being exercised independently of whether the coastal State had sufficient military power in practice to enforce its authority. The legal foundation of the three-mile limit was the theoretical powers of the coastal State, measured by the longest range within which any country could assert its power from the shore. All countries had the same width irrespective of whether they possessed cannon or not. The soil, subsoil, as well as the air above the territorial sea, were considered as being under the sovereignty of the State. Now, if they accepted, as they should, and had done, that the coastal State had power, jurisdiction, in other words, sovereignty, over the continental shelf because it was part of its own territory, then they should also apply the principle that anything underneath and above the territory of a State was also under its sovereignty. Then the Commission would also have solved the problem of the width of territorial waters, even when no continental shelf existed, just as in the case of States which did not have cannon on their shores.

29. Mr. FRANÇOIS thought that in the circumstances it would be most expedient for the Commission to defer discussion of the second and third paragraphs of Mr. Pal's proposal, and to take up article 3.

30. Faris Bey el-KHOURI observed that the continental shelf, as defined by the Commission, would be both beneath the territorial waters and beneath the high seas. For the time being, the Commission was not concerned with the first area, but with the second. He would vote in favour of Mr. Pal's proposal, subject to the inclusion of the words "natural and mineral resources".

31. Mr. SANDSTRÖM thought that the third paragraph of Mr. Pal's proposal was relevant to article 2, since it defined the term "sovereignty".

32. Mr. KOZHEVNIKOV urged the Commission to conclude its work on article 2 and then to take up articles 3 and 4. Those parts of Mr. Pal's proposal which were not relevant to article 2 could be taken up in logical sequence under the succeeding two articles.

33. Mr. LIANG (Secretary to the Commission) recalled that article 3 was subject to Mr. Alfaro's proposal to use the term "rights" instead of the term "sovereignty".[3] He would submit that to accept that proposal would be equivalent to opening a Pandora's Box, whence difficulties and problems innumerable would come forth. Article 3, which related to the principle of the freedom of the seas, and article 4 made further inroads on the principles of sovereignty as expressed in the first sentence of article 2. Originally, neither the Commission nor various legal authorities had drawn a distinction between sovereignty, and control or jurisdiction. The Commission had now drawn the distinction.

34. The CHAIRMAN said that he would put to the vote the Special Rapporteur's proposal that the Commission proceed to take up article 3.

It was decided by 5 votes to 3 with 5 abstentions to take up article 3.

35. Mr. YEPES considered that the Commission was taking decisions by margins that were too narrow, and with many abstentions, and expressed apprehension about its future work. A decision by a narrow majority was permissible in the case of a political work, but in the case of a scientific work, a mapority of 5 to 3 with 5 abstentions was hardly satisfactory considering that there were 15 members.

36. The CHAIRMAN agreed that the figures of the voting revealed a considerable measure of disagreement within the Commission. That was only natural, since the Commission was engaged in elaborating new principles.

Article 3 (resumed from the 198th meeting)

37. Mr. ALFARO proposed the following text for article 3:

> "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas."

38. Mr. FRANÇOIS said that the majority of governments and legal authorities had agreed with the text of article 3 as adopted by the Commission at its third session. Several governments had objected, however, that the term "exercise" would be too restrictive of their rights over the subsoil, and had consequently

[3] *supra*, 198th meeting, para. 93.

expressed a preference for the term "sovereignty". But all had agreed that the régime of the superjacent waters would in no way be affected by the rights enjoyed over the continental shelf. He must point out to Mr. Córdova that he was at fault in his assumption that the Commission had, by accepting the principle of the sovereignty of the coastal State over the continental shelf, also conceded the principle of rights over the superjacent waters. That was not so. The Commission had reserved the question of territorial waters which, as it had stated time and again, had little to do with the continental shelf. The question of the territorial sea was a question of width: three, six or twelve miles. In discussing the continental shelf, the Commission was discussing the exploitation of the subsoil at a depth of some hundreds of metres. He saw no reason whatsoever to defer the discussion, as proposed by Mr. Córdova.

39. Mr. CÓRDOVA said that he had not intended to ask that the whole discussion on the continental shelf be deferred. His aim was to secure an opportunity of discussing the rights of coastal States in respect of the superjacent waters, when the Commission came to discuss the limit of the territorial sea.

40. He failed to see why he should consider the problem in terms of a decision taken by the Commission at the previous meeting. To his mind "sovereignty" and "control and jurisdiction" were one and the same thing. Had the Commission accepted the principle of the coastal State's exclusive jurisdiction over the soil and subsoil just because of the law passed by the United States and other governments relating to off-shore petroleum deposits and without having a legal basis for so doing? He was sure it had not. The members of the Commission, who acted as jurists and as jurists only, had accepted the principle, no doubt, not because of any political consideration but because they correctly believed that the continental shelf formed a prolongation of the coastal State's territory. In the present state of international law, it was impossible to argue that coastal States could exercise sovereignty over the continental shelf as being part of their own territory — and that was the only possible reason for granting it any rights — and at the same time assert that that coastal State must only exercise such sovereignty over the soil and subsoil but not over the superjacent waters.

41. Mr. LIANG (Secretary to the Commission) pointed out to Mr. Córdova that any question of extending the territorial sea was precluded by the terms of article 1, in which the continental shelf was defined. At the same time, the Commission had not yet taken any decision about that sea. It would seem to him that the difficulty rested on applying the vertical conception of sovereignty — he was grateful to Mr. Lauterpacht for the neat distinction between horizontal and vertical sovereignty — to the continental shelf. The Commission had accepted the horizontal conception, and had in no way linked the problem of the continental shelf with that of the territorial sea. Was there any justification for applying the vertical conception of sovereignty to the latter?

42. Mr. LAUTERPACHT said that, so far as he could tell, there were several proposals before the Commission on article 3, namely, the Special Rapporteur's original text as given in his fourth report (A/CN.4/60) — which would require consequential amendment in the light of the Commission's decision on article 2 — Mr. Alfaro's proposal, and, perhaps, a proposal which Mr. Córdova might submit in due course.

43. He would suggest that the Chairman draw up a list of speakers on article 3 and then close the list.

44. Mr. SANDSTRÖM considered that Mr. Córdova was misinterpreting the decision taken by the Commission at its third session. The Commission had not accorded coastal States control and jurisdiction over the continental shelf in general. It had done so only for the purpose of exploring and exploiting the mineral resources of the shelf. That was an important limitation.

45. Mr. YEPES said that the Commission was wrong in seeking to depart from the text approved at its third session. As regards article 3, the Special Rapporteur's text should be approved, since it maintained the principle adopted previously. They would thus correct at least part of the mistake they had made by introducing substantial changes into the definition of the continental shelf in article 1.

46. He must maintain his view, however, that it would be impossible to vote on article 3 before article 2 had been finally disposed of.

47. Mr. ALFARO pointed out that the provision that the continental shelf is subject to the sovereignty of the coastal State had already been accepted. In order to meet the objections raised by Mr. Scelle and Mr. Sandström, he had put forward a more neutral wording for article 3. If that were not accepted, he would, albeit with great regret, be unable to vote in favour of a provision to which he attached great importance because it safeguarded the principle of the freedom of the high seas.

48. Mr. KOZHEVNIKOV agreed that the principle of the freedom of the high seas should be emphasized in article 3. The Commission should first decide on the principle to be embodied in that article, after which it could turn to the question of drafting.

49. Mr. HSU said that even if article 3 were to refer to "rights", that would still mean sovereign rights. He would therefore have to abstain from voting on the article as a whole, since it would conflict with the principle of the freedom of the seas. The scope of such a provision, moreover, might for practical reasons have the result of extending yet further the rights of coastal States.

50. In order to dispel any possible misunderstanding, it would be well for members to remember that only the first paragraph of article 2 had so far been approved. Until the article had been voted on as a whole, it would be premature to assume that the principle embodied in that first paragraph would necessarily be finally accepted.

51. Mr. FRANÇOIS withdrew his text for article 3 in favour of Mr. Alfaro's.

52. Mr. PAL did likewise.

53. Mr. CÓRDOVA proposed that article 3 should read:

"The coastal State has sovereignty over the continental shelf as its own territory and therefore has exclusive jurisdiction and control over the soil, subsoil and the waters above such continental shelf."

Mr. Córdova's text was rejected by 8 votes to 1, with 5 abstentions.

54. Mr. KOZHEVNIKOV urged that the principle laid down in Mr. Alfaro's proposal should be voted on first, before the actual text was considered.

55. Mr. LAUTERPACHT was unable to see why the Commission should first decide on a principle, and then upon the way in which it was to be expressed.

56. The CHAIRMAN, speaking as a member of the Commission, said that he was unable to understand why rights to the exploitation of the sea-bed should entail sovereignty over the superjacent waters.

57. Mr. SCELLE agreed with the Chairman. It would be impossible to safeguard the freedom of the seas in the presence of a continental shelf which might stretch for thousands of miles. He would be unable to support Mr. Alfaro's text.

58. Mr. ZOUREK agreed with Mr. Kozhevnikov that a decision of principle was first required, since there were a number of associated issues connected with article 3 which had not yet been discussed.

59. Mr. YEPES said that by rejecting Mr. Córdova's text the Commission had already taken a decision of principle against extending to coastal States rights over the superjacent waters.

60. He would like an explanation of what was meant by the word "rights" in Mr. Alfaro's text.

61. Mr. KOZHEVNIKOV again urged that the Commission should vote on the principle that the sovereignty of the coastal State over the continental shelf did not affect the legal status of the high seas.

The principle was approved by 9 votes to 1, with 4 abstentions.

62. Mr. YEPES, explaining his abstention, said that it was impossible to vote on article 3 before any decision had been taken on article 2, which defined the nature of the rights exercised by coastal States.

63. Mr. LAUTERPACHT requested the Chairman to put Mr. Alfaro's text to the vote, since it was upon that understanding that members had been invited to vote upon the principle formulated by Mr. Kozhevnikov.

64. Mr. KOZHEVNIKOV asked Mr. Alfaro why, in view of the decision taken on the first paragraph of article 2, he should refer to "rights" and not to "sovereignty".

65. Mr. ALFARO explained that his purpose had been to devise an acceptable compromise which might satisfy those members of the Commission who were opposed to the use of the word "sovereignty". He was using the word "rights" in its general sense.

66. Mr. LAUTERPACHT said that, apart from the desire to present an acceptable text, there were good reasons for Mr. Alfaro's wording. It was very probable that eventually the Commission would confer in article 2 something rather less than sovereign rights over the sea-bed. The use of the expression "rights" in article 3 would then have been vindicated.

67. Mr. KOZHEVNIKOV asked whether Mr. Alfaro's wording was consistent with the principle already approved by the Commission for inclusion in article 2.

68. Mr. ALFARO pointed out that, although coastal States would exercise sovereignty over the continental shelf, their rights over the sea-bed would be restricted to control and jurisdiction.

69. Mr. SPIROPOULOS said that none the less, if article 2 were to refer to sovereignty, the rights mentioned in article 3 would be interpreted as meaning sovereign rights.

70. The CHAIRMAN put to the vote Mr. Alfaro's proposal that the word "rights" be used instead of the word "sovereignty" in article 3.

Mr. Alfaro's proposal was adopted by 10 votes to 1, with 3 abstentions.

71. Mr. CÓRDOVA explained that he had abstained because he was opposed to a provision which would not confer on coastal States full sovereignty over the waters superjacent on the continental shelf.

Article 4

72. The CHAIRMAN put to the vote article 4, modified for purposes of consistency to read:

"The rights of the coastal State over the continental shelf do not affect the legal status of the air space above the superjacent waters."

Article 4 was adopted by 10 votes to 1, with 3 abstentions.

73. The CHAIRMAN, speaking as a member of the Commission, said that he had voted in favour of article 4, which was consistent with the limitations imposed on the rights of States over the air space above the territorial sea.

Article 2 (resumed from above)

74. The CHAIRMAN reminded the Commission that it had approved the text for the first paragraph of article 2 reading: "The continental shelf is subject to the sovereignty of the coastal State."[4]

[4] See *supra*, 198th meeting, para. 38.

75. He now invited it to consider the text submitted by Mr. Pal for inclusion in article 2, reading:

"On the sea-bed the exclusive rights of the coastal State are limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural (mineral) resources of the sea-bed and its subsoil."

76. Mr. LAUTERPACHT asked that the Commission defer its decision as to whether "natural" or "mineral" resources should be referred to.

It was so agreed.

77. Mr. SANDSTRÖM asked why a distinction should be drawn between the sea-bed and its subsoil.

78. Mr. FRANÇOIS said that that point had already been discussed at great length. If no distinction were made between the sea-bed and its subsoil, coastal States could claim sovereign rights over bottom fish and wrecks, and that would be totally unacceptable. If the principle of sovereignty over the continental shelf were accepted, some limitation must be placed upon its exercise over the sea-bed.

79. Mr. SCELLE remained unconvinced by the Special Rapporteur's explanations. According to the definition laid down in article 1, the continental shelf was the sea-bed *and* subsoil of certain submarine areas. It was impossible to base a régime upon a fictitious distinction which did not correspond to reality.

80. Mr. LIANG (Secretary to the Commission) said that according to Mr. Pal's text, a coastal State would have no jurisdiction over crimes committed on the sea-bed, a more likely contingency than crimes committed in the subsoil. That point, which had been brought up by the United Kingdom Government in its comments, must be taken into account.[5] If the sovereignty over the continental shelf were to be extended, then it should be extended to the sea-bed. He must, however, make clear that personally he had been in favour of granting coastal States rights of control and jurisdiction, and not sovereignty, over the continental shelf.

81. Mr. SANDSTRÖM pointed out that rights of control and jurisdiction over the subsoil would still not enable coastal States to deal with crimes committed on installations built above the surface of the water but going down to the sea-bed.

82. Mr. HSU considered the distinction between the sea-bed and subsoil to be artificial and unjustified; in that connexion he would draw the attention of the Commission to the case of opencast mining. It would always be possible to make a special provision covering rights to lay submarine cables on the surface of the continental shelf. He would therefore vote against Mr. Pal's text.

83. Mr. SPIROPOULOS asked whether States were really interested in acquiring jurisdiction over crimes committed on the sea-bed or in the subsoil of the continental shelf. He was personally in favour of limiting the rights of coastal States to the exploration and exploitation of natural resources.

84. Mr. LAUTERPACHT said that even if the original text of article 2 were accepted, the difficulty concerning criminal jurisdiction would still subsist. The argument, however otherwise sound, in favour of the grant of sovereignty on the grounds that States must possess criminal jurisdiction in the continental shelf, was perhaps not decisive since in many cases they already possessed jurisdiction over acts committed abroad.

85. Mr. SANDSTRÖM observed that the original text would confer rights of criminal jurisdiction since coastal States would, of necessity, have to be empowered to maintain law and order in the installations set up to explore and exploit the resources of the continental shelf.

86. Mr. CÓRDAVO considered it impractical to draw a distinction between the sea-bed and the subsoil, since it would be physically impossible to fix the dividing line.

87. Mr. FRANÇOIS said that the distinction between the surface and subsoil had long been accepted so far as *terra firma* was concerned. He saw no reason why it should not be extended to submarine areas.

88. Mr. ZOUREK said it would be unacceptable to have two separate régimes for the sea-bed and subsoil respectively, particularly as a third was to be established for the superjacent waters. The Commission had been entirely mistaken in its over-hasty rejection of Mr. Kozhevnikov's proposal, which had offered the only way out.[6]

89. Mr. KOZHEVNIKOV said that the Commission must take two decisions of principle. First, whether a distinction was to be made between the sea-bed and the subsoil; and secondly, whether a single régime was to be established for the two.

90. Mr. YEPES said that, despite the Special Rapporteur's explanation, he was still unable to see the difference between the sea-bed and subsoil in the light of the definition laid down in article 1. A uniform régime must be established for the whole continental shelf.

91. Mr. LAUTERPACHT again asked how the Commission was to take decisions of principle without a definite text before it. It was impossible to vote *in abstracto* upon a principle open to several interpretations.

92. Mr. SPIROPOULOS said that although, according to the Commission's Statute and the rules of procedure of United Nations organs, it was necessary to vote on definite proposals or amendments, in practice, decisions were sometimes taken upon questions of principle. He could, therefore, support the procedure proposed by Mr. Koshevnikov.

[5] See document A/CN.4/60 (mimeographed English text, p. 35; printed French text, No. 77).

[6] See *supra*, paras. 1 and 9.

93. Mr. YEPES proposed that the first principle referred to by Mr. Kozhevnikov should be expressed in the following terms:

"The sea-bed and subsoil are subject to the same juridical régime."

The principle, as worded by Mr. Yepes, was approved by 8 votes to 4, with 1 abstention.

94. Mr. YEPES said that it now remained to decide what régime was to be applied to the sea-bed and subsoil.

95. Mr. LIANG (Secretary to the Commission) said that, so far as he knew, the only text before the Commission for article 2 was "The continental shelf is subject to the sovereignty of the coastal State."

96. Mr. LAUTERPACHT said that the decisions so far taken on article 2 did not preclude the possibility of qualifying the régime applicable to the sea-bed.

97. Mr. CÓRDOVA considered that all the Commission's difficulties derived from its efforts to achieve the impossible task of restricting the sovereign rights of States.

The meeting rose at 6.5 p.m.

200th MEETING

Tuesday, 23 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Article 2 (continued)

1. The CHAIRMAN said that the Commission could either endeavour to formulate the principles which it had adopted[1] in relation to article 2, or go on to examine articles 5, 6 and 7.

2. Mr. KOZHEVNIKOV considered it was high time that the Commission concluded its work on article 2. The Commission had adopted the principle of the sovereignty of the coastal State over the continental shelf, the principle that the régime should be the same for the sea-bed and the subsoil and the principle that that régime did not affect the freedom of the superjacent seas and of the air space above the water, but it had not yet answered the important question about the purposes for which sovereignty over the continental shelf was granted to the coastal State. Therein, indeed, lay the source of all the Commission's troubles.

3. If members agreed with his procedural suggestion, he would submit an appropriate proposal.

4. Mr. YEPES supported Mr. Kozhevnikov on the grounds that the Commission's work must follow a logical order. As to the issue of principle, he was convinced that the decision taken at the 198th meeting that the coastal State should have sovereignty over the continental shelf was provisional and subject to rectification. He reserved his right to vote in the light of the changes made in the structure of the draft as proposed by the Special Rapporteur in his report.

5. Mr. FRANÇOIS (Special Rapporteur) also supported Mr. Kozhevnikov's proposal.

6. The CHAIRMAN said that, since the consensus of opinion was clearly in favour of finishing article 2, he would call upon Mr. Kozhevnikov to submit his proposal.

7. Mr. KOZHEVNIKOV proposed the addition to the first sentence of article 2, as adopted at the 198th meeting,[2] of the following text:

"The sovereign rights over the continental shelf are exercised by the coastal State for the purpose of exploring and exploiting the natural resources of this continental shelf."

8. Mr. ALFARO said that in order to make certain that his understanding of Mr. Kozhevnikov's proposal was correct, he would ask him whether his intention in using the words "the sovereign rights... are exercised... for the purpose... etc." was to restrict the exercise of those rights to the purpose stated. He took it

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[1] See *supra*, 198th meeting, para. 38; 199th meeting, para. 93.

[2] Para. 38.

that the first sentence of article 2 as adopted at the 198th meeting remained in being, the article therefore opening with the words "The continental shelf is subject to the sovereignty of the coastal State."

9. Mr. FRANÇOIS wished to raise exactly the same point as Mr. Alfaro.

10. Mr. SANDSTRÖM assumed that Mr. Kozhevnikov's intention was to assume that there was complete sovereignty for a certain purpose.

11. Mr. LAUTERPACHT considered Mr. Kozhevnikov's proposal to be acceptable. It served a double purpose; first, it meant that sovereign rights were granted because of the necessity of exploring and exploiting the sea-bed and its subsoil; secondly, it implied that sovereign rights must be exercised for that purpose alone. It seemed to him that that was a reasonable interpretation which would allay the apprehensions of those members who were concerned about the implications of the term "sovereignty".

12. The CHAIRMAN, speaking as a member of the Commission, considered that Mr. Kozhevnikov's proposal differed from the original draft of article 2 only in that it referred to "sovereignty" instead of to "control and jurisdiction".

13. Mr. KOZHEVNIKOV said that the Russian text of his proposal was perfectly clear, and that there could be no possible doubt as to the meaning of the Russian equivalent of the term "for the purpose" ("*v tselyakh*").

14. As for interpretation, the Commission had agreed that a commentary should be appended to the various articles. As a matter of fact, the Special Rapporteur had used the term "for the purpose" in his proposed text and had commented upon it. From his (Mr. Kozhevnikov's) point of view, the issue turned on the fact that the term "sovereign rights" had been substituted for the term "control and jurisdiction".

15. The text was clear, and there were no grounds for apprehensions of any kind.

16. Mr. FRANÇOIS noted that the aims of Mr. Kozhevnikov's proposal were identical with those he had sought to attain in his own draft of article 2. He therefore had no objection to it.

17. Mr. LAUTERPACHT hoped that the Commission would be satisfied with Mr. Kozhevnikov's explanations. It set some limits to the rights of a coastal state. Thus a coastal State would not be able to invoke its sovereign rights to prevent another State from laying submarine cables, to mention but one example selected at random.

18. Mr. SPIROPOULOS also considered that Mr. Kozhevnikov's proposal constituted a reasonable interpretation of the first sentence of article 2. Would it not be possible, however, to combine the two sentences?

19. Mr. HSU asked what were the implications of Mr. Kozhevnikov's proposal. Was it intended to convey that a State was free to enjoy its sovereign rights only to a limited extent? Could a coastal State with sovereign rights over the continental shelf take measures of security, objecting, for instance, to another State's sending a submarine into that area and concealing it there? There was also the delicate question of atomic weapons. Surely that was a consideration which the Commission should keep in mind.

20. Mr. ALFARO considered that Mr. Kozhevnikov had given a perfectly satisfactory answer to the questions put to him. He had but one small point to make. Legal texts should be absolutely clear, and he would suggest that for the sake of greater clarity the word "sole" should be inserted before the word "purpose" ("*aux seules fins*").

21. Mr. PAL was reluctant to raise any questions about a text which seemed to have won general approval, but wished to submit that if sovereign rights were limited in the sense of Mr. Kozhevnikov's interpretation, the very purpose for which those rights were granted would be frustrated. It might be held that whereas the sovereign rights remained unlimited, the immediate exercise thereof would be limited.

22. Mr. SPIROPOULOS moved the following amendment to Mr. Kozhevnikov's proposal:

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

23. That amendment would render the first sentence of article 2, as adopted at the 198th meeting, superfluous.

24. Mr. KOZHEVNIKOV feared that amendments on such lines would affect the integrity of the principle already adopted by the Commission. He believed that his proposal was logical, in that it retained that principle and proceeded to define it.

25. So far as at any rate the Russian text was concerned, Mr. Alfaro's amendment was unnecessary.

26. The question of submarine cables was dealt with in article 5, and need not be considered in relation to article 2.

27. Mr. YEPES asked whether Mr. Kozhevnikov's proposal would, if adopted, nullify the text adopted by the Commission at its 198th meeting, which he (Mr. Yepes) considered as provisional.

28. The CHAIRMAN said that a vote could not be interpreted as "provisional". How did Mr. Yepes interpret that word?

29. Mr. YEPES recalled that it had been clearly understood that the Commission was taking a vote on a question of principle, and that article 2 would in due course be put to the vote as a whole. He did not consider that a satisfactory solution had been reached, for the simple reason that the first sentence had been adopted by 6 votes to 5, with 1 abstention, three members of the Commission having been absent. Such a vote might be satisfactory in a political body, but hardly in an assembly of specialists. He therefore presumed that it

was provisional, and subject to ratification or rectification.

30. Mr. SANDSTRÖM wished to put the following question. The first sentence read: "The continental shelf is subject to the sovereignty of the coastal State." If reference were made in the second sentence to the "sole purpose", would that not mean that full sovereignty was exercised over the continental shelf for the purpose indicated, but was latent in other respects?

31. The CHAIRMAN thought that members were inclined to exaggerate the importance of words. The situation was perfectly clear. The Special Rapporteur was prepared to accept Mr. Kozhevnikov's proposal, which had been supported by several other members. Two amendments had been submitted to that proposal. The Commission must now proceed to vote on those texts.

32. Mr. ZOUREK asked whether the Commission could go back on a decision. Mr. Kozhevnikov's proposal should be put to the vote, the question of principle being left untouched.

33. Mr. LAUTERPACHT said that Mr. Kozhevnikov's proposal spoke for itself. There was little purpose in pressing the author of a proposal for its authentic interpretation.

34. Mr. Spiropoulos' amendment did not make much difference, but he would vote against it, since he considered that the Commission was bound by its decision on the first sentence.

35. The introduction of the word "sole", as proposed by Mr. Alfaro, was innocuous, but, he thought, unnecessary. It followed the lines of the amendment proposed to article 11 of the draft on arbitral procedure, where reference was made to the tribunal's "widest powers". In that case the word "powers" amply sufficed; in the present case, the words "for the purpose" likewise needed no qualification.

36. Mr. HSU agreed with Mr. Lauterpacht that Mr. Kozhevnikov's proposal was subject to reasonable interpretation, but considered it still to be true that the use of the word "sovereignty" in the first sentence would have most serious consequences. There was no getting away from the fact that control and jurisdiction were not tantamount to sovereignty. If, however, sovereignty were granted, it was only reasonable to expect claims for security to be made by the coastal State. The Commission could not escape the logical consequences of a decision which, obviously, was not very much to its liking. He saw no reason why members should not change their minde.

37. The CHAIRMAN, speaking as a member of the Commission, pointed out that the United Kingdom Government, which was the strongest champion of the doctrine of the freedom of the seas, had advocated the use of the term "sovereignty". Could Mr. Hsu hope to convince the experts in the Foreign Office? He (Mr. Amado) had been impressed by the arguments of the United Kingdom Government and had consequently abstained from voting.

38. Mr. HSU appreciated the pertinence of Mr. Amado's comment, but found it surprising that the United Kingdom Government should have made the suggestion.

39. Mr. KOZHEVNIKOV said that he was always in favour of the widest possible discussion and the fullest exchange of views, but there were limits beyond which it was impossible to go. The issue of principle had been decided, and it was essential for the Commission to proceed from that point.

40. Faris Bey el-KHOURI pointed out that the issue had been complicated by the use in Mr. Kozhevnikov's proposal of the words "sovereign rights". He proposed that the text of the second sentence be amended to read:

> "The right of exploring and exploiting the natural resources of this continental shelf belongs exclusively to the coastal State."

41. If Mr. Kozhevnikov were unable to accept such a text, he would move it formally as an amendment to his proposal.

42. Mr. LAUTERPACHT reiterated that it was not proper to press Mr. Kozhevnikov for further explanations, and supported him in the view that the Commission must act in the light of its decision on the matter of principle, so long as no formal proposal had been made that that decision should be reconsidered.

43. Mr. KOZHEVNIKOV was perfectly willing to reply to Faris Bey el-Khouri, and said that he had included the term "sovereign rights" in order to throw a bridge, so to speak, across the gap between the principle expressed in the first sentence and the practical application of that principle as described in the second. If the term "sovereign rights" were deleted, the link between the first and second paragraphs of article 2 would be destroyed.

44. Mr. HSU said that he was not proposing that the decision be reconsidered, for he had voted against it, and tradition denied an opposer the moral right to seek reconsideration.

45. Mr. FRANÇOIS assumed that the adoption of the text proposed by Faris Bey el-Khouri would imply the deletion of the first sentence of article 2 as adopted. But that was impossible. As to the proposals of Mr. Kozhevnikov and Mr. Spiropoulos, their aim was identical with that of article 2 as it appeared in the report, the sole difference between the three texts being one of drafting.

46. Mr. SANDSTRÖM indicated that he had some intention of asking that the Commission's earlier decision be reconsidered when the Commission reached the point of voting on article 2 as a whole.

47. Mr. SPIROPOULOS said that he would not press his proposal.

48. Answering Mr. CÓRDOVA, Faris Bey el-KHOURI said that his proposal was not intended to eliminate the first sentence of article 2 as adopted. The proposal simply dealt with the exploitation of the natural resources, without prejudice to the principle of the freedom of the seas.

49. The CHAIRMAN said that he would first put to the vote Mr. Alfaro's amendment to Mr. Kozhevnikov's proposal.

Mr. Alfaro's proposal that the word "sole" be inserted before the word "purpose" in Mr. Kozhevnikov's proposal was rejected, 3 votes being cast in favour and 3 against, with 7 abstentions.

Mr. Kozhevnikov's proposal was rejected by 6 votes to 5 with 2 abstentions.

50. Mr. YEPES said that Faris Bey el-Khouri's proposal was in flagrant contradiction with the decision taken by the Commission at its 198th meeting.[3]

51. Mr. ZOUREK wished to make it clear that the decision taken at that meeting was not provisional. It was true that it had been adopted by only a small minority, but he could not see that that in any way justified Mr. Yepes' attitude.

Faris Bey el-Khouri's proposal was rejected by 7 votes to 4, with 2 abstentions.

52. Answering a question put to him by Mr. YEPES with the CHAIRMAN's permission, Mr. LIANG (Secretary to the Commission) said that he would hesitate to interpret the decision taken by the Commission at its 198th meeting. However, in reply to the question put by Mr. Yepes, he would submit that the Commission had adopted the first sentence of the Special Rapporteur's amendment, which was identical with Mr. Lauterpacht's proposal.[4] The Commission had then discussed the second sentence of the special rapporteur's amendment, which had been intended to form the second paragraph of article 2. In due course the Commission would have to vote on the article as a whole. Thus, so far, only the first paragraph of article 2 had been adopted. It stood to reason that if the second paragraph of the article contradicted the first, the latter would have to be modified.

53. The CHAIRMAN emphasized that the vote taken on the first paragraph of article 2 had not been provisional. It remained in force unless and until Mr. Sandström formally moved that the decision be reconsidered, and the motion was carried.

54. Mr. SPIROPOULOS said that, after the rejection of several proposals, the Commission must perforce return to the proposal submitted by Mr. Pal,[5] in the form of three paragraphs, the first of which contained the sentence already adopted by the Commission. It was not entirely clear whether the decisions of principle taken by the Commission at the 199th meeting in respect of the superjacent waters as high seas and the air space above them had been taken in relation to the second paragraph of Mr. Pal's proposal. In any event, the third paragraph had not been voted upon.

55. Mr. ZOUREK expressed his concern at the action taken by the Commission on Mr. Kozhevnikov's proposal, which had offered a way out of the impasse. For the time being, the Commission was left with an article 2 consisting of one sentence. Nor had any decision been taken on the amalgamation of articles 3 and 4.

56. Mr. SANDSTRÖM formally moved that the Commission reconsider its decision on the first sentence of article 2.

57. The Commission was well aware of his view that the concept of sovereignty should not be introduced in relation to the continental shelf. Article 2 should be adopted as drafted by the Special Rapporteur.

58. Mr. LAUTERPACHT said that the position seemed to be fairly clear to him. The Commission had the choice either of interrupting its discussion of article 2 and taking up Mr. Sandström's motion, or of leaving that motion until a later stage.

59. Mr. Pal's text for article 2 consisted of three parts. The first paragraph had already been adopted by the Commission. The substance of the second paragraph, dealing with the legal status of the superjacent waters and of the air space above them, had been dealt with in articles 3 and 4. There remained, therefore, the third paragraph reading:

> "On the sea-bed the exclusive rights of the coastal State are limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural (mineral) resources of the sea-bed and its subsoil."

That text to some extent coincided with Mr. Kozhevnikov's proposal which had, to his (Mr. Lauterpacht's) regret, been rejected.

60. Unlike some members, he did not consider that the Commission's acceptance at the previous meeting[6] of the principle that a single régime should apply to the sea-bed and its subsoil precluded it from discussing the third paragraph of Mr. Pal's text. Unless a provision of that kind were inserted, article 2 would remain incomplete, as no qualification would be placed upon the principle enunciated in the sentence already adopted as its first paragraph.

61. Mr. CÓRDOVA said that in his opinion the Commission had rejected all proposals relating to the second paragraph of article 2. It should therefore vote upon the article as a whole, consisting of one single paragraph; it could then consider Mr. Sandström's motion.

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[3] See *supra*, 198th meeting, para. 38.

[4] *Ibid.*, paras. 5 and 38.

[5] See *supra*, 199th meeting, para. 2.

[6] *Ibid.*, para. 93.

62. Mr. SPIROPOULOS believed that the Commission should vote forthwith upon article 2 as a whole, despite the fact that acceptance of the first paragraph had presupposed the existence of another provision in the article.

63. Mr. HSU disagreed with Mr. Lauterpacht, because in his opinion the Commission, by rejecting Mr. Kozhevnikov's proposal, had also implicitly rejected the third paragraph of Mr. Pal's text. It would therefore be quite improper to re-open consideration of the latter. Once the Commission had voted on article 2 as a whole, consisting of the paragraph already adopted, it could decide whether or not the adoption of that paragraph should be reviewed.

64. He would urge the Commission to abide by the rules of procedure, which were one of the main safeguards of democratic discussion.

65. The CHAIRMAN pointed out to Mr. Hsu that he was waiting to hear the comments of other members on Mr. Lauterpacht's statement before expressing his own views. His silence should not be interpreted as necessarily conveying approval of that statement.

66. Mr. KOZHEVNIKOV said that the discussion on the latter part of article 2 had been so inconclusive that it would be only reasonable for the Commission to consider the third paragraph of Mr. Pal's text. It was not possible to leave the first paragraph as it stood, for without further development and qualification it would be impossible to interpret its meaning. He would therefore advocate that the Commission resume its consideration of the third paragraph of Mr. Pal's text in the light of the principle adopted at the previous meeting that a single régime should be established for the sea-bed and subsoil. Mr. Sandström's motion had been premature, and should be taken up only after Mr. Pal's text had been finally disposed of.

67. The CHAIRMAN said that the Commission must give legal expression to the principle adopted at the previous meeting. Its present difficulties confirmed his belief that the practice of voting on principles as distinct from texts was nefarious, and should be abandoned.

68. Mr. SANDSTRÖM said that he was opposed to the procedure outlined by Mr. Lauterpacht, as it was inadmissible at the present stage to consider any new proposals relating to the second paragraph of article 2. Once the article as a whole had been voted on, the Commission could decide whether or not to act on his own motion.

69. The CHAIRMAN pointed out that for the Commission to formulate the principle approved at the previous meeting would involve no new proposal.

70. Mr. KOZHEVNIKOV concurred.

71. Mr. PAL contended that the Commission had not yet disposed of the third paragraph of his text. Though he had voted against the text which now formed the first paragraph, he had included it in his proposal because it had been accepted by the Commission. The principles laid down in his second paragraph had been incorporated in articles 3 and 4. Consideration of the third paragraph should be abandoned only if the Chairman ruled it out of order because it conflicted with the Commission's previous decision that a single régime be established for the sea-bed and subsoil.

72. Mr. ALFARO agreed with Mr. Pal. The Commission should vote on the third paragraph of the latter's text, which would reflect the decision of principle taken at the previous meeting provided the opening words "On the sea-bed" were deleted. Subject to that amendment, he would vote in favour of the text.

73. Mr. YEPES argued that the third paragraph of Mr. Pal's text was in overt contradiction with the Commission's decision of principle, and, moreover, had already been implicitly rejected with Mr. Kozhevnikov's proposal.

74. Mr. SANDSTRÖM agreed with Mr. Yepes.

75. Mr. LAUTERPACHT moved that the third paragraph of Mr. Pal's text, being consistent with the principle adopted at the previous meeting that a single régime be established for the sea-bed and subsoil be discussed and voted upon.

The motion was carried by 8 votes to 4.

76. Mr. YEPES asked whether that decision implied any deviation from the principle accepted at the previous meeting.

77. The CHAIRMAN replied in the negative. The only effect of the decision would be to enable the Commission to discuss the third paragraph of Mr. Pal's text.

78. Mr. LAUTERPACHT moved the adoption of the third paragraph of Mr. Pal's text, which would provide a reasonable compromise between the views expressed in the Commission.

79. Mr. KOZHEVNIKOV pointed out that the text must be made to accord with the principle adopted at the previous meeting. At first sight Mr. Alfaro's amendment appeared to achieve that object.

80. The CHAIRMAN feared that the third paragraph of Mr. Pal's text did not accurately reflect the principle accepted by the Commission at the previous meeting.

81. Mr. PAL accepted Mr. Alfaro's amendment.

82. The CHAIRMAN put to the vote Mr. Pal's text for the second paragraph of article 2, as amended by Mr. Alfaro. The text now read:

> "The exclusive rights of the coastal State are limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural (mineral) resources of the sea-bed and its subsoil."

That text was adopted by 7 votes to 5, with 1 abstention.

83. The CHAIRMAN put to the vote article 2 as a whole, consisting of the text just adopted and, as first

paragraph, the words: "The continental shelf is subject to the sovereignty of the coastal State."

Article 2 as a whole was adopted by 8 votes to 4, with 1 abstention.

84. Mr. CÓRDOVA explained that he had voted in favour of article 2 on the understanding that the second paragraph did not constitute a limitation on the sovereignty of the coastal State over the continental shelf.

Article 5

85. Mr. FRANÇOIS said that the Danish Government, which supported article 5, had expressed the fear that it was not clear which of the two interests, namely, the exploitation of mineral resources and the establishment or maintenance of submarine cables, would prevail. In his opinion, the Danish Government's comment[7] did not call for any modification of the text of the article. If any doubt subsisted as to its meaning, the comment might be amplified.

86. Some authorities had regretted the Commission's decision not to make specific provision for pipelines, since they regarded that as a matter likely to become extremely important in the future. However, no government had contested the decision, which might therefore be confirmed.

87. Mr. YEPES supported the Special Rapporteur's view.

88. Mr. SANDSTRÖM did not fully agree with Mr. François. Of course, if the exploitation of part of the continental shelf required the removal of submarine cables already laid, the cost would have to be borne by the coastal State, but it was surely indefensible that, when operations began for exploiting the continental shelf, the coastal State should finance the increased cost of laying submarine cables.

89. Mr. FRANÇOIS said that once a coastal State had begun to exploit the sea-bed or subsoil it could refuse the request of another State to lay a submarine cable in that area.

90. The CHAIRMAN suggested that the point raised by Mr. Sandström should be dealt with during the discussion on the commentary. He accordingly put article 5 to the vote.

Article 5 was adopted unanimously.

Article 6

91. Mr. FRANÇOIS said that in order to meet the French Government's request for greater precision, he had added at the end of the first sentence in article 6 the words "or in reducing fish production".

92. Mr. KOZHEVNIKOV said that for the benefit of navigation and fishing, article 6 prescribed reasonable limitations to the right of setting up installations. That point should be particularly emphasized now that the Commission had recognized that the sovereignty of the coastal State over its continental shelf did not affect the status of the superjacent waters as high seas. At the same time he felt that the article was neither clear nor comprehensive enough. A number of governments, including those of Belgium, France and Sweden, felt that more stress should be laid upon navigation and fishing interests. The Belgian Government, for instance, considered that the exploitation of the sea-bed should not obstruct the traffic on sea routes. With those considerations in mind, he accordingly proposed that article 6 be amplified by the addition of a new paragraph reading:

> "(3) Neither the installations themselves, nor the said safety zones around them, shall be situated in straits, narrow channels or on recognized sea lanes."

93. Mr. CÓRDOVA said that "substantial interference" was a good criterion but should also apply to the latter part of the first sentence in article 6. He accordingly proposed the insertion of the word "substantially" before the words "reducing fish production".

94. Mr. FRANÇOIS accepted Mr. Córdova's amendment.

95. Mr. LAUTERPACHT considered that installations for the exploitation of the sea-bed on a large scale might be of great importance, and in some cases might justify substantial interference with navigation. In such cases the interference, though substantial, would not be unreasonable. He would therefore urge the Commission to consider substituting the word "unreasonable" for the word "substantial".

96. On first hearing, Mr. Kozhevnikov's proposal seemed acceptable, but before expressing his final views he would have to see it in writing.

97. Mr. SANDSTRÖM was unable to detect any difference between the words "substantial" and "unreasonable".

98. Referring to Mr. Kozhevnikov's proposal, he did not think that there was any need to prohibit the exploitation of the sea-bed in straits.

99. He wondered whether the comment brought out with sufficient clarity that navigation and fishing interests should be given equal priority with rights of exploration and exploitation.

100. Mr. FRANÇOIS considered that the interests of navigation and fishing would have to yield sometimes to larger interests of a new industry, such as the submarine extraction of petroleum. It would be impossible always to give the former preference.

101. He doubted whether there would be any justification for prohibiting the establishment of installations in straits or on recognized sea lanes in the case of an industry which might be of the greatest importance to

[7] See "Report of the International Law Commission covering the work of its fifth session", *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), pp. 47-48.

the community. The whole question was one of the balance of interests.

102. Mr. SANDSTRÖM said that the Special Rapporteur had misunderstood him. He had not claimed that the interests of navigation and fisheries should always prevail. He was perfectly familiar with the principle of the balance of interests, of which he might quote an example from his own country, where a concession to build hydro-electric installations could be obtained only where it could be proved that the benefit derived from raising the level of the water would outweigh the damage done to agriculture by at least 50 per cent.

103. Mr. CÓRDOVA said that it was a highly technical matter to determine which interests were of overriding importance, and it would consequently be impossible for the Commission to devise a comprehensive provision. He therefore welcomed Mr. Lauterpacht's suggestion that the word "unreasonable" be substituted for the word "substantial".

104. Mr. LAUTERPACHT said that it would not be desirable to establish too rigid a text determining which interests should prevail. The word "unreasonable" might be preferable to the word "substantial", provided that an article were inserted in the draft stating what organ had jurisdiction to interpret article 6.

105. He endorsed the Special Rapporteur's comments on Mr. Kozhevnikov's text. It would be going too far to prohibit rigidly the construction of installations on international sea routes. In that connexion, it was very pertinent to remember that the entire coastline of Norway had on occasions been used as an international sea route for certain purposes. Moreover, the stretch of sea near the territorial waters was often particularly convenient for navigation and used as such, and if Mr. Kozhevnikov's text were adopted it would be unlawful to erect installations there. The same argument was applicable to the exploitation of the continental shelf in straits, the definition of which, furthermore, was elastic.

106. Mr. SANDSTRÖM said that, in the light of the arguments just advanced, he would agree to the substitution of the word "unreasonable" for the word "substantial".

107. He was unable to understand what was meant by reduction in fish production.

108. The CHAIRMAN was uncertain whether there was any real need to refer to that matter. Moreover, it might be extremely difficult to establish the decisive statistics.

109. Mr. YEPES said that the Commission should establish a flexible text for article 6, expressing a general wish that the exploitation of the continental shelf and of its mineral resources should not constitute unreasonable interference with the freedom of navigation.

110. He was in general agreement with Mr. Kozhevnikov's text, which was consistent with customary law on the continental shelf and with the declarations made by President Truman and a number of Latin-American Governments in recent years.

111. Mr. KOZHEVNIKOV said that the word "unreasonable" was even less clear than the word "substantial".

112. He was unable to understand the criticism of his text, which was designed to render article 6 more complete and consistent with the whole spirit of the draft, and notably with the principle of freedom of the seas. That principle must at all costs be maintained.

113. Mr. SPIROPOULOS said that he could admit the use of the word "reasonable" in a legal text, but not that of the word "unreasonable".

114. He agreed with Mr. Yepes that the rule established in article 6 should be flexible, and with the Chairman that there was no need to refer to reduction in fish production, which was not of sufficient importance to merit special mention.

115. Mr. ZOUREK said that article 6, and notably paragraph 2 thereof, constituted a serious derogation from the principle of freedom of navigation and of the seas. In striving to achieve a balance between different and conflicting interests, the Special Rapporteur had only succeeded in being imprecise and in drafting a text which would be difficult to interpret. Mr. Lauterpacht's suggested amendment was no improvement.

116. It was clearly essential to establish certain minimum safeguards for the freedom of navigation, as had been done in Mr. Kozhevnikov's text. Rules governing straits already existed, and States could not repudiate them unilaterally. Anything which might affect important international sea routes would bring about so many difficulties as to make it impossible to maintain the freedom of navigation. The establishment of such minimum safeguards would, moreover, make the text far more acceptable to governments.

The meeting rose at 1 p.m.

201st MEETING

Wednesday, 24 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Article 6 (continued)

1. The CHAIRMAN, speaking as a member of the Commission, said that neither the word "substantial" as used in paragraph (1) of article 6, nor even less the word "unreasonable", suggested by Mr. Lauterpacht, gave him satisfaction, because both were open to highly subjective interpretation. However, as the first had gained currency in legal usage, he felt obliged to accept it.

2. He could not, on the other hand, support the Special Rapporteur's proposed addition at the end of the first sentence of the words "or in reducing fish production", because he felt that such a provision would inevitably prove a constant source of controversy between States.

3. He feared that Mr. Kozhevnikov's intention in proposing an amendment [1] to clarify the meaning of article 6 would fail in its purpose, and would only result in restricting the scope of the original text.

4. Mr. FRANÇOIS (Special Rapporteur) said that the words "substantial interference" might be replaced by the words "unjustified interference taking into account the different interests involved". Once the English and French texts of Mr. Kozhevnikov's proposal had been brought into line, he could accept it, provided it were amended by the addition at the end of the words "essential to international navigation".

5. Mr. SCELLE observed that so far as the French text was concerned the word "*sensiblement*" was the most appropriate.

6. Mr. YEPES said that, although he was in general agreement with Mr. Kozhevnikov's text because it sought to safeguard the freedom of navigation, he considered that article 6 should be drafted in general terms in order to ensure flexibility. He was therefore opposed to a detailed provision dealing with technical matters which the Commission was not really competent to discuss, and accordingly submitted an alternative text for the first paragraph of article 6 reading:

> "The exploration of the continental shelf and the exploitation of its natural resources must not be carried out in a manner calculated to entail unnecessary or useless departures from the principle of freedom of navigation on the high seas or a real interference with the exercise of that freedom or with the development — utilization, exploitation — of the resources of the sea.
>
> "Conversely, the exercise of freedom of navigation must not unnecessarily impede construction of the installations essential for exploring the soil and subsoil of the continental shelf or for exploiting its natural resources.
>
> "Any dispute concerning the interpretation or application of the provisions of this article shall be decided by the International Court of Justice at the request of one of the parties concerned or by an arbitral tribunal constituted in accordance with the rules for arbitral procedure adopted by the International Law Commission."

7. Mr. SANDSTRÖM said that, although at the pre-previous meeting [2] he had declared his acceptance of Mr. Lauterpacht's amendment for the substitution of the word "unreasonable" for the word "substantial", he now felt, on reflection, that the original wording was preferable.

8. He wished to propose an alternative text, based on the Special Rapporteur's comment to paragraph (1), to read as follows:

> "The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing.
>
> "The construction of installations which hamper navigation or fishing is justified only where the benefit to the community of States to be derived from the exploitation outweighs the inconveniences to navigation and fishing.
>
> "Due notice must be given of such construction and due means of warning must be maintained."

9. Commenting on Mr. Kozhevnikov's proposal, he said that in his opinion it was too rigid; its substance could more appropriately be dealt with in the commentary.

10. Mr. KOZHEVNIKOV said that, though not agreeing that his text was too rigid, he would be prepared to accept the Special Rapporteur's amendment to it, which would apply to straits, narrow channels and recognized sea lanes.

11. Mr. YEPES reaffirmed his conviction that the Commission should first decide the issue of principle, namely: whether to have a general or a detailed provision.

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[1] Mr. Kozhevnikov's proposal read as follows:

"Add the following paragraph, (3), to article 6:

"(3) Neither the installations themselves, nor the said safety zones around them shall be situated in straits, narrow channels or on recognized sea lanes.'"

[2] See *supra*, 200th meeting, para. 106.

12. Mr. LAUTERPACHT shared the Special Rapporteur's views on Mr. Kozhevnikov's text, and accepted his amendment to it.

13. Mr. FRANÇOIS pointed out to Mr. Yepes that Mr. Kozhevnikov's text dealt not with matters of detail, but with a general issue of great importance.

14. Mr. ALFARO said that he could vote for Mr. Kozhevnikov's text, but was doubtful about the inclusion of the word "straits", which was apt to be broadly interpreted. Some straits were so wide that installations constructed in them could not possibly constitute a hindrance to navigation. Mr. Kozhevnikov's purpose might perhaps be fully met by referring solely to narrow channels and recognized sea lanes.

15. Mr. SANDSTRÖM agreed with Mr. Alfaro. If installations could be erected in wide straits without hampering either navigation or fishing, there was no reason why States should be precluded from erecting them.

16. The CHAIRMAN shared Mr. Alfaro's misgivings about the reference to straits in Mr. Kozhevnikov's proposal.

17. Mr. CÓRDOVA said that paragraph (1) of article 6 in the Special Rapporteur's draft would suffice to safeguard the interests of navigation and fishing. No more detailed provision was required. Mr. Kozhevnikov's text would do more harm than good, and was, moreover, open to serious practical objections. It was, for instance, not clear what was meant by "narrow channels". There was, furthermore, no reason why States should not be allowed to erect installations in recognized sea lanes if the only result would be to oblige ships to make a slight detour.

18. Mr. SCELLE said that he was in favour of Mr. Kozhevnikov's proposal, as amended by the Special Rapporteur, because it would, at least to some extent, deflect the Commission from the course it had taken of whittling down the principle of the freedom of the seas.

19. Mr. HSU said he had no objection in principle to Mr. Kozhevnikov's text, but shared the doubts expressed by Mr. Alfaro. Would the Straits of Formosa and Tsushima, for example, come within Mr. Kozhevnikov's definition?

20. Faris Bey el-KHOURI proposed the deletion of the word "straits" from Mr. Kozhevnikov's proposal, with the remainder of which he was in agreement.

21. Mr. KOZHEVNIKOV explained that the purpose of his text was to ensure that the freedom of navigation would not be threatened.

22. Referring to Mr. Hsu's question, he said that it was impossible in a text of three lines to define what was meant by "straits", nor did he feel that the Commission should go into such detail. It must limit its discussion to general issues.

23. Mr. ZOUREK pointed out that the interests of navigation and fishing on the one hand, and of the exploration and exploitation of the continental shelf on the other, could never be of equal importance, since the first concerned the community of States and the second, one State alone. Recognized sea lanes had been established after long years of experience, and it would be difficult to justify any interference with them on the grounds of expediency for one State. He therefore supported Mr. Kozhevnikov's proposal.

24. Mr. HSU was unable to see how the Commission could accept Mr. Kozhevnikov's text if its author could not explain what he meant by "straits". The text must, if adopted, inevitably give rise to disputes. Unless the word "straits" were deleted, he would have to vote against the text.

25. Mr. LAUTERPACHT said that his original views about Mr. Kozhevnikov's proposal had undergone some change during the discussion. In view of the objections revealed in the course of the discussion, it might be as well to allow members more time for reflection before it was put to the vote. Perhaps the Commission might eventually decide to deal with its subject matter in the comment, since the essential points were already covered in paragraph (1).

26. The CHAIRMAN, speaking as a member of the Commission, considered that the first sentence in article 6 was broader than Mr. Kozhevnikov's text, and would better safeguard the freedom of the seas. Although the purpose of the two texts was the same, he would be unable to vote for Mr. Kozhevnikov's proposal, which was too detailed and could not be exhaustive.

27. He did not feel that the Commission's work would be in any way advanced by deferment of the vote on Mr. Kozhevnikov's proposal.

Faris Bey el-Khouri's proposal that the word "straits" be deleted from Mr. Kozhevnikov's text was adopted by 6 votes to 3, with 5 abstentions.

Mr. Kozhevnikov's text, as amended, was adopted by 8 votes to 3, with 3 abstentions.

28. Mr. YEPES said that he had voted for the deletion of the word "straits" from Mr. Kozhevnikov's proposal but had abstained from voting on the text as a whole for the reasons he had already explained.

29. Mr. SCELLE said that he had voted against Faris Bey el-Khouri's amendment because he feared that readers of the summary records might conclude that the Commission's decision to delete the word "straits" meant that the construction of installations in such areas was authorized.

30. Mr. KOZHEVNIKOV said that he had voted in favour of his own text as a whole, despite the adoption of Faris Bey el-Khouri's amendment, because, in a sense, the expression "recognized sea lanes" would include straits.

31. Mr. ZOUREK said that he had voted against Faris Bey el-Khouri's amendment because the reasons militating in favour of the freedom of navigation in narrow

channels and recognized sea lanes applied even more to straits. However, as the amended text would still cover straits, he had voted for it.

32. Mr. CÓRDOVA expressed concern that members of the Commission should so frequently abstain from voting even after taking an active part in the debate, and deprecated the fact that decisions were being taken by so small a majority.

33. The CHAIRMAN observed that the Commission had recently been examining certain entirely new questions. The failure to secure a wide area of agreement was, therefore, not surprising.

34. Mr. ALFARO said that he had voted in favour of Faris Bey el-Khouri's amendment because it was well known that many so-called straits were very wide. When not narrow channels, they could not be described as regular sea lanes. However, Mr. Kozhevnikov's text fulfilled the purpose of safeguarding navigation and fishing from undue interference, and he had accordingly voted in favour of the text as a whole.

35. The CHAIRMAN, speaking as a member of the Commission, thought that the deletion of the word "straits" would not seriously affect the text.

36. Pending distribution of Mr. Sandström's and Mr. Yepes' texts for article 6, he would open the discussion on article 7.

Article 7

37. Mr. FRANÇOIS said that, in view of the conclusions reached by the Committee of Experts on certain technical questions concerning the territorial sea (A/CN.4/61/Add.1), he proposed an amended text for article 7, to replace the one contained in his fourth report (A/CN.4/60). The new text read as follows:

> "1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to each State should be the median line, every point of which is equidistant from the two opposite coasts.
>
> "2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to each State should be drawn according to the principle of equidistance from the respective coastlines of the adjacent States.
>
> "3. If the parties cannot agree on how the lines are to be drawn in accordance with the principles set forth in the preceding paragraphs, the dispute shall be submitted to arbitration."

38. The Commission would remember that article 7, as adopted at the third session, contained no directives about the delimitation of the continental shelf, on which there was no rule of law that could be applied by a tribunal. The comment, by referring to median lines, did give some guidance in the matter to States whose coasts were opposite to each other, but gave none to adjacent States, because the Commission had not yet reached any decision on the delimitation of the territorial sea of such States. In the absence of any rules of law, the Commission had decided that disputes on the delimitation of the continental shelf should be submitted to arbitration *ex aequo et bono*. In view of the objections raised by numerous governments to that proposal, however, he had suggested in his fourth report that disputes should be submitted to conciliation procedure. But since the completion of the fourth report, the conclusions of the Committee of Experts had become available and had prompted him to prepare a new text for article 7.

39. At the request of the Commission, he had convened the Committee of Experts to examine matters connected with the delimitation of the territorial sea. The General Assembly, in its customary anxiety to economize, had voted no funds for the purpose. However, with the help of the totally inadequate sum of 1,500 dollars, left over from the 1952 budget, and the Netherlands Government's generous offer to provide administrative assistance, it had been possible to comply with the Commission's request. The Committee, consisting of Professor L. Asplund, Mr. Whittemore Boggs, Mr. P. Couillault, Commander Kennedy and Vice-Admiral Pinke, had met at The Hague in April 1953, and had established certain rules for delimiting the territorial sea both between adjacent States and States whose coasts faced each other. It had expressly stated in its report that those rules were equally applicable to the delimitation of the continental shelf, and had confirmed the Commission's preliminary view that the technique of the median line could be adopted for States whose coasts faced each other, at the same time indicating how the line was to be drawn. In the case of adjacent States, when the coast was straight, the continental shelf was delimited by means of a line perpendicular to the coast. If the coast was curved, the line took into account its configuration. The experts had agreed that the rules might give rise to doubts in certain specific cases, but had recognized that it would be impossible to devise a universally applicable method.

40. In the light of the Committee's conclusions, States might now be prepared to submit disputes to arbitration.

41. Mr. HSU welcomed the new text submitted by the Special Rapporteur. Although conciliation was, on the face of it, a very admirable procedure, in practice it was frequently abused and transformed into a shield to protect the powerful against the weak. Since, according to the Charter of the United Nations, disputes between States should be settled by peaceful means in conformity with the principles of justice and international law, arbitration was preferable.

42. Mr. SANDSTRÖM said that, although he had not yet studied the report of the Committee of Experts, since it was annexed to the Special Rapporteur's report on the régime of the territorial sea, two points immediately came to mind. First, though it might be obvious, it would perhaps be wise to indicate the point from which the boundary between the continental shelf

of two States was to be drawn. Secondly, the Special Rapporteur had referred to the important question of median lines following the configuration of the coast in certain cases. Perhaps that should be explicitly stated in paragraph 2 of the new text as it was an extremely important qualification of the general principle laid down therein.

43. Mr. CÓRDOVA said that the Special Rapporteur's new text made no allowance for existing or future bilateral agreements between States on the delimination of the continental shelf between them. There was no reason why the system laid down in article 7 should be mandatory in the presence of such agreements.

44. He was unable to grasp precisely what was meant by the last phrase in paragraph 1, reading "every point of which is equidistant from the two opposite coasts".

45. Referring to paragraph 3, he said that if the intention was to submit the actual tracing of the demarcation line to arbitration he could not accept it; only disputes about the respective rights of States could be dealt with by that procedure.

46. Mr. SCELLE said that article 7 simply fortified his unremitting opposition to the whole notion of creating a continental shelf, since, after delimiting their respective zones in narrow waters — which was his conception of a strait — States would be able to set up installations there for the exploitation of the sea-bed to the detriment of the interests of navigation. It would be interesting to observe the reactions of the United Kingdom Government if, for example, the continental shelf in the Baltic were to be delimited in the manner suggested in article 7. Surely such a provision could only lead to incessant friction, if not to more serious consequences. Paragraph 1 was proof positive of the Commission's failure to foresee what would happen in narrow straits if the articles so far approved were put into force.

47. Mr. KOZHEVNIKOV said that his initial hesitation about the new text of article 7 had been confirmed by the discussion as it had so far developed. Acceptance of the new text would presuppose that the Commission had taken a stand on the experts' conclusions. He, among other members of the Commission, had not yet studied the experts' report. He therefore moved that discussion on the new text of article 7 be deferred until the Commission had dealt with item 3 of its agenda, relating to the régime of the territorial sea.

48. Such a procedure would in on way preclude the Commission from discussing the Special Rapporteur's text of article 7 as set forth in his fourth report. Such a discussion might well result in a consensus of opinion leading to final agreement on the article.

49. The CHAIRMAN considered Mr. Kozhevnikov's motion to be a reasonable one.

50. Mr. YEPES disagreed with Mr. Kozhevnikov. Article 7 was indispensable, and without it the whole draft would be incomplete.

51. Commenting on the Special Rapporteur's new text, he said that it was not for the Commission to attempt to deal with technical matters. The advice of the experts should be accepted, and he personally would vote for paragraphs 1 and 2. Moreover, a precedent for the method of delimitation recommended by them already existed in the treaty relating to the submarine areas of the Gulf of Paria, concluded between the United Kingdom and Venezuela in 1942.

52. Paragraph 3, he felt, should be made more flexible. There was no *a priori* reason why all disputes should be submitted to arbitration. He therefore proposed the substitution of the words "one of the methods of peaceful settlement provided for by international law" for the word "arbitration" at the end of the paragraph.

53. Mr. FRANÇOIS said that he could not agree to consideration of article 7 being deferred until the Commission had disposed of item 3. As Chairman of the Commission he would shortly be submitting a proposal concerning the Commission's programme of work, and he was not optimistic enough to think that, even if sufficient progress were made to enable the Commission to take up item 3, discussion on it could be concluded at the present session. If he were proved right, the draft on the régime of the high seas would then not be ready for submission to the General Assembly.

54. Mr. SPIROPOULOS said that, although in principle he could support Mr. Kozhevnikov's motion, he also fully recognized the weight of Mr. François' remarks, for he, too, believed the situation to be somewhat inauspicious for completing at the present session the work on the régime of the high seas.

55. Mr. KOZHEVNIKOV said that, although he fully understood the force of the arguments adduced by the Special Rapporteur, he still did not think that there was any reason why the Commission should not take as its basis for discussion the text contained in Mr. François' fourth report on the régime of the high seas. Quite clearly, the new draft which dealt with highly technical matters could not be taken up at the present stage.

56. Mr. LAUTERPACHT considered that conditions were propitious for the final adoption of the report on the continental shelf and that the Commission should avoid the course of linking that question with other controversial and unresolved matters. He would suggest that a final decision on article 7 be deferred for a day or two in order to give the Commission time to study the report of the Committee of Experts. He did not feel that detailed discussion of the technical questions dealt with by the experts would serve any useful purpose. Members of the Commission must be guided by the views of the experts whom they had entrusted with the task of examining certain highly technical problems.

57. Nor did he consider that the question raised in article 7 should be linked with that of the territorial sea.

58. Faris Bey el-KHOURI was opposed to deferment of article 7, on the ground that no new light would be shed on the problem even if more time were allotted to its study.

59. Mr. CÓRDOVA considered that it would be very serious if the Commission failed to complete its work on the continental shelf. At the same time, he, too, had had no opportunity of studying the experts' report, and would welcome a few days' respite.

60. He agreed that the problem need not be linked with that of the territorial sea, the main issue in respect of which was that of width.

61. The CHAIRMAN, speaking as a member of the Commission, said he was opposed to any lengthy deferment. The matter was ripe for decision, the report was good, and the argument that the Commission's decisions were taken by a small majority was inconclusive, for that was inevitable in the circumstances, particularly in view of the fact that the Commission was elaborating wholly new principles. He, too, would find it difficult to vote on article 7 in the version submitted by the Special Rapporteur, since it differed fundamentally from the text in the latter's fourth report.

62. He had every sympathy for Mr. Kozhevnikov's suggestion that the Commission might examine article 7 in the original text, but feared that no progress would be possible, since a number of technical and far-reaching problems had now been raised. To mention one instance only, the original proposal that any dispute be submitted to conciliation procedure had now been superseded by the proposal that it be submitted to arbitration.

63. Speaking as Chairman, he would propose that further consideration of article 7 be deferred for one day, the Commission meanwhile resuming its examination of article 6.

64. Mr. ZOUREK maintained that it was essential to defer the vote on article 7 at least until the Commission had discussed the related question of territorial waters. In his view, the connexion between article 7 and the problem of the territorial sea was intrinsic to the nature of the problem. Any system that the Commission might adopt for delimiting the boundaries of territorial waters between neighbouring States would have to be linked with the system of delimiting the boundaries of the continental shelf.

65. The CHAIRMAN pointed out that since the continental shelf began beyond the limit of the territorial sea, the link was not quite so close as Mr. Zourek would imply.

66. Mr. CÓRDOVA supported Mr. Kozhevnikov's proposal. No great harm would be done if the Commission failed to reach a final decision on the continental shelf at the present session. At its third session, the Commission had adopted certain principles which it had reversed at the present one. Indeed, the Commission had discussed the question of the high seas five times all told, and there was some likelihood of another change of viewpoint at the next session.

67. Nor did he take a serious view of the lack of unanimity in the Commission.

68. Mr. KOZHEVNIKOV suggested that the Chairman put his motion to the vote in the following form: Should the discussion on article 7 be deferred? If so, for how long?

The motion that the discussion of article 7 be deferred was carried by 11 votes to 1, with 2 abstentions.

69. Mr. KOZHEVNIKOV proposed that the Chairman next put one of the following alternative proposals to the vote: that the discussion on article 7 be deferred until the Commission had concluded its examination of item 3 of the agenda (régime of the territorial sea); or that the discussion on article 7 be deferred until the Commission had concluded its examination of item 2 of the agenda (régime of the high seas) and of item 1 (arbitral procedure).

70. Although he would prefer the second alternative, he believed that the first was the correct one, and should be adopted.

71. Mr. ALFARO wished formally to move the Chairman's suggestion that discussion of article 7 be deferred for one day, namely, until Friday, 26 June 1953.

72. The CHAIRMAN said that he would put Mr. Kozhevnikov's alternative motions to the vote in the order in which they had been presented.

Mr. Kozhevnikov's first alternative motion was rejected by 9 votes to 2 with 3 abstentions.

Mr. Kozhevnikov's second alternative motion was rejected by 9 votes to 2 with 3 abstentions.

Mr. Alfaro's motion — that discussion of article 7 be deferred until Friday, 26 June 1953 — was adopted by 8 votes to none, with 6 abstentions.[3]

Article 6 (resumed from above)

73. The CHAIRMAN said that before inviting Mr. Pal to introduce his proposal on article 6, he would ask Mr. Sandström to comment on his amendment to paragraph (1) of that article.

74. Mr. SANDSTRÖM said that he could not add very much to his previous comments, except that he had tried to draft a text which would cover the Special Rapporteur's comments on the necessity of keeping a balance between the various interests involved.

75. The CHAIRMAN felt that Mr. Sandström's amendment in no way differed from Mr. François' own proposal that the words "unjustified interference, taking into account the different interests involved" ("*d'une maniére injustifiée en tenant compte des différents intérêts en cause*") be substituted for the words "substantial interference".

76. Mr. SANDSTRÖM said he was prepared to withdraw his amendment in favour of Mr. François'.

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[3] See *infra*, 204th meeting, para. 1.

77. Answering the CHAIRMAN, he said that he considered that both texts raised the problem that the concept of the benefit of the community of States was difficult to define. That, however, was a general question, and its solution was surely to be found in Mr. Scelle's proposal for an additional article, the text of which read as follows:

"A permanent international organ should be empowered to investigate the methods of exploring or exploiting the continental shelf and to make certain that such exploration or exploitation does not interfere with the free use of the high seas. Any disputes which may arise between States concerning the exploration or exploitation of the continental shelf should be compulsorily submitted to the Permanent Court of Arbitration at the request of any of the parties."

78. Mr. SCELLE drew attention to the general character of his proposal.

79. Mr. LAUTERPACHT doubted whether Mr. Sandström's reference to the benefit of the community of States added anything to the meaning of the words "substantial" or "unreasonable", both of which had been proposed as terms to qualify the word "interference". The proper criterion was the relative importance of the interests involved. Who was to judge whether the community of States benefited more from boring for oil or from fishing? He maintained his view that the word "unreasonable" adequately expressed the Commission's intentions.

80. Mr. SANDSTRÖM withdrew his amendment.

81. Mr. SCELLE said that to use the term "*déraisonnable*" in French would be *déraisonnable,* meaning foolish. The precise and unequivocal word which should be used in the French language was "sensiblement".

82. Mr. PAL submitted the following alternative text for article 6:

"1. The exploration of the continental shelf and the exploitation of its mineral (natural) resources must not result in any unreasonable interference with navigation or fishing.

"2. Subject to the provisions contained in clause 1, the rights of exploration and exploitation of the mineral (natural) resources shall include the right to construct and maintain requisite installations on the continental shelf for the actual exercise of those rights and to establish safety zones at a reasonable distance from and around such installations, where measures necessary for their protection may be taken.

"3. Such installations shall not have the status of islands for the purpose of delimiting the territorial sea.

"4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained."

83. Although it looked somewhat formidable, it followed the lines of the Special Rapporteur's proposal, except in paragraph (2), which opened with the words: "Subject to the provisions contained in clause 1,..." He proposed in that paragraph to confer on coastal States the right to construct and maintain installations on the continental shelf, the limitations of that right being already defined in articles 2, 3 and 4 of the draft rules. He had so framed his proposal as to circumvent the difficulty that article 6, as the Special Rapporteur indicated in his comment, might be interpreted as meaning that coastal States could exercise their right to construct and maintain installations as from the limit of the territorial sea.

84. Further, he had made a separate paragraph of the second sentence of paragraph (*i*) of the original text, on the ground that due notice of the construction of installations should be given in all cases, and not only in those when interference might be caused.

85. Finally, he had deleted the reference to fish production, since he believed that it would be difficult to define such production quantitatively.

86. The CHAIRMAN noted that Mr. Pal used the word "unreasonable" in paragraph 1 of his proposal, whereas Mr. Yepes used the word "unnecessary".

87. Mr. PAL said that he preferred the word "unreasonable" to any other. The word "unnecessary" might raise the question of the absolute necessity of exploring and exploiting the resources of the sea-bed and the subsoil, whereas the only point at issue was that such exploration and exploitation should not interfere with navigation or fishing.

88. Mr. LAUTERPACHT considered that Mr. Pal's re-draft of article 6 was on the whole preferable to the original version, and supported his use of the term "unreasonable" which might be rendered in French by "*d'une manière injustifiée*".

89. He would favour the inclusion of the reference to fish production.

90. Mr. PAL was prepared to accept Mr. Lauterpacht's suggestion.

91. The CHAIRMAN maintained his opposition to the inclusion of such a reference.

92. Mr. LAUTERPACHT suggested that the Commission take Mr. Pal's proposal as a basis for discussion and asked whether Mr. Yepes would be prepared to withdraw the first and second paragraphs of his proposal, while retaining the last, which dealt with the submission of disputes to the International Court of Justice or to an arbitral tribunal.

93. Mr. SCELLE considered that "*exagérément*", which was how "unreasonable" had been rendered in the French text, was far too strong a term. He favoured the term "*sensiblement*", which meant that exploration should not interfere with navigation or fishing constantly and to any appreciable extent. Slight interference would not matter. When shipping interests became

aware that they were being hampered by having to make long and consequently costly detours, then the situation would no longer be tenable. That notion was clearly conveyed by the French word "*sensiblement*".

94. Mr. KOZHEVNIKOV also thought that Mr. Pal's proposal could serve as a basis for article 6. The term which had been used in the original text in the Russian was "substantial" ("*sushchestvenniya*") interference, which was preferable to the new version — "unfounded" ("*neobosnovanniya*"). The latter introduced an element of doubt, and of possible conflicting interpretations. He also favoured the inclusion of the reference to fish production, which was a wholly different problem from that of fishing, and noted that Mr. Pal was prepared to accept Mr. Lauterpacht's view on the subject. Finally, he would suggest that his own proposal relating to article 6, which had already been adopted, should form paragraph 5 of Mr. Pal's proposal.

95. Mr. PAL confirmed that that was how he interpreted the Commission's decision.

96. Mr. CÓRDOVA said that he could accept neither the word "*sensiblement*" nor the original formula "substantial", since both conveyed the idea that installations could not be constructed if they substantially interfered with navigation. It might happen, however, that the interests of navigation or fishing in any given area would be so slight that there was no need to take them into account at all. It was, on the other hand, in the interest of all States to exploit the resources of the sea-bed and subsoil, and a proper balance must be kept between the various interests at stake. For that reason he would prefer the word "unjustifiable".

97. Faris Bey el-KHOURI said that the factor of reason did not come into the picture at all. Reasonableness was a criterion closely connected with the general concept of right or wrong. But the factors which came into play in the present instance were on the one hand the natural conditions and on the other hand prevailing political considerations. The concept of justification was accordingly the correct one to apply.

98. Finally, he would draw Mr. Pal's attention to the fact that he (Faris Bey el-Khouri) would advocate the use of the words "mineral and natural resources"; he was opposed to a choice between mineral and natural.

99. The CHAIRMAN recalled that the Commission had decided to suspend judgement on that point, with the result that the vote on Mr. Pal's proposal would be taken conditionally.

100. Mr. SCELLE said that all difficulties would be resolved if the Commission accepted his proposal for an additional article, together with the third paragraph of Mr. Yepes' proposal, which described methods for dealing with difficulties once they had arisen. As things stood at present, any word was as good as another. But if the Commission accepted the principle of arbitration, it would be for the arbitrators to decide any disputes.

101. Mr. YEPES took a somewhat different view of the problem. He thought the opportunity should be taken to lay down one or two major principles, namely, that navigation should not be hampered, and that humanity should be enabled to profit from the resources of the sea-bed and subsoil. Since, however, the Commission seemed disinclined to accept that view, he would withdraw the first two paragraphs of his proposal and maintain the third.

102. He agreed with Mr. Scelle that "*sensiblement*" was the right word to use. It could, if desired, be amplified by the addition of the words "or in an unjustified manner ("*ou d'une manière injustifiée*"), as proposed by Mr. Lauterpacht.

103. The CHAIRMAN, speaking as a member of the Commission, withdrew his opposition to the inclusion in the first paragraph of the reference to fish production.

104. He would invite the Commission to vote on Mr. Lauterpacht's amendment on that point.

Mr. Lauterpacht's amendment that the words "or in reducing fish production" be added to paragraph 1 of Mr. Pal's proposal was adopted by 11 votes to 2.

105. Mr. CÓRDOVA said that he had voted against the amendment because he considered it unnecessary to refer to fish production.

106. The CHAIRMAN said that, although he personally agreed that the most suitable term would be "*sensiblement*", it would seem that the consensus of opinion tended to favour the use of the word "unjustifiable", which had the merit of being exactly translatable in all the official languages.

107. Mr. PAL agreed.

The proposal that the word "unjustifiable" be substituted for the word "unreasonable" in paragraph 1 of Mr. Pal's proposal was adopted by 11 votes to none, with 2 abstentions.

108. Mr. LAUTERPACHT considered that the purpose of paragraph 3 would be made clearer if the following sentence were added: "Such installations shall not have territorial waters of their own." That would make it clear not only that an installation could not be used as a factor for delimiting the territorial sea, but also that it had no territorial waters of its own.

109. Mr. PAL was prepared to accept Mr. Lauterpacht's suggestion.

110. Mr. FRANÇOIS drew attention to the fact that the point was covered in comment 4 to article 6 (A/CN.4/60, chapter IV). He had, however, no objection to the reference being included in the text itself.

111. Mr. CÓRDOVA suggested that the amendment might be inserted after the word "islands", and read: "and shall not have territorial waters of their own".

112. Mr. ALFARO assumed that the French text would therefore read: "*et n'auront pas des eaux territoriales qui leurs sont propres*".

113. Mr. KOZHEVNIKOV recalled that the Commission would, in due course, have to take a decision as to whether it used the term "territorial sea" or the term "territorial waters". He presumed that the vote on paragraph 3 of article 6 would not be interpreted as affecting that issue.

114. The CHAIRMAN confirmed that that was so.

115. Mr. HSU asked what was the meaning of the last clause of paragraph 3: "for the purpose of delimiting the territorial sea".

116. Mr. LAUTERPACHT explained that the consequences of regarding an installation as an island would be two-fold: first, the delimitation of the territorial waters of the mainland might be affected; secondly, apart from the question of proximity to the mainland, an installation viewed as an island might be considered as having territorial waters of its own. Paragraph 3 was intended to obviate those difficulties.

117. Mr. YEPES considered that the text of paragraph 3 was too far-reaching. It was hardly advisable to contemplate the possibility of the construction of such installations as might become artificial islands. He would therefore abstain from voting on the paragraph.

118. Mr. SPIROPOULOS, speaking in explanation of his vote, said that he would vote against paragraph 3 because, according to international law, there was no doubt whatsoever that only an island, and an island alone, could have the status of an island. A heap of stones could be an island, and it would be subject to international law.

119. Mr. SCELLE agreed with Mr. Lauterpacht. A government which was lacking in good faith might pretend that its installation was an island. It was consequently necessary to state the prohibition in relation to the territorial sea.

120. Mr. CÓRDOVA pointed out that the Commission was concerned with the high seas and not with territorial waters. It was true that an installation might well be the size of an island. The purpose of paragraph 3 was to ensure that an installation should not serve as the starting point for the delimitation of territorial waters. In all other respects, however, an installation must have the same status as an island. In other words, it must come under the jurisdiction of the coastal State. Some jurisdiction must be applicable to an installation; otherwise what would happen if a crime were committed on it? Obviously, that must fall under the jurisdiction of the coastal State. Thus, the sovereignty of the coastal State could be extended to new areas on the high seas.

121. Faris Bey el-KHOURI considered that paragraph 3 was unnecessary. No lawyer, geographer or politician could possibly concede to an installation the status of an island. Everybody knew perfectly well what an island was, and there was no need to direct attention to the issue.

122. Mr. HSU proposed that paragraph 3 be amended by the deletion of the last clause. The text would therefore read: "Such installations shall not have the status of islands." He made his proposal in the light of Mr. Córdova's comments on the difficulties which might arise.

123. Mr. LIANG (Secretary to the Commission) thought that the text would be clearer if it were amended to read: "Such installations shall not be assimilated to islands..."

124. Mr. ALFARO proposed the following amendment: "Such installations shall not have the status of islands and the waters of the safety zones shall not have the character of territorial waters."

125. Mr. CÓRDOVA emphasized that it was essential to define the source of jurisdiction for installations.

126. Mr. FRANÇOIS thought that explicit reference to the jurisdiction of the coastal State was hardly necessary. It might perhaps be included in a comment.

127. He did not agree with Mr. Spiropoulos. The question of artificial islands was highly controversial, and it was essential to state that the installations should not have the status of islands.

128. Mr. ZOUREK drew attention to the fact that, since Mr. Pal had accepted the addition of a fifth paragraph to his proposal, reference thereto should be made in the first clause of paragraph 2.

129. Mr. PAL said that he would not that point.

130. Answering Mr. Hsu, Mr. LAUTERPACHT said that he could not support the suggestion that part of the text of paragraph 3 be deleted.

131. Mr. SCELLE wished to draw the Commission's attention to the fact that it must guard against establishing one juridical system for islands and another for the continental shelf.

132. The CHAIRMAN said that it would obviously be premature to put Mr. Pal's proposal to the vote forthwith. The vote should be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.5 p.m.

202nd MEETING

Thursday, 25 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Article 6 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of paragraph 3 of Mr. Pal's text,[1] which read:

> "Such installations shall not have the status of islands for the purpose of delimiting the territorial sea."

2. Mr. FRANÇOIS (Special Rapporteur) said that the discussion at the previous meeting had shown that most of the members of the Commission were in favour of stating explicitly that, although the coastal State had jurisdiction over installations set up on the continental shelf, such installations would not possess a territorial sea of their own. He therefore proposed the following wording for paragraph 3 of Mr. Pal's text:

> "Such installations, though under the jurisdiction of the coastal State, shall not have the status of islands. They shall have no territorial sea of their own and their presence shall not affect the delimitation of the territorial sea of the coastal State."

3. Mr. PAL accepted the Special Rapporteur's wording.

The Special Rapporteur's amendment was adopted by 9 votes to none, with 3 abstentions.

4. Mr. YEPES said that he had abstained from voting because he regarded the proposed provision as superfluous. It was self-evident that installations would not have the status of islands.

5. Mr. SANDSTRÖM, referring to paragraph 4 of Mr. Pal's text,[2] said that several governments had pointed out that States should give notice before starting to construct installations. He therefore considered that the words "any such installations constructed" should be replaced by the words "the construction of such installations".

6. Mr. SCELLE said that paragraph 4 of Mr. Pal's text was unsatisfactory. He proposed that it be amended to read:

> "The State concerned must give notice of any installations constructed or any places for installations it proposes to construct and must maintain the necessary means of warning of the presence of such installations."
>
> ["*L'état interessé devra donner avis des constructions et plans d'installations qu'il entend faire et entretenir les moyens permanents de signalisation nécessaire.*"]

7. Mr. FRANÇOIS said that he was disturbed by the inclusion of the word "*plans*" in Mr. Scelle's text, which would constitute an entirely new departure by making it obligatory for coastal States intending to construct installations to submit the plans to other States for approval.

8. Mr. KOZHEVNIKOV said that if Mr. Scelle could see his way to withdrawing the reference to "*plans*", his text might be acceptable.

9. Mr. SANDSTRÖM, in support of Mr. Scelle, drew attention to the second sentence in paragraph 2 of the comment on article 6 (A/CN.4/60, chapter IV) which read: "Wherever possible, notification should be given in advance."

10. Mr. SCELLE observed that prevention was better than cure. The advantages of providing against the possibility of disputes were obvious.

11. The CHAIRMAN, speaking in his personal capacity, agreed with Mr. François that Mr. Scelle had introduced a new concept into paragraph 4. It would be going too far to ask coastal States which exercised sovereignty over the continental shelf to submit in advance, to other States, their plans for the construction of installations. Furthermore, even if adopted, such a provision would not prevent States from pursuing their projects.

12. Mr. CÓRDOVA said that the rights of coastal States had already been qualified in paragraph 1. If they were further restricted by a requirement of the kind advocated by Mr. Scelle, disputes would inevitably arise about the construction of installations.

13. Mr. FRANÇOIS asked whether Mr. Scelle would be satisfied with the addition at the end of paragraph 4 of the words, "Wherever possible, notification should be given in advance".

14. Mr. SCELLE replied that such an amendment would not give him entire satisfaction because it would not allay his anxiety about the effect upon navigation and other international interests of allowing the coastal State full freedom of action in the waters above the continental shelf. He also feared that preparations for

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[1] See *supra*, 201st meeting, para 82.

[2] "4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained."

exploiting the natural resources of the shelf might prove more of a hindrance to navigation than the exploitation itself.

15. The CHAIRMAN said that, although he agreed to some extent with the views expressed by Mr. Kozhevnikov and Mr. Córdova, he was also anxious that the interests of the international community should not be threatened. He pointed out to Mr. Scelle that coastal States would not necessarily wish to endanger in any way the principle of freedom of navigation.

16. Mr. YEPES considered that paragraph 4 was unnecessary and too detailed and should be deleted.

17. Mr. SPIROPOULOS said that it had always been the practice of States to give warning of any danger to shipping which might arise from the erection of installations in the sea — the more so as they would be responsible for any accident which might occur. It might, therefore, be possible to follow Mr. Yepes' advice and delete paragraph 4.

18. However, if it were retained, Mr. Scelle's point would surely be covered by the words "due notice".

19. Mr. FRANÇOIS emphatically warned the Commission against following Mr. Yepes' advice. It would be inadmissible to allow States to construct installations without giving due warning, providing danger signals and indicating the position of the installations on maritime charts. A mandatory provision of that kind was absolutely indispensable.

20. Mr. KOZHEVNIKOV said that no one disputed the need for giving due warning of the presence of installations. Paragraph 4 of Mr. Pal's text was perfectly clear, and would suffice for the purpose. The point raised by Mr. Scelle could be dealt with in the comment.

21. Mr. SPIROPOULOS suggested that Mr. Scelle's point might be met by the substitution of the words "the construction of installations" for the words "any such installations constructed", which would ensure that notice was given as soon as erection began.

22. Mr. YEPES, in reply to Mr. François, said that he had never argued that there was no need to give warning of installations. All that he had sought to emphasize was that there was no need for a detailed provision on the matter.

23. Mr. FRANÇOIS said that, in the light of the discussion, he now felt that it would be preferable to leave the text of paragraph 4 as it stood in Mr. Pal's proposal. The point raised by Mr. Scelle could be dealt with in the comment.

24. Mr. LAUTERPACHT and Mr. ALFARO agreed with the Special Rapporteur.

25. The CHAIRMAN put to the vote Mr. Pal's text for paragraph 4.

Mr. Pal's text was adopted by 10 votes to 1, with 2 abstentions.

26. Mr. YEPES said that he had voted against the text, which he regarded as superfluous, for the reasons he had already given.

Article 6 as a whole was adopted unanimously.[3]

Additional article relating to arbitration

27. The CHAIRMAN invited the Commission to consider Mr. Scelle's proposal for an additional article to read:

"A permanent international organ should be empowered to investigate the methods of exploring and exploiting the continental shelf and to make certain that such exploration or exploitation does not interfere with the free use of the high seas. Any disputes which may arise between States concerning the exploration or exploitation of the continental shelf should be compulsorily submitted to the Permanent Court of Arbitration at the request of any of the parties".

28. Mr. YEPES said that he wished to submit an alternative text to read:

"Any dispute concerning the interpretation or application of the provisions of this article shall be decided by the International Court of Justice at the request of one of the parties concerned or by an arbitral tribunal constituted in accordance with the rules for arbitral procedure adopted by the International Law Commission."

29. Mr. SCELLE said that his text had been inspired by article 2 in Part II of the draft rules relating to resources of the sea (A/CN.4/60, chapter IV). The arguments in favour of a provision of that kind on fisheries applied all the more to the exploration and exploitation of the continental shelf.

30. Mr. CÓRDOVA suggested that the first sentence in Mr. Scelle's text was not drafted in a form suitable for incorporation in an article, as it was more in the nature of a recommendation.

31. Mr. ALFARO endorsed the idea underlying Mr. Scelle's text. The protection of the freedom of the seas was indeed a noble aspiration. However, the provision as part of a draft convention should not be drafted as a mere recommendation, but should be cast in the form of an undertaking to arbitrate. He therefore proposed the following text:

"Should a permanent international organ be created with power to investigate the methods of exploring or exploiting the continental shelf and to make certain that such exploration or exploitation does not interfere with the free use of the high seas, any disputes which may arise between States concerning the exploration or exploitation of the continental shelf and its effect on navigation and fishing shall be submitted to such international organ. Disputes of the same nature outside the competence

[3] See however *infra* 205th meeting, para. 69.

of such an organ shall be submitted to the Permanent Court of Arbitration."

If his proposal were rejected, he would vote for Mr. Scelle's text.

32. Mr. SANDSTRÖM asked whether Mr. Scelle envisaged the permanent international organ examining the actual methods of an exploration or exploitation. Surely the situation was not at all analogous with that provided for in article 2 of part II (Resources of the Sea) concerning fisheries (A/CN.4/60, chapter IV)? He would therefore propose the substitution of the words "plans for" for the words "methods of".

33. Mr. LIANG (Secretary to the Commission) said that there was a similarity between the substance of Mr. Scelle's proposal and article 2 of part II. It would be remembered that, before a last minute change, the Commission, at its third session in 1951, had intended in the latter text to designate the United Nations Food and Agriculture Organization as the permanent international body empowered to conduct continuous investigations of the world's fisheries.[4] There was, however, a difference in that FAO was an existing permanent organization, whereas the organ contemplated by Mr. Scelle had to be created. He doubted whether FAO would have jurisdiction over the matters under discussion.

34. Mr. KOZHEVNIKOV said that, though he had not participated in the discussion on the Special Rapporteur's draft at the third session, he supposed that Mr. Scelle's proposal had been prompted by anxiety to safeguard the principle of the freedom of the high seas. But his purpose was achieved by the articles already adopted. Mr. Scelle's text went a very long way, and would result in the creation of a supranational organ which might threaten the interests of States. That would be entirely contrary to international law, the purpose of which was to reconcile the interests of sovereign States. He would therefore vote against the text.

35. Mr. HSU said that he wholeheartedly supported the principles underlying Mr. Scelle's proposal, but could not accept Mr. Sandström's suggestion that the function of the permanent international organ should be limited to reviewing projects for exploration or exploitation. It was conceivable that certain States might lack the technical knowledge to exploit the resources of their continental shelf. They would therefore need the advice and help of an international organ in the matter.

36. Mr. PAL said that as the Commission was virtually creating new rights pertaining to the continental shelf, it would be appropriate to make provision for the settlement of disputes which might arise concerning them. Though he agreed with Mr. Scelle's purpose, he believed the provision should be cast in simpler form and, therefore, proposed the following wording:

"Any disputes between States arising out of or in relation to the exercise of the right of exploration or exploitation of the continental shelf shall be submitted to arbitration (the Permanent Court of Arbitration) at the instance of any of the parties."

37. Mr. SCELLE asked whether Mr. Pal was in favour of the deletion of the first sentence from his (Mr. Scelle's) text.

38. Mr. PAL replied in the affirmative.

39. Mr. CÓRDOVA considered the first sentence in Mr. Scelle's text unnecessary. The second sentence should be acceptable if its application were not restricted solely to disputes concerning fishing or navigation. Other matters connected with the continental shelf might give rise to conflicts between States and should also be submittable to arbitration. If, however, Mr. Scelle's intention was that the permanent international organ should exercise, as it were, police control over coastal States, he could not accept it. The permanent international organ should only intervene if coastal States exceeded their rights as laid down in the rules being drawn up by the Commission.

40. Mr. FRANÇOIS said that he could not agree that Mr. Scelle's proposal was analogous to article 2 of part II. The permanent international body referred to in the latter text was a purely scientific advisory organ. If in the former the functions of the permanent international organ were to be restricted to studying the best methods of protecting the freedom of navigation, the objections it had raised would be largely met.

41. Mr. YEPES was in entire agreement with the principles underlying Mr. Scelle's proposal. There was no reason to fear the limitation it placed upon the exercise of sovereignty by coastal States. The Commission had already stated in its draft Declaration on the Rights and Duties of States that the sovereignty of each State was subject to the supremacy of international law. However, he saw no need for creating a new international organ to exercise functions which might well be discharged by the Economic and Social Council of the United Nations. He therefore proposed an alternative text for that submitted by Mr. Scelle reading:

"The Economic and Social Council, through one of its organs, shall be empowered to investigate the methods of exploring or exploiting the continental shelf and to make certain that such exploration or exploitation does not interfere with the free use of the high seas or with the conservation of the resources of the sea. The Economic and Social Council shall issue the results of these investigations in the form of an advisory opinion."

42. Mr. LAUTERPACHT hoped that the second sentence in Mr. Scelle's text would be accepted subject to certain modifications. He agreed with certain other members of the Commission that it was unnecessary to create a new supranational organ with compulsory jurisdiction over States and therefore proposed the following text for the first sentence:

[4] See *Yearbook of the International Law Commission, 1951*, vol. I, 132nd meeting, para. 59.

"A permanent international organ shall be created for the purpose of making investigations and recommendations concerning the methods of exploring and exploiting the continental shelf and safeguarding the freedom of the seas."

43. Faris Bey el-KHOURI pointed out that Mr. Scelle's text could not be interpreted to mean that a new organ must necessarily be created. In his own view, existing organs of the General Assembly were competent to investigate disputes connected with the continental shelf.

44. He could not support the second sentence in Mr. Scelle's text because it provided for compulsory arbitration. He believed that States should be free to choose the method for the settlement of the dispute according to the provisions of article 33 of the Charter of the United Nations.

45. The CHAIRMAN, speaking as a member of the Commission, said that he could not support any of the proposals before the Commission, from a conviction that States should be free to exploit the continental shelf without its methods being subject to control by a permanent international organ. Furthermore, it would be extremely difficult to select any international organ for the purpose, since it would have to be highly qualified both on the scientific and the legal side. He did not share Mr. Scelle's view regarding the predatory instinct of States and preferred to act in the belief that they would not abuse their rights.

46. Mr. SANDSTRÖM said that, taking into account the points made by the Special Rapporteur, he had prepared an alternative text for the first sentence of Mr. Scelle's proposal, reading:

"A permanent international organ shall be empowered to give its opinion, at the request of a State concerned, on the question whether intended exploration or exploitation of the continental shelf will interfere with the free use of the high seas."

47. Mr. SCELLE, replying to the points made concerning his text, said that he had never suggested that the permanent international organ should carry out police functions of supervision over the exploration and exploitation of the continental shelf.

48. Faris Bey el-Khouri had been perfectly right in thinking that he had not envisaged the creation of a new organ. The powers conferred upon the Economic and Social Council under the Charter would enable it to exercise the functions he had in mind. It could, for instance, set up a commission for the purpose of making general recommendations on the exploitation of the continental shelf so as to ensure that there was no interference with navigation and fishing. The commission would be of a technical character, and not dissimilar to other functional commissions of the Council.

49. He would probably be able to accept Mr. Sandström's and Mr. Alfaro's proposals, though both of them went somewhat further than his own.

50. In answer to Mr. Kozhevnikov, he said that the freedom of the seas must be safeguarded. It was also essential to make every effort to obviate the possibility of international disputes about the continental shelf. Such disputes could be prevented if a commission of the kind he had in mind were set up.

51. Mr. HSU considered that the second clause of the first sentence of Mr. Scelle's proposal really belonged to the second sentence, being relevant to the problem of the application of the principle of the freedom of the seas and to such disputes as might arise between States concerning the exploration or exploitation of the continental shelf.

52. The first problem, however, was that of setting up an international organ. He believed that what the Commission really had in mind was a body functioning on lines similar to those of the specialized agencies which worked full time and did carry out administrative work. The commissions which were created by and functioned under the aegis of the Economic and Social Council generally dealt with principles, and performed specific tasks which were assigned to them. If the problem were viewed from that angle, Mr. Sandström's proposal was perhaps too restrictive.

53. Mr. ALFARO said that Mr. Scelle had rightly expressed the opinion that his (Mr. Alfaro's) proposal went farther than his own (Mr. Scelle's). The reason was that he believed in the principle of promoting international co-operation. The sense of interdependence was stronger today than the doctrine of sovereignty, which was being daily curtailed. Indeed, even membership of the United Nations implied some limitation on national sovereignty. He was in favour of the international supervision of and control over the continental shelf, and would draw the attention of members to a chapter in Mouton's work *The Continental Shelf* (The Hague, 1952, entitled: "Is international control (supervision) possible or desirable"? (p. 309). It was stated in that chapter that at the Conference of the International Law Association held at Copenhagen in 1950 Lapradelle had expressed his views on the continental shelf as follows:

"The control of and jurisdiction over all maritime installations should be vested in an international organization in which all nations should be able to be represented, either directly or indirectly". [translation]

54. Mouton expressed views on identical lines. Whatever the final form given to Mr. Scelle's proposal, he would vote in favour of the principle of international supervision and the principle of the peaceful settlement of disputes concerning the continental shelf.

55. Mr. SPIROPOULOS wished to comment on the statement that the Economic and Social Council was competent to create commissions or organs at will. He failed to see how the relevant articles of the Charter could be interpreted in that sense. The Economic and Social Council was empowered to prepare draft conventions for submission to the General Assembly, but it could not create commissions, attribute powers to them and impose them upon States. Current practice within the United Nations supported that view.

56. Mr. SCELLE disagreed with Mr. Spiropoulos, and cited the Commission on Human Rights as an example of a commission created by the Economic and Social Council. The latter was ultimately dependent on the General Assembly, but there could be no question of its competence to create commissions.

57. Mr. SPIROPOULOS said that all the General Assembly could do was to draft a text and submit it to governments for their acceptance. It could impose nothing on governments.

58. Mr. SCELLE protested against such an interpretation, and cited paragraph 1 of Article 62 of the Charter in support of his view. It went without saying that the Economic and Social Council could not impose any decisions taken by any commissions it might create.

59. Mr. KOZHEVNIKOV wished to amplify his preceding comments. The arguments in favour of creating an international organ had not convinced him. The conception that the proposed organ should have wide powers of investigation, control and supervision, and that it should be competent to lay down certain rules, was fundamentally a faulty one. Its advocates started out from a false premise, namely, that no trust could be placed in the good will of States. He would submit that it was wrong to build up a system of international law on such a premise. His view was inspired by faith in the good will of States and in a reasonable correlation between the interests of sovereignty and the interests of international co-operation. He failed to see how any agreement could be secured unless good will were assumed. Every question was capable of solution on the basis of mutual agreement between States. That was why it was wrong to try and impose a dictatorial organ upon peace and good will. It was possible to set up a body for consultation and research, but it was unnecessary, since the Charter provided full opportunities for such methods. He agreed with Faris Bey el-Khouri on that point.

60. Mr. CÓRDOVA asked whether Mr. Yepes would be prepared to include the word "unjustifiably" after the word "interfere" in the fourth line of his proposal.

61. Mr. YEPES accepted Mr. Córdova's suggestion. Commenting on his own proposal, he said that he took the view that the Economic and Social Council was the proper organ to institute inquiries and to make certain that there was no interference with the freedom of the seas or with the conservation of resources. He supported Mr. François' conception that the proposed organ should merely function in a consultative capacity and offered his proposal as a synthesis of the views expressed in the course of the debate.

62. Mr. KOZHEVNIKOV considered that it was difficult for the Commission to vote on particular proposals before it had taken a decision on the issue of principle. Should an international organ be set up or not? That was the first question that the Commission must answer.

63. Mr. FRANÇOIS was not in favour of voting on principles. In the present instance he failed to see how the Commission could vote on whether an international organ should or should not be set up, since that decision must be taken in the light of what the functions and competence of that organ were to be. The Commission must vote on the basis of concrete proposals, taking Mr. Yepes' first. For his part, he preferred Mr. Lauterpacht's proposal because it was more general. It was the better part of wisdom to leave the General Assembly a free hand, the more so as certain doubts had been expressed with regard to the competence of the Economic and Social Council. Could Mr. Yepes not withdraw his proposal in favour of Mr. Lauterpacht's?

64. Mr. LIANG (Secretary to the Commission) noted that both Mr. Lauterpacht's and Mr. Sandström's proposals referred to a "permanent international organ". At the same time, article 2 of part II (A/CN.4/60, chapter IV) clearly fell within the terms of reference of FAO. But was it really necessary to have a permanent international organ merely for purposes of investigation?

65. Mr. SANDSTRÖM said that he would be prepared to delete the word "permanent".

66. Mr. KOZHEVNIKOV did not agree with the interpretation which Mr. François had placed on his proposal that a vote should be taken on the principle. The issue of the competence of various United Nations bodies was of secondary importance. His view was that no international organ should be set up.

67. The CHAIRMAN pointed out that he was averse to giving rulings, and preferred the Commission to make its attitude clear on such proposals as that made by Mr. Kozhevnikov.

68. He also agreed with Mr. Spiropoulos that neither the Economic and Social Council nor the General Assembly could impose an international organ on governments. The creation of a body with such wide powers as Mr. Scelle envisaged would place it outside the framework of current international law.

69. Finally, he did not agree with the views expressed regarding the curtailment of sovereignty. Limitations of sovereignty were voluntarily accepted by States; there, again, the factor of good will came into play.

70. Mr. CÓRDOVA doubted whether the Commission could address to the General Assembly a recommendation which was more of a political than of a juridical nature. Actually, the Commission proposed to suggest to governments the creation of a body which would have powers of policing. That type of recommendation had nothing whatsoever to do with the codification of international law or its progress and development. According to the Charter, the Economic and Social Council was competent to make recommendations of that type, but the International Law Commission was not.

71. The CHAIRMAN stated that the Commission must vote on Mr. Lauterpacht's, Mr. Sandström's and

Mr. Yepes' amendments to Mr. Scelle's proposal. The last-named was the farthest removed from the original.

72. Mr. SCELLE said that he wholly agreed with Mr. Lauterpacht's proposal, which was surely of such a character as to allay Mr. Kozhevnikov's apprehensions. The proposed permanent organ would study questions in the abstract, and would give considered opinions, acting as a consultative body. It was not intended to create an organ which would be a kind of police court.

73. It was possible to go further than Mr. Lauterpacht had gone, but his proposal offered an acceptable basis.

74. Mr. LAUTERPACHT, answering the Secretary, said that his proposal referred to a permanent organ, because the latter should study scientifically the technical questions arising with regard to the continental shelf, research being aimed at eliminating and preventing possible friction between the owners of adjoining continental shelves. There was no reason why the proposed organ should be expensive, but surely the discussion had shown that it was necessary.

75. Mr. YEPES supported Mr. Kozhevnikov's proposal that a vote should be taken on the principle.

76. Answering Mr. François, he said that he had related his proposal to the Economic and Social Council for the simple reason that that was the appropriate existing organ. There was consequently no need to set up another body. Furthermore, there was also FAO, which was competent to deal with certain questions arising with regard to the continental shelf.

77. Mr. SPIROPOULOS pointed out that an organ could be permanent and yet not work full time. That, indeed, was how the International Court of Justice functioned. Unless the life of an organ were expressly limited, it was permanent even if it only met when necessary. He offered those comments for the sake of clarification. He had no views on the question as such.

78. Mr. KOZHEVNIKOV having reiterated his proposal that the Commission should first take a vote on the principle,

79. Mr. LAUTERPACHT expressed the view that in order to prevent future difficulties the Commission should formally decide not to vote on principles but only on concrete proposals.

80. Faris Bey el-KHOURI said that the question of principle was in any case contained in Mr. Lauterpacht's proposal. Those who voted against it would vote against the principle.

81. Mr. KOZHEVNIKOV strongly objected to Mr. Lauterpacht's suggestion, and held that it was impossible to prevent the Commission from voting on principles. After all, the Commission was supposed to be formulating principles. Mr. Lauterpacht's suggestion was entirely contrary to democratic procedure.

82. Mr. HSU asked the Chairman to invite the Commission to decide whether it wished to vote on the issue of principle in accordance with Mr. Kozhevnikov's motion.

83. Mr. SPIROPOULOS said that, according to the Commission's rules of procedure, it was usual for votes to be taken on concrete proposals incorporated in documents. But the possibility of voting on principles was not expressly precluded. Indeed, he could himself recall at least two occasions when a vote on principle had been taken in the Sixth (Legal) Committee of the General Assembly. If the Chairman did not wish to give a ruling, he should consult the Commission.

84. Mr. PAL said that even if the Commission agreed to vote on an issue of principle, that principle must first be formulated.

85. The CHAIRMAN invited the Commission to vote on Mr. Kozhevnikov's proposal that the issue of principle should be voted upon before the several proposals before the meeting were put to the vote.

Mr. Kozhevnikov's proposal was rejected by 8 votes to 4, with 1 abstention.

86. Mr. SCELLE asked Mr. Lauterpacht whether he would be prepared to add the words "by the Economic and Social Council" after the word "created" in order to meet Mr. Yepes' point.

87. Mr. LAUTERPACHT said that it would be difficult for him to accept such an amendment.

88. Mr. LIANG (Secretary to the Commission) drew Mr. Scelle's attention to Article 66, paragraph 3, of the Charter, which read in part as follows:

> "It [the Economic and Social Council] shall perform such other functions... as may be assigned to it by the General Assembly".

If the words "by the Economic and Social Council" were not included in Mr. Lauterpacht's proposal, a request by the International Law Commission to the General Assembly would suffice. The proposal, however, was perhaps worded somewhat peremptorily.

Mr. Yepes' proposal was rejected by 8 votes to 1, with 3 abstentions.

89. Faris Bey el-KHOURI said that he would vote against Mr. Lauterpacht's proposal. The text was not sufficiently clear. Would a State have to secure the permission of the proposed organ before it started exploring and exploiting the continental shelf? Viewing the problem from the other angle, would the proposed organ investigate and recommend on its own initiative or would it wait until it was requested to do so?

90. Mr. CÓRDOVA said that he would vote against Mr. Lauterpacht's proposal, since the Commission was neither competent to create an organ nor to address to the General Assembly a recommendation which was not of a juridical nature.

91. Mr. SANDSTRÖM assumed that the recommendation would be addressed to governments.

92. Mr. CÓRDOVA emphasized that, in his view, the proposed recommendation fell entirely outside the framework of the draft on the continental shelf.

93. Mr. YEPES said that he would vote in favour of Mr. Lauterpacht's proposal, because it expressed the principles which Mr. Scelle advocated, but proposed that it be amended by the inclusion of the words " and the conservation of the resources of the sea " after the words " freedom of the seas ".

Mr. Lauterpacht's proposal was rejected by 7 votes to 6.

Mr. Sandström's proposal was rejected by 7 votes to 6.

94. The CHAIRMAN said that the vote on Mr. Scelle's proposal would be deferred until the next meeting.

The meeting rose at 1 p.m.

203rd MEETING

Friday, 26 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur : Mr. H. LAUTERPACHT.

Present :

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

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

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

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

PART I : CONTINENTAL SHELF

Additional article relating to arbitration (continued)

1. Mr. PAL proposed that the second sentence in Mr. Scelle's text [1] be replaced by the following words :

" Any disputes between States arising out of or in relation to the exercise of the right of exploration or exploitation of the continental shelf, shall be submitted to arbitration or judicial settlement at the instance of any of the parties."

2. Such a provision would apply to all disputes, of whatever nature, and should remove the difficulties mentioned during the discussion.

3. Mr. YEPES asked whether there was any difference between Mr. Pal's proposal and his own text, in which disputes concerning the interpretation or application of the provisions of the draft were to be decided by the International Court of Justice or by an arbitral tribunal constituted in accordance with the rules adopted by the Commission.

4. Mr. SPIROPOULOS replied in the affirmative. In the first place, Mr. Yepes' text referred to disputes, whereas Mr. Pal's was restricted to disputes connected with the exploration or exploitation of the continental shelf. Secondly, the former mentioned an arbitral tribunal constituted according to the rules adopted by the Commission, whereas the latter spoke of arbitration in general.

5. Mr. KOZHEVNIKOV said that, without seeing Mr. Pal's text in writing, it would be difficult for him to give his considered opinion. On first hearing, however, it seemed that it should be rendered more flexible by the substitution of the words " conciliation procedure " for the words " arbitration or judicial settlement ", and by the deletion of the words " any of " from before the words " the parties ".

6. Mr. LAUTERPACHT said that the articles of the draft on the continental shelf constituted a significant step, which might be interpreted in some quarters as potential interference with the freedom of the seas and other important principles of international law. Certain safeguards had, it was true, been provided. However, the Commission and governments could only be assured that the principle of the freedom of the seas had not been abandoned if provisions were inserted to give effect to those safeguards. He therefore considered the provision under consideration to be an essential part of the draft.

7. He hoped that the Commission would not accept Mr. Kozhevnikov's amendment, which its author had described as introducing a measure of elasticity into Mr. Pal's text. In reality, the result of the adoption of that amendment would be to nullify the purpose of the proposal, which was the final settlement of disputes. Conciliation would offer no solution seeing that the procedure of conciliation did not result in a finding binding the parties. It could not prevent unrestricted unilateral action by States.

[1] See *supra*, 202nd meeting, para. 27.

8. The first difference between Mr. Pal's and Mr. Yepes' texts mentioned by Mr. Spiropoulos was an obvious one. Moreover, there were disputes that might not be covered by either of the texts. For instance, Mr. Yepes had not envisaged the possibility of disputes arising between two adjacent States, as a result of the uneconomic and wasteful exploitation by one of them of a common oil deposit in their respective continental shelves. There was a whole range of possibilities that would not be covered by Mr. Pal's wording, which might, therefore, be extended by the substitution of the words "concerning the exploration or exploitation of the continental shelf or concerning the interpretation of these articles" for the words "arising out of... continental shelf".

9. Mr. KOZHEVNIKOV regretted that a fundamental cleavage of opinion should have emerged which had dashed his first hope that a large measure of agreement might be reached on the article under consideration. He could not accept Mr. Lauterpacht's contention that his amendment was contrary to the purpose of Mr. Pal's draft. Surely the Commission had already rejected the notion that States would be under an obligation to submit disputes to a definite procedure for settlement. To impose methods for the peaceful settlement of disputes was a veritable contradiction in terms. He had not proposed anything new in his amendment, which had been inspired by the wise addition to article 7 suggested by the Special Rapporteur in his fourth report.

10. Mr. FRANÇOIS (Special Rapporteur) remained a faithful protagonist of arbitration, but doubted whether the Commission would be wise to adopt either Mr. Yepes' or Mr. Scelle's text. Its task was the codification of international law, not its practical application. What the Commission had to do was to decide what should be the rule in any particular instance. To introduce a clause at every stage in the Commission's work on specific texts, concerning the obligatory submission of disputes to arbitration would be outside its competence and would diminish the possibility of acceptance by governments of the rules of law it was concerned to codify. That consideration must of necessity be a guiding one. He did not wish in any sense to argue that such a clause was always inappropriate. Indeed, it had its proper place in cases where it was impossible to draft rules with any precision, and when the special circumstances of each case had to be taken into account. In such matters the Commission had to convey its responsibility to the arbitral tribunal, which would then begin to fulfil legislative functions. He fully recognized, for instance, that there are certain articles in the draft, and notably articles 2 and 7, dealing with very special matters, whose scope was so indefinite that the parties must accept the obligation to submit to arbitration any dispute about their interpretation or application.

11. He could not, however, accept a general clause on compulsory arbitration applicable to the whole draft, particularly as the draft had now been made more precise. There was nothing, on the other hand, to prevent the Commission from stating in the commentary that if many States felt that it would be impossible to accept the draft in the form of a convention without such provision for compulsory arbitration, it could be included, together with an article allowing for reservations on that point.

12. Mr. Faris Bey el-KHOURI was unable to agree with Mr. Lauterpacht's reading of the effect on Mr. Pal's text of Mr. Kozhevnikov's amendment. As he had already stated at the previous meeting (para. 44), the parties should be free to choose any of the methods, including "other peaceful means of their own choice" for the settlement of their disputes, enumerated in Article 33 of the Charter of the United Nations. If they failed to agree after one or more of those methods had been tried, their dispute would probably become a threat to the maintenance of international peace and security, and would accordingly be brought within the orbit of the Security Council. He was convinced that the freedom of choice of the parties as to the method of settlement to be used must be safeguarded.

13. Mr. SPIROPOULOS said that as a jurist who was at the same time a citizen of the small State which had been the cradle of arbitration, he was naturally an adherent of that procedure. But, as the Special Rapporteur had said, the task of the Commission was to codify international law and to establish rules governing the relations of States. Surely it could not be argued that in each case provision must be made for compulsory arbitration. He therefore asked the Commission to consider whether it would be wise to accept so general a provision as that envisaged by Mr. Yepes. If analogous clauses were included in every convention, States would be hesitant to ratify them, and the practical application of the rules codified by the Commission would thereby be hampered.

14. The Commission had already adopted a general draft on arbitral procedure. If accepted by States, the whole problem facing the Commission at the present moment would be solved, since all disputes would be submittable to arbitration. For the special instances referred to by the Special Rapporteur, where no general rule could be devised for technical reasons, special provision could be made for arbitration of limited scope.

15. To reinforce his argument, he pointed out that there would be nothing to prevent States from adding a general clause on compulsory arbitration to the draft if it finally took the form of a convention. At the present stage, however, the Commission was not in a position to foresee the ultimate fate of the text. If the General Assembly went no further than to take note of it, a general arbitral clause would be totally ineffective. For those reasons he was opposed to the several proposals before the Commission.

16. Mr. LIANG (Secretary to the Commission) referring to the second sentence in Mr. Scelle's draft, said that there could be no doubt that it would be desirable to have a general article at the end of part I of the draft concerning the interpretation of the articles and the settlement of disputes arising therefrom. The

question was whether the provision should apply to all articles, or only to those concerning the exploration and exploitation of the continental shelf. He did not consider it inappropriate to include such a clause, since any legal text, whether codifying or developing existing rules, must specify some procedure for the settlement of disputes. That was all the more true of a draft on the continental shelf, since there was very little customary law on it. In that connexion he agreed with Lord Asquith's view (A/CN.4/60, mimeographed English text, p. 52; printed French text, No. 111), that the Commission's work in the field was more in the nature of progressive development of law than its codification. A general clause for compulsory arbitration would, moreover, ensure further development by leading to a whole series of arbitral decisions. Without the creation of such case law, the Commission's texts would never pass beyond the theoretical stage.

17. He added that the words "to the Permanent Court... of any of the parties" in Mr. Scelle's text were not sufficiently precise. Moreover, the Permanent Court of Arbitration was merely a panel, and not a judicial body. Those words might therefore be replaced by the words "to a tribunal to be established according to the provisions of The Hague Convention of 1907."

18. As a matter of procedure, he suggested that as certain amendments to Mr. Scelle's first sentence had been voted on at the previous meeting, that text itself should now be put to the vote.

19. Mr. SCELLE withdrew his proposal.

20. The CHAIRMAN said that after the amendments to Mr. Scelle's proposal had been put to the vote at the previous meeting (paras. 88 and 93), he had informally sounded the Commission as to whether the first sentence in Mr. Scelle's text should be voted on, and had concluded that no one thought that necessary. He could not therefore be charged with a contravention of rule 129 of the rules of procedure of the General Assembly.

21. Mr. HSU said that he would vote in favour of Mr. Pal's text since, without such a provision, the draft would be incomplete. He shared the Secretary's views about the Commission's functions and felt that, inasmuch as the grant to coastal States of sovereignty over the continental shelf was a very considerable development in international law, a provision on compulsory arbitration could not be regarded as an inadmissible imposition upon States. Moreover, any decision taken by the Commission in the matter would not be final, and the General Assembly could always jettison the provision. From a procedural point of view, therefore, there would be no danger in including such an article.

22. He could not agree with Faris Bey el-Khouri that the parties should be left free to choose the method for the settlement of the dispute, since any procedure which was not a judicial one would be subject to abuse. Conciliation was often merely another word for appeasement or surrender.

23. Mr. Spiropoulos's claim that it would be unwise to have a general provision on compulsory arbitration was arguable. In his own view, it would be unwise to omit it.

24. Mr. LAUTERPACHT said that the issue with which the Commission was faced had inspired a debate on a very high level which, he hoped, would be maintained. He regretted that much of what he had to say would conflict with the views of the Special Rapporteur, with his unrivalled knowledge of the subject. Mr. François had, on the grounds that the Commission was concerned with codification, expressed doubts about the wisdom of including a general clause on compulsory arbitration. However, the General Rapporteur had submitted that part of the Commission's work on the subject was to formulate new rules of law. The Commission should ponder carefully his argument that it was not concerned with the practical application of the rules it codified. Surely, when preparing the draft on arbitral procedure, the Commission's main purpose had been to give concrete form to a principle in order to ensure its practical application. He would suggest to the Special Rapporteur that the provision under consideration was typical of most general international conventions. Mr. François, who had attended the Conference for the Codification of International Law held at The Hague in 1930, would remember that most of the texts relating to technical matters adopted by it had contained a provision for the judicial settlement of disputes on interpretation and application. Was the Commission to be first in departing from that practice? Was it to lead the way in the direction of regression? Mr. Spiropoulos' argument that the draft on the régime of the high seas was not a draft convention was not convincing. Unless the draft embodied something which was eventually to become a convention, namely, a statement of binding rules, it had little purpose. The Commission was striving to achieve as complete and workable a statement of law as possible. Without a general provision of the type under consideration the text would be both dangerous and incomplete.

25. Mr. Spiropoulos had claimed that the inclusion of such a provision would increase the reluctance of governments to ratify. But there was substance in the view that the fears of many governments that the draft might weaken the principle of freedom of the seas would be allayed if the essential safeguard contemplated in the additional article were included. It was all the more necessary inasmuch as the draft was vague in almost every detail. Who, for instance, was to interpret the meaning of the words "unreasonable interference"? Mr. Córdova's interpretation had been particularly illuminating, because it had confirmed his particular concept of the nature of the sovereignty exercised by the coastal State over the continental shelf. In the opinion of other members, however, those words constituted a limitation on the exercise of sovereignty.

26. Article 7 was another example. Though it appeared to lay down clear and definite rules on the delimitation of the continental shelf, yet the Special Rapporteur had found it necessary to provide for the submission of disputes to arbitration.

27. Faris Bey el-Khouri had placed his views and those of Mr. Kozhevnikov in their proper perspective by pointing out that if the parties were unable to agree, the dispute would come before the Security Council. Experience had shown that no final settlement could be anticipated from that procedure, which was hampered by the rule of unanimity. Faris Bey el-Khouri had really succeeded in strengthening the thesis that a provision for the settlement of disputes was indispensable.

28. Mr. CÓRDOVA believed in arbitration as a means of resolving disputes between States and of assuring the principle of equality. He therefore felt that great progress would be made if the Commission now decided that all disputes concerning the continental shelf should be submitted to arbitration. The more so since the Commission was legislating rather than codifying, and could not, therefore, precisely foresee how the rules could be applied. In the absence of a provision on compulsory arbitration, it was doubtful whether disputes would ever be settled. If the Commission were properly to discharge its tasks of developing international law, it must not only state what the rules were in any particular case, but also indicate the means by which they were to be applied. He would, therefore, vote in favour of Mr. Pal's text.

29. Mr. ALFARO said that he would vote in favour of Mr. Pal's text because he considered it appropriate to include a general clause on arbitration in the draft. Any law or treaty must provide for the effective application of its provisions. Disputes about the continental shelf would have to be settled by arbitration or judicial procedure, since, from the very nature of things, the other methods enumerated in Article 33 of the Charter were not likely to suceed. Governments were not inherently unjust or unfair, but were unable to resist the human failing of always regarding themselves as in the right. Some effective way of judging between two parties in dispute had therefore to be found.

30. The Commission was making its contribution towards the creation of a new and peaceful world, and must, to that end, ensure that the reign of law prevailed. The draft on the régime of the high seas dealt with vital economic interests. It was therefore essential that it contain a provision which would make the rules effective.

31. In answer to Mr. Spiropoulos's argument that such a clause might prevent governments from accepting the draft, he pointed out that if it were incorporated in a convention, States would always have the possibility of making reservations.

32. Mr. SPIROPOULOS said that is was quite mistaken to argue that rules drafted for the purpose of the progressive development of international law would not be applied in the absence of a general provision about the settlement of disputes. No provision of such a procedural nature, moreover, existed in any civil code, or in the texts adopted by the Conference for the Codification of International Law or in the Convention respecting the laws and customs of war on land of 1907. The question whether the rules were new or not was irrelevant, since in any event they would be applied.

33. In order to refute Mr. Lauterpacht's affirmation that the text was a draft convention, he would draw attention to article 23 of the Commission's Statute which read:

> "1. The Commission may recommend to the General Assembly:
>
> "(*a*) To take no action, the report having already been published;
>
> "(*b*) To take note of or adopt the report by resolution;
>
> "(*c*) To recommend the draft to Members with a view to the conclusion of a convention;
>
> "(*d*) To convoke a conference to conclude a convention.
>
> "2. Whenever it deems desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting."

34. Thus the General Assembly would have to decide what was to be done with the text on the régime of the high seas. If he were a delegate at a conference called for the purpose of drafting a convention on the basis of that text he would support the inclusion of a general clause stipulating the procedure to be followed for the settlement of disputes, but he could not agree that that could be fittingly done by the Commission itself, which was a body of experts with certain well-defined functions.

35. Another consideration which should be taken into account was that the inclusion of a general provision on the settlement of disputes would in all probability reduce the number of members who would be prepared to vote in favour of the draft.

36. Mr. FRANÇOIS also felt that the Commission as a whole would be gratified by a discussion which had been held on such a high level, and which had touched upon the fundamental issues of its work.

37. Mr. Lauterpacht, arguing that the application of law did concern the Commission, had mentioned the draft on arbitral procedure. In that case, however, the Commission had been requested to codify the methods of applying arbitral procedure. It was, generally speaking, not its task to prepare conventions, and he would remind Mr. Lauterpacht of the views expressed by Sir Cecil Hurst, who had played a leading role in the setting up of the Commission.

38. Sir Cecil Hurst's view had been that the codification of international law had reached an *impasse*, because all the work being done was in the form of conventions which required accession and ratification by Governments. Sir Cecil had suggested the setting up of a body of such high juridical standing as would confer on it decisive influence and enable it to do authoritative work, so that in due course the international community would not need to depend entirely on rules framed in conventional form. That was an important aspect, which must always be kept in mind,

and was the reason why he deprecated the General Assembly's tendency to treat the International Law Commission as just another body of experts. The Commission, which indeed had been created by the General Assembly, was more than that. It was a group of specialists of recognized standing whose decisions had weight in virtue of the personal authority of the members.

39. The Commission had not prepared a convention on the continental shelf. Had it done so, article 2 on the resources of the sea would have been couched in wholly different terms. The Commission expressed its opinions, and need not provide rules of application. That was a task which could be undertaken by the General Assembly. But in cases where there was uncertainty about existing rules, such uncertainty must be provided for. In his view, there was no uncertainty or lack of precision in the rules on the continental shelf. Certainly there were debatable points, as Mr. Lauterpacht had said. The Commission would never at any time be able to formulate rules which would not be debatable. But if that premise were made the starting point for codification, provision for arbitral procedure would have to be made in every subject. He had accepted the view of the experts that the rules applicable to the continental shelf were not capable of a single interpretation or of a uniform solution, and that they must be complemented by decisions, the character of which must depend on the circumstances of each particular case. It was for that reason that he had made arbitration compulsory in article 7, but he did not consider that a general provision for compulsory arbitration was absolutely essential to the draft.

40. Mr. YEPES considered that Mr. Pal's proposal was too limited, since disputes involving interpretation were as likely to arise as disputes related to the exercise of the right of exploration or exploitation. Would Mr. Pal accept the inclusion of a reference to that point in his text.

41. As to the question whether the draft constituted a convention in preparatory form or simply a declaration of principles, he would submit that that did not really matter, since the results would ultimately be the same. States would only accept principles in the form of a convention, and that was why principles should be so stated as to be acceptable to governments. He believed that the methods he proposed for the solution of disputes would prove acceptable.

42. Mr. Spiropoulos had very ably challenged the advocates of a general clause on the settlement of disputes, and had reminded members that Greece had served as the cradle of philosophy as well as of arbitration. He would, however, remind Mr. Spiropoulos that Greece was also the home of sophistry, and it was sophistry that Mr. Spiropoulos had offered the Commission when he had spoken of the dangers of inserting the proposed article and of the apprehensions to which it might give rise. He (Mr. Yepes), on the contrary, was convinced that a number of States would decline to accept the proposals unless they were accompanied by a method for solving disputes. The principles were being formulated for the first time; without means of settling disputes they would have no significance. It was simple caution to forestall enquiries from governments as to how they were to settle disputes, by prescribing methods therefor. He must insist, therefore, on the inclusion of the additional article.

43. The Secretary had stated that there was no customary law on the continental shelf. In his opinion, customary law did exist, although it did not respect traditional rules. Customary law was in the process of formation. Thus, the United Kingdom and Venezuela had shared the continental shelf between the mainland and the island of Trinidad. Thus, too, the Truman proclamation of 1945, the proclamations made by a number of Latin-American States and by the Arab States in respect of sovereignty over continental shelves, had created international customary law. It was true that in the formation of that customary law on the continental shelf no account had been taken of *diuturnitas* which some publicists regarded as a necessary condition for the existence of a customary law. But they were dealing with an exceptional case and *diuturnitas* was not absolutely essential provided they observed the principle of *opinio juris sive necessitatis*.

44. It had been argued that arbitral procedure and judicial settlement should be abandoned in favour of conciliation. He was always in favour of conciliation, which happened to be an American conception, but conciliation was a preliminary stage in the settlement of a dispute. No obligation was involved in conciliation, and unless an obligation were imposed the Commission would have achieved nothing. The next step on from conciliation was arbitration. In the Pact of Bogotá, conciliation was obligatory, but if it failed, arbitral procedure was also imposed as an obligation.

45. He would be prepared to accept the principle of conciliation provided that Mr. Kozhevnikov would accept arbitration, once conciliation had failed.

46. Mr. KOZHEVNIKOV wished to offer some comments on the nature of the Commission's work in relation to the problem under discussion. Surely the Commission's aim was to prepare texts in such a manner as to render them acceptable to the greatest number of States. The criterion of the effectiveness of the Commission's work was the attitude of governments towards it. The Commission was not working *in vacuo*, and was not engaged on pure research. It was preparing standards for governments and endeavouring to secure the development of international law. The members of the Commission were not law-givers, but they must help to make international relations more normal. That was why it was necessary to avoid any action likely to frustrate that aim. The Commission's texts must ultimately be applicable in practical life. If they were unacceptable, they would serve no purpose. He was convinced that compulsory arbitration would make it difficult for many governments to accept the draft on the continental shelf, with the result that all the work done on it would be wasted. And surely the Commis-

sion's authority would only be enhanced if its work led to concrete results and promoted peaceful relations between States.

47. It was for those reasons that he was insisting on the adoption of a more flexible formula.

48. Faris Bey el-KHOURI wished to propose the following amendment to Mr. Pal's proposal:

> "Any disputes between States arising out of or in relation to the continental shelf shall be settled by arbitration or by any other peaceful means of the choice of the parties".

49. The purpose of that amendment was to widen the scope of Mr. Pal's proposal in order to cover not only disputes arising from the exercise of the right of exploration or exploitation, but all other types of dispute, such as, for instance, those which might arise under article 7. Moreover, he considered that the method of settling disputes should be left to the discretion of States. That was why he had included the words "or by any other peaceful means of the choice of the parties". Why should arbitration be insisted upon? If States chose some other method, so much the better. He hoped that Mr. Pal would be able to accept his amendment, which he would then allow Mr. Pal to make his own. Otherwise he would maintain it himself.

50. The CHAIRMAN, speaking as a member of the Commission, said that the argument did not hinge on the question of arbitral procedure itself. Everybody was in favour of arbitration. Indeed, if it were thought in his own country that he was opposed to arbitration his career would be ruined. The question was whether the principle should be included in the present draft. Despite all the eloquence displayed, he was still not prepared to dissociate himself from the Special Rapporteur.

51. Mr. PAL said he hesitated to speak on the general issue after so many brilliant interventions.

52. The first point that he must, however, make was that the proposal which was attributed to him was really Mr. Scelle's.[2] He had taken the second part of Mr. Scelle's original proposal and slightly changed its drafting. Thus, for instance, he referred to the "exercise of the right"; and he had used the words "arising out of". But the substance of the proposal was Mr. Scelle's, and should be expressly associated with his name. He trusted that the Commission would be clearly aware of that and he would ask Mr. Scelle to accept his verbal changes and make the proposal his own.

53. As to the questions which had been raised, Mr. Spiropoulos had argued against the inclusion in the draft of a procedural article, and had referred to the practice of national courts. The difference was that national communities lived wholly under the rule of law, and any questions arising in law could be solved peacefully. There was consequently no need for the explicit provision of remedy and relief. But the international community was not as yet living wholly under the rule of law. The Commission was trying to bring the international community under that rule and that was why it had occasionally to make a provision for compulsory relief, since only thus could any progress be achieved. Was the international community ready for the kind of régime which the Commission was seeking to establish? Time would show. He would submit that the Commission must take the step forward.

54. Mr. Yepes had referred to customary law. It was perfectly correct that in so far as relief was concerned no customary law existed, the sole customary law being resort to force. A procedural clause of that kind was essential in a wholly new subject where the Special Rapporteur had found no rules for his guidance.

55. As to the scope of the article as framed in his own proposal, he considered that it was sufficiently comprehensive to cover all kinds of dispute. The question of boundaries fell under article 7. Furthermore, doubts as to interpretation would arise only in relation to the exercise of the right to explore or exploit the continental shelf. Questions of interpretation could not arise without some foundation.

56. Much had been said about the fact that the articles should be generally acceptable. That did not mean that the Commission must take into account the attitude of nations which were not wholly in favour of the peaceful settlement of disputes. Actually, his proposal in no way precluded the possibility of conciliation. If conciliation yielded results, the dispute would be settled. But the Commission could not fail to recommend recourse to arbitration at the subsequent stage, if and when conciliation failed.

57. Mr. HSU considered that Mr. Pal had fully disposed of Mr. Spiropoulos' objections. The Commission was not drawing up a domestic code, but formulating rules of international law to regulate the new problem of the continental shelf. He saw no season why a rule like the one under discussion could not go into a convention. At any rate, if the General Assembly, to which the draft was to be submitted, should prefer to relegate it to some other place, it could always do so. So far as the Commission was concerned, if the rule were considered essential to the scheme to be recommended, it was only sensible that it be given a place in the text of the articles rather than in the commentary.

58. On the question of whether the formulation of rules governing the continental shelf was codification or progressive development, he asserted that it was progressive development. The theory that acquiescence in the claim of sovereignty justified the view that sovereignty was in existence for the Commission to codify was false, inasmuch as the time that had elapsed was too short for opposition to have become articulate, especially in view of the fact that the encroachments were upon collective rather than individual interests.

59. Mr. LAUTERPACHT, intervening on a point of order, said that speakers should confine themselves to the point at issue.

[2] See *supra*, 202nd meeting, para. 27.

60. Mr. HSU concluded his exposition by going over some other arguments in favour of sovereignty, which he considered false.

61. Mr. SPIROPOULOS, intervening, moved the closure of the debate after the members on the Chairman's list had spoken.

62. Mr. LAUTERPACHT supported the motion.

63. Mr. YEPES opposed the motion on the grounds that closure of the debate was permissible in political, but not in scientific bodies.

The motion for the closure was carried by 7 votes to 1, with 3 abstentions.

64. The CHAIRMAN said that before taking the vote, he would call on Mr. Alfaro and Mr. Scelle, the last speakers on his list.

65. The Commission now had before it a proposal submitted jointly by Mr. Scelle, Mr. Yepes and Mr. Pal. It read:

> "Any disputes between States arising out of or in relation to these articles shall be submitted to arbitration or judicial settlement at the instance of any of the parties."

66. Mr. ALFARO waived his right to speak.

67. Mr. SCELLE first apologized for having wrongly interpreted the procedure adopted at the present meeting in respect of his proposal.

68. He would be able to vote for Mr. Pal's proposal, which was identical with his own, but not for the joint proposal, which referred to "judicial settlement". In his view, it would be very dangerous to use that term, since if a dispute arising out of the continental shelf were submitted to the International Court of Justice, the latter would only be able to consider the question in terms of violation of existing law. Mr. Yepes was wrong in stating that rules of customary law existed. The only rule was the freedom of the seas. It was because the Court would only be able to judge in law that he had avoided any reference to it, and had instead proposed arbitration.

69. He would, therefore, ask that he be dissociated from the joint proposal.

70. The CHAIRMAN said he fully appreciated the reasons given by Mr. Scelle. Members of the Commission represented different legal systems and it was inevitable that certain conflicts and differences of opinion should arise. Mr. Scelle was unanimously acknowledged as the brilliant representative of the European attitude of mind in the Commission.

71. Mr. CÓRDOVA asked whether Mr. Scelle would be prepared to accept the deletion of the words "the Permanent Court of Arbitration" from his original proposal, and to refer simply to arbitration.

72. Mr. SCELLE replied in the affirmative.

73. Mr. PAL said that that amendment would be acceptable to him. He asked whether Mr. Yepes would be prepared to withdraw the joint proposal.

74. Mr. YEPES agreed to do so.

75. The CHAIRMAN said that he would consequently put Mr. Scelle's original proposal to the vote.[3]

76. Mr. KOZHEVNIKOV asked whether Mr. Scelle would be prepared to agree to the deletion of the word "compulsorily", and the amendment of the last clause to read: "at the request of *both* parties," instead of "any of the parties."

77. If Mr. Scelle's proposal were amended in that sense, he would be able to vote in favour of it.

78. Mr. SCELLE said he was perfectly aware that Mr. Kozhevnikov did not expect him to accept those amendments.

79. Mr. KOZHEVNIKOV formally moved his amendments.

Mr. Kozhevnikov's amendments were rejected by 8 votes to 2, with 1 abstention.

Mr. Scelle's proposal as amended was adopted by 7 votes to 4, with 1 abstention.

80. The CHAIRMAN said that he had voted against Mr. Scelle's proposal for the same reasons as those given by the Special Rapporteur during the debate.

81. Faris Bey el-KHOURI said that he had voted against the proposal because it would have the effect of rendering arbitration compulsory for one of the parties. He was always opposed to compulsory arbitration, and was unable to accept the principle either in the present instance or in the draft on arbitral procedure. Proposals of that nature would be perfectly acceptable only if world government were a reality.

The meeting rose at 1.10 p.m.

[3] *Ibid.*

204th MEETING

Monday, 29 June 1953, at 3 p.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Article 7 (resumed from the 201st meeting)

1. The CHAIRMAN invited members to resume discussion of article 7, together with the experts' report (A/CN.4/61/Add.1). He would urge them to limit their comments to the points at issue, without enlarging on general problems which were sufficiently familiar to everyone. Apart from the Special Rapporteur's proposed amended text for article 7,[1] Mr. Pal and Mr. Yepes had submitted proposals.

2. Mr. PAL proposed the following text for article 7:

"1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to them shall, unless otherwise amicably determined by them, be the median line every point of which is equidistant from the outer limits of their respective territorial seas (waters).

"2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to them shall, unless otherwise amicably fixed by them, be determined by the application of the principle of equidistance from the outer lines of their respective territorial seas (waters).

"3. Any dispute concerning the determination and location of boundary lines shall be submitted to arbitration."

3. A cursory glance at the proposal would show that it was based on the principle applied by the Special Rapporteur in his amended text, which followed the conclusions reached by the committee of experts on technical questions concerning the territorial sea. He therefore suggested, in the case of States whose coasts were opposite one another, that the boundary between their continental shelves should be equidistant from the outer limits of their respective territorial waters, the same principle being applied in cases where the continental shelf was contiguous to the territories of two adjacent States. He believed that States should be given the opportunity of arriving at an amicable settlement, and had consequently included in paragraphs 1 and 2 the words "unless otherwise amicably determined by them".

4. Paragraph 3 laid down that any dispute concerning the boundary lines should be submitted to arbitration — a principle which was in accordance with that adopted by the Commission at its 203rd meeting in the additional article.[2]

5. Mr. FRANÇOIS (Special Rapporteur) was not opposed to the inclusion of the words "unless otherwise amicably determined by them", although he considered them to be superfluous. Obviously, when two parties agreed not to follow the prescribed rules and arrived at a settlement which did not conflict with the interests of a third party, no possible objection could be raised. He was more concerned about Mr. Pal's proposal to draw a boundary equidistant from the outer limits of the territorial waters and not from the coasts. On the face of it, the idea was logical, but it did not allow for the crucial difficulty that no unanimity obtained regarding the breadth of territorial waters. The consequence would therefore be that, by staking a claim for a wider territorial sea, a State would be able to secure a larger extent of continental shelf. That was why his proposal to draw the boundary equidistant from the coast was fairer.

6. The third paragraph was no longer necessary, since the Commission had adopted an additional article wherein provision was made for the submission of all disputes to arbitration.

7. Faris Bey el-KHOURI said that the only way of delimiting a continental shelf which was contiguous to the territories of two adjacent States was by applying the principle of equidistance from the coastlines. But that would necessitate the drawing of straight lines, and he presumed that that was what the Special Rapporteur had in mind in referring to "coastlines" instead of coasts.

8. Mr. YEPES said that three separate problems were involved: the delimitation of the continental shelf as between States facing one another; the delimitation of the continental shelf when it was contiguous to the territories of two adjacent States; and, finally, a method of solving disputes.

9. Taking the last problem first, he agreed with the Special Rapporteur that there was no longer any need to refer to arbitration in article 7 since the issue was covered by the additional article adopted by the Commission at its 203rd meeting. Consequently, paragraph 3 of Mr. Pal's proposal should be deleted.

10. As to paragraphs 1 and 2, he believed that it would be easier if the Commission discussed and voted on them separately, and he would consequently confine his observations to paragraph 1. In his view, the Special Rapporteur's version, based as it was on the conclusions

[1] See *supra*, 201st meeting, para. 37.

[2] See *supra*, 203rd meeting, para. 79

of the experts, was the correct one. The experts had been consulted on a number of highly technical questions and the Commission should accept their views for which, indeed, there existed a precedent in the treaty between the United Kingdom and Venezuela, concluded in 1942 and relating to the submarine areas of the Gulf of Paria.[3] The criterion of the median line should be maintained.

11. Mr. SANDSTRÖM said that on the whole he agreed with the Special Rapporteur. The clause relating to amicable settlement was not absolutely essential, but no harm would be done by including it. Paragraph 3 could be deleted.

12. The more practical solution for delimiting the boundary of the continental shelf would be to draw it equidistant from the opposite or adjacent coasts. On that point, the Special Rapporteur's arguments were pertinent, and his proposal had the merit of separating the question of the continental shelf from that of the territorial waters.

13. As to the question raised by Faris Bey el-Khouri, he (Mr. Sandström) did not consider that the term "coastlines" could be interpreted as meaning straight lines.

14. He was concerned about the point made by the experts (A/CN.4/61/Add.1, Annex, point VI) to the effect that there might be special reasons, such as navigation and fishing rights, which might divert the boundary from the median line. He feared that the clause relating to amicable settlement suggested by Mr. Pal would not suffice to cover those issues. The Commission should perhaps consider whether rules should not be laid down for such special cases where the application of the normal rule would lead to manifest hardship.

15. Mr. CÓRDOVA considered that Mr. Pal's proposal was the best, since the method of delimitation on the basis of equidistance from the coasts would give rise to difficulties in cases where the limits of the territorial waters had been fixed. Had the Special Rapporteur perceived that in those cases the drawing of the boundary of the continental shelf in accordance with the principle of equidistance from the coasts might cause overlapping between the territorial waters and the continental shelf?

16. He, too, thought that paragraph 3 of Mr. Pal's proposal could be deleted.

17. Mr. SPIROPOULOS said that the problem needed careful consideration. The Special Rapporteur proposed that the boundary of the continental shelf should be the median line equidistant from the two opposite coasts, whereas Mr. Pal proposed that it should be the median line equidistant from the outer limits of the territorial waters. If the outer limits of those waters were parallel to the coast no problem would arise, and the width of the territorial waters would be irrelevant; but in point of fact the outer limits of the territorial waters did not always follow the coastline. If there were an island or an archipelago, the outer limits of the territorial waters were fixed at a certain distance from them, and not from the coastline. The ensuing complications of delimiting the continental shelf in accordance with the principle of equidistance from the coasts in such cases were obvious.

18. Mr. ZOUREK considered that the main merit of Mr. Pal's proposal was that it assimilated article 7 to article 1, which laid down that the continental shelf was situated outside the territorial waters. Mr. Spiropoulos had shown that it was impossible to delimit the continental shelf of opposite States except on the basis of equidistance from the outer limits of the territorial waters — a method which was both practical and logical. He was not sure whether he had quite followed the arguments to the effect that the application of that principle might lead States to claim a greater area of the continental shelf by extending the limit of their territorial waters. That issue did not arise, since under article 1, the continental shelf had been fixed in terms of a depth of 200 metres. It followed, therefore, that if the territorial waters were extended, the area of the continental shelf would be reduced.

19. As to paragraph 2 of Mr. Pal's proposal, it would seem to him that at least in theory, it involved the application of two different systems. Assuming, as Mr. Córdova had argued, that adjacent States had agreed on the delimitation of their territorial waters and the continental shelf was not delimited on the basis of the same principle, two different regimes might be applied in respect of the territorial waters and of the continental shelf. It would be better therefore to amend paragraph 2 by replacing the words "by the application of the principle of equidistance from the outer lines of their respective territorial seas (waters)" by the words: "In accordance with the principles applied to the delimitation of the territorial waters of the two States concerned".

20. Mr. LAUTERPACHT preferred the Special Rapporteur's formula, since the application of the criterion of the limits of the territorial waters would introduce an undetermined and highly controversial factor into the situation. If Mr. Pal's proposal were accepted, and two States whose coasts were opposite one another claimed the one a limit of three miles, and the other a limit of twenty miles, the continental shelf of one would be far larger than that of the other. It would be unwise to encourage extravagant claims for the extension of territorial waters.

21. As to the reference to amicable settlement, there were reasons in favour and reasons against its insertion. In any case, the word "amicably" was obviously superfluous.

22. Replying to the CHAIRMAN, he stated that he had no opinion on Mr. Zourek's amendment to paragraph 2 of Mr. Pal's proposal.

23. Mr. PAL said that the case for his proposal had already been ably argued by Mr. Córdova, Mr. Zourek

[3] See text in *Laws and regulations on the régime of the high seas*, vol. I (United Nations publication, Sales No.: 1951.V.2), p. 44.

and Mr. Spiropoulos. He could not add very much, except to emphasize that the delimitation of the continental shelf must be based on equidistance from the outer limits of the territorial waters, since the continental shelf was defined as being *outside* the area of the territorial waters. The territorial waters must be delimited before the boundaries of the continental shelf could be fixed. The only equitable starting point for dividing the continental shelf between two States whose coasts were opposite one another was the median line equidistant from the outer limits of the territorial waters. If the boundaries were drawn from the coastlines, one State might be left without any part of the continental shelf in its possession.

24. He agreed that paragraph 3 had now become superfluous, and was prepared to agree to its deletion. As to the clause relating to amicable settlement, he was prepared to delete the word "amicably", but felt that the clause should be retained because the principle was expressed in mandatory form: "... the boundary of the continental shelf appertaining to them shall...". It would be preferable to give States the opportunity of settling differences by agreement.

25. He was not able to gauge the consequences of Mr. Zourek's amendment to paragraph 2.

26. Mr. ALFARO suggested that the Chairman rule that discussion be limited to paragraph 1, it being understood that paragraph 3 of Mr. Pal's proposal had been deleted.

27. The CHAIRMAN replied that he was averse to giving rulings unless it was absolutely essential to do so. The discussion was going well, the issues were becoming clear and the fate of paragraph 3 had obviously already been settled.

28. Mr. HSU was inclined to prefer the Special Rapporteur's text for article 7. Paragraph 2 of Mr. Pal's proposal was open to the objection that difficulties might arise between adjacent States, when each claimed a different limit for its territorial waters. As to paragraph 1, he considered that, though perhaps more logical, it was also more dangerous. He agreed with Mr. Lauterpacht about the inadvisability of opening the door to exaggerated claims, and noted that since the question of the continental shelf had acquired topical interest, the tendency to press for sovereignty should not be further reinforced.

29. Mr. CÓRDOVA supported Mr. Yepes' suggestion that paragraphs 1 and 2 should be considered separately, since they covered different cases. In the case of adjacent States, the territorial waters were also adjacent, and it would seem to him that there the continental shelf could be delimited by simple extension of the boundary between the respective territorial waters.

30. Mr. YEPES wished formally to move his proposal that a separate discussion should be held and separate votes taken on paragraphs 1 and 2 of article 7.

31. The CHAIRMAN said that, despite his reluctance to do so, he would, in the present instance, *rule* that the Commission first discuss paragraph 1 of article 7.

32. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos that if the outer limits of the territorial waters were parallel to the coast, no problem would arise, and that there would be no difference between measuring the equidistant line from the outer limits of those waters and measuring the line from the coasts. But in view of the uncertainty of the limits of the territorial waters of the States concerned it might well happen that the measuring would not be the same. For example, if one State claimed three miles and the State opposite claimed twelve miles, where would the equidistant line be measured from? There would be no such difficulty if the line were measured from the respective coasts. If the Commission were to lay down that territorial waters should be "X" miles in breadth, Mr. Pal's proposal would be perfectly acceptable. But in the absence of such a decision the Special Rapporteur's proposal was less open to objection.

33. Mr. FRANÇOIS said he had listened with great interest to the discussion. Starting with Faris Bey el-Khouri's comment, he would reply that he had not intended the words "coastlines" to mean straight lines. He did not agree that the principle of equidistance necessitated the drawing of a straight line between two points. On the contrary, the configuration of the coast should be taken into account in applying the principle of equidistance. If the term "coastlines" was considered to be insufficiently clear, the term "base lines of the territorial waters" could be substituted therefor, and he would be prepared to accept it. But the question would still be open whether those base lines should be straight or should follow the configuration of the coast. Either alternative could be adopted.

34. He must reiterate his warnings about the dangers of Mr. Pal's proposal, which would lead to conflicting claims over the continental shelf on the basis of the breadth of the territorial waters. He feared that the adoption of Mr. Pal's proposal would make the whole draft unacceptable to a number of States. For instance, the United Kingdom and Netherlands Governments were both anxious that the three-mile limit for territorial waters be maintained. They would consequently, in the absence of general agreement, be placed at a great disadvantage in comparison with States which claimed a limit of four, six or even twenty miles.

35. Mr. Sandström had drawn attention to the fact that the experts whose report was annexed to the addendum to his second report on the régime of the territorial sea (A/CN.4/61/Add.1) had pointed out that there might be special reasons, such as navigation and fishing rights, for not taking the median line as the boundary between countries with coasts opposite one another at a distance of less than twice the width of the territorial sea. The experts, however, had been considering delimitation through the territorial sea, which was quite irrelevant to delimitation across the continental shelf, with regard to which navigation and fishing rights were protected by article 5 of the Commission's draft.

36. Similarly, the experts had pointed out that the same considerations might make it necessary in exceptional cases to depart from the rule of equidistance from the coast in determining the boundary between two adjacent States through the territorial sea. Again, those considerations did not apply to delimitation across the continental shelf.

37. There were cases, however, where a departure from the general rule was necessary in fixing boundaries across the continental shelf; for example, where a small island opposite one State's coast belonged to another; the continental shelf surrounding that island must also belong to the second State. A general rule was necessary, but it was also necessary to provide for exceptions to it.

38. An interesting case was that of the Gulf of Venezuela, in which were situated islands belonging to Venezuela, and where the "normal" jurisdiction line might ignore those islands. Members were all no doubt familiar with Mr. Whittemore Boggs' article on the "Delimitation of Seaboard Areas under National Jurisdiction" in which the problem was discussed.[4]

39. Mr. ALFARO pointed out that article 7 dealt solely with the problem of delimitation across the continental shelf, not with that of its definition, and that any solution which was not both practicable and fair to all States concerned must be rejected. Mr. Spiropoulos had said that it would make no difference whether the basis of delimitation was the coastline or the outer limits of the territorial sea. That was only true provided that general agreement was reached on the width of the territorial sea. Such agreement at present seemed remote, and in the circumstances the only possible basis of delimitation was the coastline. He was therefore opposed to Mr. Pal's proposal and agreed with the view expressed by Mr. François, Mr. Lauterpacht and other speakers, although it remained to be seen how that view could best be put into words.

40. Mr. FRANÇOIS suggested that that could be done by amending paragraph 1 of Mr. Pal's proposal to read as follows:

> "Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall, as a general rule and unless otherwise agreed by them, be the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured".

41. Mr. KOZHEVNIKOV said that he was still exceedingly doubtful about the wisdom of attempting an insert in the convention provisions of a highly technical nature, instead of adopting a flexible formula such as would be more acceptable to a larger number of States than any rigid formula could possibly be. He preferred the wording contained in the Special Rapporteur's fourth report (A/CN.4/60, chapter IV) to that which the Special Rapporteur now suggested, and to that proposed by Mr. Pal; it had clearly stated that boundaries across the continental shelf should be established by agreement between the States concerned; he (Mr. Kozhevnikov) attached great importance to that idea, which did not find a place in the two later drafts, and therefore proposed the following text:

> "The boundary of the continental shelf contiguous to the territories of two or more States shall be determined by agreement between them. In the absence of such agreement, any dispute between them shall be settled by applying one of the methods for the joint peaceful settlement of disputes."

42. Mr. PAL said that, in order to simplify the discussion, he would accept the wording suggested by Mr. François for paragraph 1 of his proposal.

43. Mr. YEPES still thought that the wording first proposed by Mr. François was the best, since "the coast" was a clear expression which would be universally understood in a way in which the wording he (Mr. François) now suggested could not be.

44. Mr. SANDSTRÖM said that he could accept the wording now suggested by Mr. François and drew Mr. Kozhevnikov's attention to the fact that the rule it laid down was subject to the proviso, "unless otherwise amicably determined by them". It did, however, give States some guidance as to how the boundary should be drawn, and in that way filled a gap which Mr. Kozhevnikov's proposal left unfilled.

45. Mr. FRANÇOIS said that his reason for preferring the wording he had suggested to that proposed by Mr. Kozhevnikov was the same as Mr. Sandström's. He disagreed with Mr. Yepes: "the coast" was not an expression such as could be used in a legal text; it was necessary to define it, and that was what he had sought to do.

46. Mr. YEPES replied that, on the contrary, the word "coast" had a clearly defined meaning in law. In French administrative law it was the line of low tide.

47. Mr. LAUTERPACHT pointed out that since the award in the *Norwegian fisheries* case, even the wording suggested by Mr. François might no longer be considered completely clear. He had, moreover, another doubt, namely, concerning the words "as a general rule"; it was not clear what they meant, and it was at least arguable that they deprived the rule of its legal character.

48. He did not agree with Mr. Kozhevnikov's proposal, under which the Commission would not lay down a rule at all, but would simply leave the parties free to agree between themselves. Moreover, in the event of their failing to agree, Mr. Kozhevnikov proposed that the question should be solved "by one of the methods for the peaceful settlement of disputes". If Mr. Kozhevnikov had proposed that in such an event recourse be had to arbitration or judicial settlement, he (Mr. Lauterpacht) could have accepted that part of his text,

[4] *American Journal of International Law*, vol. 45 (1951), pp. 240-266.

but the wording proposed left the door open to conciliation, and conciliation might well fail, in which case the whole question would be left unresolved.

49. Mr. SANDSTRÖM assumed that it was the Special Rapporteur's intention to insert in his commentary an explanation of what was meant by the words "as a general rule".

50. Mr. FRANÇOIS agreed.

51. Mr. KOZHEVNIKOV requested that a vote on the various proposals and amendments which had been submitted should be deferred until they had been distributed in writing.

52. The CHAIRMAN felt that there was no reason why voting should not take place at once; he put that issue to the vote.

It was agreed by 8 votes to 2, with 4 abstentions, that voting should take place at once.

The wording proposed by Mr. Kozhevnikov for article 7 was rejected by 10 votes to 3, with 1 abstention.

The wording suggested by Mr. François and accepted by Mr. Pal was adopted by 9 votes to 4, with 1 abstention.

53. Mr. YEPES said that he had voted against the wording suggested by Mr. François because he thought it would be clearer, simpler and in every way better to say "the median line every point of which is equidistant from their respective coasts".

54. The CHAIRMAN next drew attention to paragraph 2 of Mr. Pal's proposal,[5] to which Mr. Zourek had submitted an amendment.[6] Mr. Córdova had also submitted a proposal that paragraph 2 be amended to read as follows:

> "Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to them shall, unless otherwise agreed by them, be the prolongation of the limits of their respective territorial seas over the common continental shelf."

55. Mr. FRANÇOIS said that he could not accept Mr. Córdova's proposal, as many of the special considerations which were involved in delimiting the territorial sea, particularly questions of navigation and fishing interests, were irrelevant in delimiting the continental shelf. A line which might be perfectly satisfactory as a boundary between two countries' territorial seas might, if extended, be far from satisfactory as a boundary between their sectors of the continental shelf. In a bay, for example, the boundary between two adjacent States' territorial seas might be drawn in such a way that if extended it would actually cut the coastline of one of them.

56. Although Mr. Zourek's proposal did not provide that the boundary of the territorial sea should be extended, it was open to the same objection, namely, that considerations which arose with regard to the territorial sea did not arise with regard to the continental shelf. He (Mr. François) saw no difficulty in using a different method for fixing boundaries of the territorial sea and of the continental shelf, since the two did not overlap, and the latter only began at the outside limit of the former. For the continental shelf, he believed that the most appropriate general rule would be that of equidistance from the coasts, but that the same provision as in paragraph 1 should be made for departures from that rule in special cases where its application would be unsatisfactory. Mr. Pal's text should therefore be amended to read:

> "Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States shall, as a general rule and unless otherwise agreed by them, be determined by application of the principle of equidistance from the baselines from which the width of the territorial sea of each of the two countries is measured."

57. Mr. CÓRDOVA said that as his concern had been to ensure that the same method was used for fixing boundaries across the continental shelf as through the territorial sea, he would withdraw his amendment in favour of the text proposed by Mr. Zourek. He pointed out that the Commission had not yet decided how boundaries through the territorial sea were to be fixed.

58. Mr. PAL pointed out that the experts whose report was annexed to the addendum to Mr. François' second report on the territorial sea recommended "that the (lateral) boundary through the territorial sea — if not already fixed otherwise — should be drawn according to the principle of equidistance from the respective coastlines" (A/CN.4/61/Add.1, Annex, point VII). In practice, therefore, there would be no difference between the wording proposed by Mr. François and that proposed by Mr. Zourek, and he preferred the latter.

59. Mr. ZOUREK said that the purpose of his proposal was as Mr. Córdova had said. There was no reason why boundaries should be fixed by a single uniform method the world over, but it was desirable that they should be fixed in the same way for any two countries through the territorial sea and across the continental shelf.

60. Mr. KOZHEVNIKOV said that he was more and more convinced that it was unwise to attempt to lay down rigidly the manner in which the boundary across the continental shelf should be determined, and was therefore becoming increasingly drawn to the wording proposed by the Special Rapporteur in his fourth report. As Mr. François had withdrawn that text, he (Mr. Kozhevnikov) would sponsor it.

61. Mr. LAUTERPACHT said that for the reasons he had already given in connexion with paragraph 1 of

[5] See *supra*, para. 2.

[6] See *supra*, para. 19.

Mr. Pal's proposal he could only vote for the wording proposed by Mr. François if the words "as a general rule" were omitted, or if the commentary was to contain a full explanation of them, giving specific instances of cases where a departure from the rule was permissible.

62. Mr. SPIROPOULOS suggested, as a point of drafting, and leaving aside the question of substance, that it would be preferable to replace the words "as a general rule" by the words "unless another boundary line is justified by special circumstances".

Further discussion on paragraph 2 of Mr. Pal's proposal was adjourned.

The meeting rose at 6 p.m.

205th MEETING

Tuesday, 30 June 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Article 7 (continued)

1. The CHAIRMAN expressed the hope that the Commission would soon be ready to vote on paragraph 2 of Mr. Pal's text for article 7,[1] since it had so thoroughly explored the troubled waters of the continental shelf at the previous meeting. Ideal solutions were, unfortunately, impossible of attainment.

2. Mr. FRANÇOIS (Special Rapporteur) said he was unable to accept Mr. Zourek's amendment[2] to paragraph 2, since it proposed that the continental shelf between two adjacent States should be delimited on the same principle as the territorial waters. No such principle at present existed, and he considered that the Commission should adopt a definite rule in respect of the continental shelf rather than wait on the future.

3. He had redrafted his own amendment to Mr. Pal's proposal, and wished to submit it in the following form:

> "Where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them shall as a rule, unless otherwise agreed between the two States, be effected by applying the principle of equidistance from the base lines from which the width of the territorial waters of each country is measured."

4. Mr. KOZHEVNIKOV agreed with the Chairman that ideal solutions were difficult, if not impossible, to achieve. That was why he considered that the Special Rapporteur's original text for article 7, as given in his fourth report (A/CN.4/60, Chapter IV), though not offering an ideal solution, at least provided a reasonable and practical basis for action. As he had said at the previous meeting,[3] he wished to take over the text which the Special Rapporteur had withdrawn, and would now submit it to the Commission with some slight drafting changes.

The text of his proposal read:

> "The boundaries of a continental shelf contiguous to the territories of two or more States shall be established by agreement between those States. Failing such agreement, a dispute between them shall be resolved by one of the methods for the joint peaceful settlement of disputes."

5. Mr. YEPES expressed surprise at Mr. Kozhevnikov's proposal, since he had understood Mr. Kozhevnikov to have said at the previous meeting that he wished to sponsor the Special Rapporteur's original text.

6. Mr. KOZHEVNIKOV recalled that at the previous meeting Mr. Yepes, too, had favoured the substitution of the original text for the new text proposed by the Special Rapporteur for paragraph 1 of article 7.[4] His (Mr. Kozhevnikov's) amendment, the text of which was identical with the original text of article 7, had been rejected.[5] He was now submitting a proposal which also followed the lines of the original text, because he wished the Commission to keep that text in mind. If his

[1] See *supra*, 204th meeting, para. 2.

[2] *Ibid.*, para. 19.

[3] *Ibid.*, para. 60.

[4] *Ibid.*, para. 43.

[5] *Ibid.*, para. 52.

proposal were adopted, it should replace both paragraph 1 and paragraph 2 of article 7.

7. Mr. CÓRDOVA pointed out that Mr. Kozhevnikov's proposal suffered from a serious defect. The Commission wanted to prescribe a rule; Mr. Kozhevnikov left the whole issue in the air. It was in fact in order to avoid vagueness that the Special Rapporteur had modified the original text of article 7.

8. On the other hand, he agreed with Mr. Zourek that the same principle of delimitation should be applied to the continental shelf as was applied to the territorial waters. He would suggest that Mr. François incorporate Mr. Zourek's amendment in his proposal for paragraph 2.

9. Mr. LAUTERPACHT said that Mr. Kozhevnikov's proposal reflected his attitude to the whole of the Commission's work. For reasons which were perfectly legitimate as far as Mr. Kozhevnikov was concerned, he (Mr. Kozhevnikov) was opposed to the formulation of rules or, if a rule were laid down, insisted that there ought to be no authority competent to take a decision binding on the parties in regard to the application of the rule. Mr. Kozhevnikov was wholly in favour of settlement between the parties on the basis of good will and mutual agreement. However, it was the business of the law — and of the International Law Commission — to provide for situations in which no such agreement or good will was forthcoming.

10. Turning to Mr. François's proposal, he would draw attention to the words: "shall as a rule... be effected... etc." He was prepared to vote for any precise rule, or indeed to agree that there be no rule at all, but it was difficult to adopt a kind of half-way-house formula. No judge or arbitrator could interpret a text so worded, because any party to a dispute could always argue that its case did not fall within the general rule, but formed an exception to it. He appreciated the point that some mention should be made of exceptions, but was convinced that it would be better to specify the cases rather than to open the door to difficulties of interpretation.

11. Mr. YEPES submitted the following proposal for paragraph 2:

> "Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to each State should be drawn according to the principle of equidistance from the respective coastlines of the adjacent States.
>
> The term "coastline" here signifies the low-water line as usually marked on the large-scale charts officially recognized by the coastal State. If there are no charts showing the low-water line, the "coastline" shall be understood to mean the high-water line."

12. Mr. HSU considered that Mr. Zourek's amendment was sound in its intentions and did not conflict with Mr. François's proposal. Although, at the present time, there was no fixed rule for the delimitation of territorial waters, such a rule might be established in future. As to the continental shelf, he agreed that it would be wise to lay down a rule of delimitation, since the submarine area beyond the territorial waters might be very extensive. He would therefore be prepared to support Mr. François's proposal.

13. However, he agreed with Mr. Lauterpacht's objection to the words "as a rule", which should be deleted. A reference to exceptions should be included, but it should be worded differently. In any case, arbitrators would be aware of the difficulties and the exceptions.

14. Mr. FRANÇOIS said that that was exactly what he was afraid of. If no exceptions were admitted to an inflexible rule, and disputes were submitted to arbitration, it would be the rule that the arbitrators would have to apply. The purpose of inserting an escape clause was to enable arbitrators to deviate from the rule in such circumstances. If the Commission felt that it would be enough to refer to that point in a comment, he would not object, but he could not regard such a solution as satisfactory as a reference in the text itself. It was a moot point whether arbitrators would feel authorized to deviate from a text on the strength of an interpretation included in the comments.

15. The CHAIRMAN noted a wide divergence of views. Mr. Lauterpacht considered that the words "as a rule" deprived the text of its juridical significance, whereas Mr. François considered that they were necessary in order to ensure the proper application of the principle in law.

16. Mr. SANDSTRÖM shared Mr. François's apprehensions, and considered that provision for exceptions should be made in the text. Would not the best solution be to go back to a suggestion made at the previous meeting by Mr. Spiropoulos,[6] to the effect that the words "unless another boundary line is justified by special circumstances" be substituted for the words "as a rule"?

17. Mr. LAUTERPACHT feared that the adoption of Mr. Spiropoulos's formula would not solve the difficulty. If the Commission had certain specific exceptions in mind, it should say so. But to state generally that arbitrators should take exceptions into consideration was tantamount to giving them the power to judge *ex aequo et bono,* which the Commission did not intend to do.

18. Mr. ALFARO was in favour of deleting the words "as a rule", on the grounds that they would lead to conflict. The Commission wished to lay down a rule for the delimitation of the continental shelf between two adjacent States. Nothing would be gained by prescribing a rule qualified by a very general exception.

19. Mr. PAL drew attention to the fact that whereas the Special Rapporteur's proposal made use of the words "as a rule", the first paragraph of article 7, which

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[6] *Ibid.*, para. 62.

had been adopted at the previous meeting, contained the words "as a general rule", so that in point of fact the mischief had already been done. So far as paragraph 2 was concerned, he considered that those words would be less harmful because they would be taken in juxtaposition with the following clause: "unless otherwise agreed between the two States". Exceptions would fall under that clause.

20. Mr. ZOUREK said that he had voted in favour of Mr. Kozhevnikov's amendment at the previous meeting and would vote in favour of the proposal he had submitted at the present meeting. Since it was impossible to foresee all possible contingencies, the original text of article 7 had rightly reserved the future, thus allowing for the creation of precedents. Codification would be easier once the practice of States had been established. Paragraph 1 of article 7 as adopted offered convincing proof of the fact that no uniform rule could be laid down. It conceded the principle of equidistance, and immediately weakened that principle by introducing the qualification "as a general rule", and by a reference to agreement between the parties. Furthermore, it left unanswered the question of what were to serve as the base lines from which the width of the territorial seas should be measured. As such, paragraph 1 manifestly contained the elements of future discord.

21. Mr. SPIROPOULOS, noting Mr. Pal's argument that exceptions would come under the clause which provided for agreement between States, said that other members of the Commission approached the problem from a different angle, namely, that the principle would prove inapplicable in practice because of the numerous exceptions and special circumstances. Mr. Lauterpacht and Mr. Alfaro were opposed to vague formulation. The Commission could choose only between accepting a principle without exceptions, or admitting exceptions. Further, he would point out to Mr. Lauterpacht that the amendment originally proposed by him and now re-introduced by Mr. Sandström would itself enable arbitrators to settle disputes *ex aequo et bono*. For instance, in cases where an island belonged to one State but was situated in the territorial waters of another, arbitrators would have to judge *ex aequo et bono*.

22. Mr. LIANG (Secretary to the Commission) said that the difference between the Special Rapporteur's proposal for paragraph 2 and his original text for article 7 was slight. The first sentence in the original text said no more and no less than the clause "unless otherwise agreed between the two States". The second sentence provided that, failing agreement, the parties must submit the dispute to conciliation procedure. In the new version, the principle of equidistance was laid down, but was accompanied by the proviso that it was inapplicable where special circumstances prevailed. That meant that the principle of equidistance was attenuated almost to the point of non-existence, and the new text was no stronger than the original. Was it worth while formulating a principle in such terms? If the Commission did not feel happy about equidistance, surely the original version of article 7 would do. But if the Commission desired to adopt a clear statement of the principle of equidistance, it should state it in its integrity, without weakening it.

23. Mr. LAUTERPACHT proposed the following formula which, in his opinion, was less indefinite than Mr. Spiropoulos's amendment:

> "In cases in which such delimitation is physically impossible or in which it may cause undue hardship to one of the coastal States, the line shall be determined by arbitration in a manner approximating as closely as possible to the principle of equidistance."

24. The CHAIRMAN, speaking as a member of the Commission, objected to the word "physical" on the grounds that a delimitation could never be theoretical.

25. Mr. CÓRDOVA considered that Mr. Lauterpacht's formula was open to countless objections. The words "undue hardship" were no better than the words "as a rule".

26. At the CHAIRMAN's request, Mr. SANDSTRÖM said that he would word Mr. Spiropoulos's original amendment as follows: "except where special circumstances call for some other solution" ("*à moins qu'exceptionellement à la suite de circonstances spéciales une autre solution ne soit indiquée*"). Those words should be added at the end of the text proposed by Mr. François.

27. Mr. YEPES considered that the Commission had approached the problem in the wrong way. It had discussed a general rule without examining what that general rule consisted in substantively. It was not as yet clear whether the Commission accepted the principle of equidistance.

28. Mr. PAL thought that one way out of the predicament might be to delete the words "as a rule" and add at the end of the text the phrase "except where the special circumstances of the case require otherwise". It would be not for the parties but for the arbitrators to decide whether the circumstances did or did not warrant special adjustment.

29. Mr. SPIROPOULOS considered that the Commission should adopt the Special Rapporteur's proposal together with the amendment which had just been suggested by Mr. Sandström and which he would formulate as follows: "unless special circumstances justify another delimitation" ("*à moins que des circonstances spéciales ne justifient une autre délimitation*"). After all, the Commission had accepted the principle of arbitration, and must therefore leave it to the arbitrators to assess the special circumstances. The other alternative was to accept Mr. Kozhevnikov's proposal and leave everything to the parties.

30. Turning to Mr. Zourek's amendment, he agreed with its underlying principle, but considered that it was impossible to cut the Gordian knot of delimitation of the territorial waters forthwith.

31. Mr. CÓRDOVA did not consider Mr. Spiropoulos's amendment any improvement on the words "as a rule".

As to Mr. Zourek's amendment, he felt it would be more appropriate to insert it in a separate article, provided always that the Commission accepted the principle of equidistance. As Mr. Yepes had pointed out, it had not yet done so.

32. The CHAIRMAN wished to draw attention to the fact that the words "as a rule" ("*en règle générale*") related to a question of procedure, and not to a rule in law.

33. Mr. LAUTERPACHT urged the Commission to conclude the discussion. All the proposals gave, as they must, latitude to the arbitrators. What was causing him concern was that, although money had been spent on calling together experts, no clear rule had been proposed by them.

34. In order to simplify matters, he would withdraw his proposal and vote either for the Special Rapporteur's proposal or for that proposal as amended by Mr. Sandström and Mr. Spiropoulos, provided an explicit reference were included in the comments to the extent of the latitude to be given to arbitrators.

35. Mr. ALFARO said that it was essential to lay down a clear-cut rule and to devise some means of providing for such special circumstances as were not defined in the text. The arbitral tribunal would have to pronounce on the existence or on the non-existence of such special circumstances. If it made no pronouncement then the rule would have to be applied.

36. He accordingly submitted the following amendment:

> "... unless otherwise agreed upon by the parties, or unless special circumstances should justify any method of delimitation and the existence of such circumstances should be pronounced by an arbitral tribunal".

37. Mr. SANDSTRÖM considered that Mr. Alfaro's formula added nothing to his own.

38. The CHAIRMAN expressed the opinion that the formula proposed by Mr. Sandström and Mr. Spiropoulos stressed the exceptions rather than the rule. He hoped, therefore, that the Special Rapporteur would accept that formula, which was preferable to the bald expression "as a rule".

39. Mr. SPIROPOULOS agreed with the Chairman. If the words "as a rule" were retained, arbitrators would not know how to act. His formula made it perfectly clear that only in cases where the application of the rule would lead to manifest unfairness would it have to be waived.

40. Mr. Alfaro's proposal had the disadvantage that it stated a principle and then made two exceptions to it. Moreover, his reference to arbitration raised a somewhat delicate issue. He (Mr. Spiropoulos) had all along been wondering whether the additional article adopted at the 203rd meeting (para. 79), which related to disputes arising in respect of the exploitation and exploration of the continental shelf also covered the question of delimitation.

41. Mr. SCELLE said that the purpose of the additional article was to ensure that all disputes arising out of the exploration, exploitation or utilization of the continental shelf would be submitted to arbitration. But the concept of arbitration was dual. It could bear either the strict juridical meaning as expressed in the draft on arbitral procedure, or a wider meaning which made it akin to mediation. In the present instance, where there was no rule in law, the Commission was really thinking in terms of mediation. It was reluctant to have recourse to a supra-national organ, and had therefore transferred the powers of such an organ to arbitrators, relying upon them to correct mistakes and make such adjustments as special circumstances might warrant *ex aequo et bono*. The arbitrators must judge a dispute, but the disputes in the present instance would not be juridical disputes. That was why it was hardly surprising that the discussion had been so prolonged. There was no way out of a quandary which was of a political nature.

42. Mr. ALFARO and Mr. YEPES withdrew their proposals.

43. Mr. FRANÇOIS said that he would be prepared to accept Mr. Sandström's amendment as re-formulated by Mr. Spiropoulos.

44. The CHAIRMAN said that he would first put to the vote Mr. Kozhevnikov's proposal, and then the Special Rapporteur's proposal.

Mr. Kozhevnikov's proposal was rejected by 10 votes to 2, with 1 abstention.

45. Mr. ZOUREK considered that his amendment should be put to the vote before the Special Rapporteur's proposal, since it was farther removed from the original text.

46. Mr. CÓRDOVA reiterated his suggestion that Mr. Zourek's amendment should form a separate article.

47. Mr. ZOUREK was prepared to accept that suggestion.

Mr. François' proposal was adopted by 8 votes to 5.

48. Replying to a question by Mr. KOZHEVNIKOV, the CHAIRMAN recalled that there had been general agreement that paragraph 3 of Mr. Pal's proposal could be deleted in view of the fact that the Commission had already adopted a separate article on arbitration.

49. Mr. CÓRDOVA wondered whether the Special Rapporteur agreed that the procedure laid down in that article applied equally to disputes concerning the determination and allocation of boundary lines.

50. Mr. FRANÇOIS replied in the affirmative. Such had certainly been the Commission's intention; mention of the fact could be made in the commentary, and the Drafting Committee could also be asked to attempt to make the point clear in the text.

Mr. François' suggestions were adopted.

51. The CHAIRMAN then put to the vote article 7 as a whole in its amended form.

Article 7, as amended and as a whole, was adopted by 9 votes to 3, with 1 abstention.

52. The CHAIRMAN recalled that Mr. Córdova had suggested that the amendment which Mr. Zourek had submitted to paragraph 2 of Mr. Pal's proposal should be made a separate article.

53. Mr. FRANÇOIS felt that in view of the text which had been adopted for article 7, no further provisions concerning delimitation of the continental shelf were necessary, even if the text proposed by Mr. Zourek were compatible with that already adopted. On the other hand, there could be no objection to its being said in the commentary that the principles governing delimitation of the continental shelf and those governing delimitation of territorial waters should be the same, although the actual method used for delimiting the latter might be affected by certain considerations, particularly as regards navigation and fishing interests, which would not apply in the case of the continental shelf.

54. Mr. ZOUREK said that the sole aim of his proposal was to ensure that the same principles should govern delimitation of territorial waters and delimitation of the continental shelf. It seemed only logical that they should, particularly now that the principle of sovereignty over the continental shelf was accepted; and if they did not, practical complications would ensue. If his view was generally accepted, as seemed to be the case, he saw no reason why it should not be reflected, in general terms, in the text.

55. Mr. SPIROPOULOS thought that all members of the Commission were agreed that the principles governing delimitation of the continental shelf should be the same as those governing delimitation of the territorial waters. The latter principles, however, had not yet been formulated, and until they had been defined he saw little point in considering Mr. Zourek's proposal.

56. Mr. CÓRDOVA and Mr. KOZHEVNIKOV pointed out that agreement on the principles governing delimitation of the territorial sea might well be long delayed. If there were no objections to the substance of Mr. Zourek's proposal, there was no reason why it should not be adopted at once. If it were rejected, Mr. François' suggestion should next be put to the vote.

57. Mr. SPIROPOULOS said that if the majority of the Commission thought it opportune to insert Mr. Zourek's proposal in the text, he would have no objection.

58. Mr. LAUTERPACHT feared that there was at least a possibility of conflict between Mr. Zourek's proposal and paragraph 2 of article 7, in the form in which it had been adopted.

59. Mr. ZOUREK pointed out that paragraph 2 reserved to the parties the right to fix the boundary of the continental shelf amicably by some means other than that indicated. There was therefore no contradiction between it and his proposal.

60. Mr. ALFARO could not regard Mr. Zourek's proposal in any other way than as a substitute for paragraph 2. As paragraph 2 had already been adopted, he did not see how the Commission could vote on Mr. Zourek's proposal.

61. Mr. HSU suggested that Mr. Zourek's point might be met if a recommendation were inserted in the commentary to the effect that where the States concerned agreed to depart from the rule laid down in article 7, they should adopt the same principles for delimiting the continental shelf as for delimiting their territorial seas.

62. Mr. YEPES said that, although sympathetic to Mr. Zourek's proposal, he could not support it, as there was a possible conflict between it and paragraph 2 of article 7, which had already been adopted; if the Commission later decided that delimitation of the territorial waters should be governed by some principle other than that of equidistance from the coasts, the contradiction would be patent.

63. Mr. SANDSTRÖM agreed.

64. Mr. SPIROPOULOS thought that all members of the Commission could accept the suggestion that it should be stated in the commentary that the principles governing delimitation of the continental shelf and those governing delimitation of the territorial waters should be the same. On the other hand, if Mr. Zourek's proposal were adopted and the Commission came to consider how the territorial waters should be delimited, it might find that the rule of equidistance from the coasts was unsuitable; then it would have to alter the draft on the continental shelf, a course which, in view of its definitive character, would be impossible.

65. The CHAIRMAN put Mr. Zourek's proposal to the vote.

Mr. Zourek's proposal was rejected by 7 votes to 2, with 4 abstentions.

66. Mr. KOZHEVNIKOV said that he had abstained because, although warmly supporting the principle of Mr. Zourek's proposal, he firmly believed, as he had already said, that it was essential that all questions of delimitation should be decided solely by mutual consent between the parties.

67. Mr. SCELLE explained that he had voted against Mr. Zourek's proposal, first, because it tended to equate the continental shelf with the territorial sea, despite the fact that they were two quite different things, and secondly, because it would open the door to division of the sea-bed by simple bilateral agreement between States.

68. The CHAIRMAN then put to the vote the suggestion that it should be stated in the commentary that the principles governing delimitation of the continental

shelf and those governing delimitation of the territorial waters should be the same.[7]

That suggestion was adopted by 12 votes to 1.

Article 6 (resumed from the 202nd meeting)[8]

69. The CHAIRMAN recalled that article 6 had been adopted conditionally, subject to decision as to whether the word "resources" should be qualified by the word "natural" or by the word "mineral".[9]

70. Mr. LAUTERPACHT pointed out that the definition of the continental shelf adopted by the Commission covered both the sea-bed and the subsoil. The Commission had now to decide whether it wished to limit the exclusive right of exploration and exploitation to the mineral resources which were to be found on the sea-bed and in the subsoil, or whether it should be extended to cover the pearl and oyster beds, sponge deposits and other resources which would be included under the term "natural" resources. He saw no good reason why mineral and non-mineral resources should be treated differently. It was true that President Truman's original proclamation of 28 September 1945 had used the term "mineral resources", but the term "natural resources" had frequently been used in later statements of policy.

71. There were two reasons for allowing the coastal State exclusive rights of exploration and exploitation over its continental shelf. In the first place, it would be more convenient in practice for the coastal State to engage in such activities. Secondly, it would not be desirable to permit other States to engage in such activities close to the coastal State's shores. Both those considerations applied with as much force to the exploration and exploitation of non-mineral resources as to those of mineral resources. He therefore proposed that the term "natural resources" be used, it being made clear, either in the text or in the commentary, that "natural resources" did not include swimming fish or bottom fish.

72. Mr. FRANÇOIS recalled that a number of governments, particularly the Swedish Government, had expressed a preference for the term "mineral resources", in order that there might be no doubt that the coastal State's exclusive rights of exploration and exploitation did not cover fishing. It might be considered that that point was met by Mr. Lauterpacht's suggestion, but it would be well for the Commission to exercise extreme caution, especially as one government at least proposed that sedentary fisheries should be regarded as part of the "natural resources" of the continental shelf, while it was the Commission's clear intention that they should be dealt with quite apart from the continental shelf. If there was no compelling reason for using the term "natural resources", it might be wiser, in the circumstances, to keep to the term "mineral resources".

73. Mr. SANDSTRÖM said that there was one important difference between exploitation of the mineral resources of the sea-bed and subsoil and exploitation of their non-mineral resources, namely, that exploitation of the latter had already been going on for some time. For that reason it seemed preferable to limit the exercise of exclusive rights of exploration and exploitation to mineral resources.

74. Mr. YEPES felt that that was unnecessarily restrictive. He would vote in favour of the term "natural resources" being used both in the text and in the commentary.

75. Mr. SCELLE feared that any exploitation of the sea-bed and its subsoil would necessarily be total in its effect, and that even use of the term "mineral resources" in the draft would not suffice to protect the fish.

76. Mr. LAUTERPACHT suggested that the point made by Mr. Sandström might be met by adding to the text some such phrase as "subject to any established rights".

77. Mr. CÓRDOVA emphasized that the Commission should approach the question from a legal point of view, from which there could be no doubt that everything attached to the sea-bed, including oysters etc., belonged to the sea-bed. The Commission had already agreed that the continental shelf comprised the sea-bed and its subsoil, and had therefore no choice but to use the term "natural resources".

78. Mr. FRANÇOIS pointed out that sedentary fisheries were also attached to the sea-bed, but that the Commission had already decided to deal with them separately. It would only lead to confusion if it now regarded other non-mineral resources attached to the sea-bed as part of the resources of the continental shelf. He was therefore in favour of the term "mineral resources".

79. Mr. HSU said that he was altogether opposed to the principle of sovereignty over the continental shelf, but that if that principle was adopted, he did not see why it should not be extended to the non-mineral, as well as to the mineral, resources present.

Mr. Lauterpacht's proposal was adopted by 6 votes to 4, with 3 abstentions.

Points of terminology

80. Mr. KOZHEVNIKOV suggested that the opportunity be taken to discuss another question of terminology, that of the terms "territorial sea" and "territorial waters". He personally felt that the Commission should continue to use both.

81. Mr. FRANÇOIS recalled that at its fourth session the Commission had already decided, during its consideration of the régime of the territorial sea, to use the term "territorial sea" in lieu of "territorial waters"

[7] See *infra*, 236th meeting, para. 22 and 238th meeting, para. 25.

[8] See *supra*, 202nd meeting, para. 26.

[9] See *supra*, 201st meeting, para. 99.

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

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

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

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

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

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

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

87. The CHAIRMAN agreed.

88. Mr. KOZHEVNIKOV asked whether it was the intention that a vote should be taken on part I of the draft articles on the continental shelf and related subjects. In his view that would be desirable.

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

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

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

The meeting rose at 1 p.m.

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

206th MEETING

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

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART I: CONTINENTAL SHELF

Additional article proposed by Mr. Yepes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

PART II: RELATED SUBJECTS

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

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

Articles 1 and 2: Resources of the sea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. Mr. SCELLE agreed with Mr. Kozhevnikov that it would be preferable to deal with each article in turn. With regard to article 1, it was generally speaking true, as Mr. Lauterpacht had said, that the second sentence went farther than existing law, although there were notable instances where conservatory measures had been taken by a number of States in concert, as in the case of the North Sea fisheries. It was also true that the present situation resulted in anarchy, since no two States had drawn up regulations that were the same. It must therefore be recommended that the necessary measures should be taken in concert by the States concerned. It was also essential that a permanent international body be set up and empowered to frame the necessary regulations where the States concerned were unable to agree among themselves. It was also necessary, however, to provide, as a bridge between the two recommendations — a bridge that was lacking in the present text — that in the event of failure to agree among themselves, the States concerned should be under an obligation to submit the question to the permanent international body for decision.

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

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

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

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

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

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

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

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

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

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

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

35. The CHAIRMAN, speaking as a member of the Commission, said that, although he fully appreciated the desire of several members to achieve perfection, he was in favour of the text adopted by the Commission at its third session. In the present instance, the Commission's task was to ensure the protection of the resources of the sea, and not to solve general questions arising in international law in regard to the high seas. He made that comment in no spirit of pessimism: on the contrary, he was always inspired by the hope that ultimately international relations would improve, and States come to act together in harmony. But in his capacity as Acting Chairman of the Commission it was his duty to point out that for the time being the Commission was concerned with one particular concrete problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

54. Mr. CÓRDOVA was glad that Mr. Lauterpacht had come closer to his (Mr. Córdova's) conception of the kind of international organ that was needed, but must draw attention to some of the shortcomings of the proposal. It granted the interested parties the right to regulate fishing activities in the high seas. It then laid down that such regulation would not be binding upon nationals of other States. In article 2, however, Mr. Lauterpacht insisted that the nationals of a State must abide by the regulations; if they did not, that State would incur international responsibility. The two articles were thus contradictory. Further, they provided for jurisdiction by an international organ only after an abuse had been committed. The point was that an international organ should draw up regulations before remedies became necessary. Its main task should be prevention, not cure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

65. As regards the jurisdictional powers of the International Court of Justice, he would submit that no difficulty would arise if agreement were embodied in a convention, but what struck him most about Mr. Lauterpacht's text was the absence from it of preventive measures. Mr. Lauterpacht had entirely discarded the valuable features of the original text, investigation, research and so on.

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

207th MEETING

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

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART II: RELATED SUBJECTS

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

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

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

3. Mr. KOZHEVNIKOV recalled that he had stated that article 1, as adopted by the Commission, was, despite a certain lack of clarity, on the whole acceptable to him, since governments were therein invited to act within the framework of sovereignty.[1] Furthermore, the article contained elements for international collaboration. The proposals submitted at the preceding meeting did not improve the text.

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

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

6. Article 2 should be deleted.

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

Article 3: Sedentary fisheries

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

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

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

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

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

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

exploitation and exploration of mineral resources, and sedentary fisheries were not mineral resources.

10. In the light of the Commission's decision, the argument might perhaps be stated thus: the sovereign rights of a State over the continental shelf and its exclusive right to exploit the natural resources thereof could be interpreted as granting that State the exclusive right to exploit sedentary fisheries except in so far as another State or States possessed historic rights to those fisheries. Mr. Córdova had suggested previously that the article on sedentary fisheries imposed a new restriction on the principle of the freedom of the seas. It might be stipulated that the right to exploit and explore the natural resources of the sea-bed and subsoil was not intended to modify the régime applied to sedentary fisheries. The question was far from academic. For instance, Australia was opening up new pearl fisheries in its continental shelf. Could it reserve those fisheries to its nationals and prevent the Japanese from exploiting them? That was the point on which the Commission must take a decision. One thing was certain and that was Mr. Scelle's opinion on the matter.

11. Mr. SCELLE intimated that the Special Rapporteur's interpretation of his attitude was correct.

12. Mr. YEPES considered that sedentary fisheries were included in the continental shelf, since they were attached to the soil. He would therefore vote in favour of the idea that such fisheries formed part of the natural resources and were accordingly subject to the same régime as the continental shelf.

13. Mr. LAUTERPACHT noted that Mr. François seemed to be suggesting that the Commission should reverse its decision to use the term "natural resources". Certainly, when that decision had been taken, he had been aware of its relevance to article 3. He entirely agreed with Mr. Yepes.

14. As to the argument that further restriction would thereby be imposed upon the freedom of the seas, he would point out that articles 3 and 4 of the draft rules on the continental shelf clearly reserved that principle in its integrity. The Commission had decided to insert a comment relating to swimming fish.

15. Mr. CÓRDOVA agreed with Mr. Yepes and Mr. Lauterpacht, and considered that everything had been said on the issue when the Commission had taken its decision about natural resources. He would consequently limit himself to stating for the record that the comments he had made then[4] applied also in the present instance.

16. Mr. ALFARO said that the logical consequence of articles 1 and 2 on the continental shelf was that the coastal state had exclusive rights over the sedentary fisheries situated in its continental shelf. A case in point was the Gulf of Panama, which was almost entirely continental shelf. In the past his country had possessed a fine mother-of-pearl industry and pearl fisheries, which had been completely destroyed by foreign fishermen. He held, therefore, that article 3 should be modified in order to ensure the enjoyment by the coastal state of control over sedentary fisheries situated in the continental shelf.

17. Mr. PAL agreed with the preceding speakers, but pointed out that article 3 was not concerned only with the continental shelf, but with areas of the high seas contiguous to territorial waters. The extent of the contiguous areas should be defined.

18. Mr. LAUTERPACHT pointed out that those areas were equivalent to the continental shelf.

19. Mr. SANDSTRÖM agreed with Mr. Pal, and said that the difficulty of interpretation arose because reference was made in the draft on the continental shelf to the exploitation and exploration of the sea-bed and subsoil. Had the word "sea-bed" alone been used, then clearly only natural resources would be involved. But the reference to the subsoil opened the door to difficulties of interpretation.

20. Mr. HSU agreed that article 3 should be amended to make it tally with the Commission's decision to use the term "natural resources" in article 6 of the draft rules on the continental shelf.

21. Mr. Pal had raised an important question. Since the Commission had admitted sovereignty of coastal States over the continental shelf, it should also recognize their right to control sedentary fisheries beyond the continental shelf. As to which State should enjoy the right in a given area, his answer was the one closest to it. He thought that vested rights of distant States should be respected, subject to change by agreement.

22. Mr. CÓRDOVA said that the concepts must be clarified. Article 3 dealt not only with the continental shelf, but also with the areas of the high seas contiguous to territorial waters. The question of fishing in the high seas had already been disposed of, but sedentary fisheries lay at the bottom of the sea. In his view, the change of the word "mineral" to "natural" meant the admission of the right of coastal States to regulate sedentary fisheries.

23. Mr. LAUTERPACHT said that Mr. Córdova evidently assumed that no sedentary fisheries could exist outside the 200-metre limit. That was a matter of scientific fact which he was not competent to discuss. He would suggest that article 3 be retained as adopted by the Commission at its third session, with the addition of the words "and its continental shelf" after the words "territorial waters" (A/1858, Annex, Part II). There was no getting away from the fact that by adopting the formula "natural resources", the Commission had greatly reduced the scope and significance of article 3.

24. Mr. LIANG (Secretary to the Commission) recalled that although, both at its third and present sessions, the Commission had concentrated its attention on the continental shelf and on the exploitation of natural resources, it had had in mind the exploitation of oil,

[4] *Ibid.*, para. 77.

which was a mineral. That was why the special rapporteur had taken the realistic view and had in his draft used the words "mineral resources". Discussion at the present session had clearly shown that the whole concept of the continental shelf was closely related to the problem of the exploitation of oil. Thence arose the necessity for an article on sedentary fisheries. In his view, the problem should be treated separately from that of the continental shelf, since not all coastal States possessed such a shelf.

25. Finally, he would express the opinion that the second sentence of article 3 as drafted by the Special Rapporteur (A/CN.4/60, Chapter IV, Part II), needed modification. Reference to the past was appropriate in a treatise, but out of place in that article.

26. Mr. SCELLE was unable to agree with the views expressed by several members of the Commission. Sovereign rights over the continental shelf had been granted to States, sovereign rights must now be granted over the high seas and over sedentary fisheries. What would be left of the principle of the freedom of the high seas at the end of that process of extension? He feared that so little would be left of the high seas as would not suffice to drown a celebrated little book, the author of which was one named Grotius.

27. Mr. KOZHEVNIKOV disclaimed any special competence in a highly technical matter, but was under the impression that the Commission had wished to correlate sovereign rights over the sea-bed and subsoil of the continental shelf with the principle of the freedom of the seas and the interests of navigation and fishing. That had been the guiding principle, and should remain so. He recalled that he had abstained from voting on the decision to use the words "natural resources", and noted that in general article 3 seemed to be correct in its approach and to need only slight modification.

28. Mr. ALFARO said that, in view of the Commission's earlier decisions, he was unable to agree that article 3 could be accepted by the Commission as it stood. It was essential to admit the theory of the coastal State's exclusive rights, with the result that no concession could be made to historic rights.

29. Mr. FRANÇOIS said that at the beginning of the meeting he had explained the position without expressing his own views. It had been suggested that he was in favour of reversal of the decision to use the term "natural resources". Members had declared that they had all along been aware that that decision would affect the problem of sedentary fisheries, but at the time not a word had been said about them.

30. According to Mr. Lauterpacht, the principle of the freedom of the seas was in no way affected. He (Mr. François) doubted whether the Japanese fishermen who would be barred access to the pearl fisheries off the Australian coast would agree with Mr. Lauterpacht. Under the original text they would have been able to exercise their trade in that area because Australia possessed no historic rights therein. It was now proposed that Australia should have exclusive rights: surely, therefore, it was inadmissible to argue that the principle of the freedom of the seas was not affected. If Mr. Córdova, who had espoused the Australian point of view, were followed, the article would have to be changed completely. For his part, he failed to see how one could violate historic and acquired rights.

31. Mr. SPIROPOULOS agreed with Mr. François that historic rights must be safeguarded, and did not consider that the Commission's decision on the term "natural resources" vitiated article 3.

32. Mr. CÓRDOVA reminded the Commission that when, at the 206th meeting, the Commission had discussed the proposal of Mr. Yepes for an additional article recognizing that the rights of the coastal State over the continental shelf were independent of any occupation by that State,[5] members had taken the view that occupation was not a prerequisite of sovereignty. Yet the Special Rapporteur now argued that in the case of sedentary fisheries historic occupation must be taken into account. His proposed text read: "The regulation of sedentary fisheries may be undertaken by a State in areas... where such fisheries have long been maintained." But no reference was made to the length of time during which those historic rights had been exercised. Before the last war Japanese fishermen had been accustomed to fish in the Gulf of California. Had they any historic rights? It was impossible to allow a coastal State to oust all foreigners from those areas of the high seas.

33. Mr. LAUTERPACHT pointed out that, according to the articles adopted by the Commission on the continental shelf, a State had an exclusive right over the sea-bed and the subsoil regardless of whether the continental shelf did or did not actually exist. If his amendment to article 3 were adopted, the text would clearly mean that States had no rights over sedentary fisheries beyond the continental shelf, provided always that they had no historic rights in the area. He agreed with the Special Rapporteur that those rights must be admitted, and considered that the second sentence of article 3 as drafted by him (A/CN.4/60, Chapter IV, Part II) was wholly justified.

34. Mr. SANDSTRÖM said that the Commission was getting further and further away from its original ideas. He would vote for article 3 as drafted at the third session.

35. The CHAIRMAN, speaking as a member of the Commission, said that he took the same view as Mr. Sandström.

36. Mr. SPIROPOULOS pointed out to Mr. Córdova that in international law occupation could only be carried out by a State. Fishermen could not occupy an area. The conception of occupation had originated in certain special circumstances, and was clearly defined as involving action by a State.

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[5] See *supra*, 206th meeting, paras. 1-14.

37. As to the controversy about the term "natural resources", he would point out that the question had not really been solved, and that article 3 as adopted by the Commission at its third session allowed both for natural and mineral resources. One of the reasons for the difficulty was that the subsoil must be distinguished from the sea-bed. The subsoil was not a mere legal fiction.

38. Mr. PAL said that the discussion clearly showed that article 3 was intended to apply to areas beyond the continental shelf, and he was opposed to the granting of exclusive powers to a State beyond the continental shelf for any purpose whatsoever. In his view, therefore, the first sentence of article 3 must be so modified as to make it clear that rights could only be exercised within the area covered by the continental shelf. He took the strongest exception to the second sentence of the text proposed by the Special Rapporteur (A/CN.4/60, Chapter IV, Part II), since it was clearly inadmissible that a State should have to solicit the permission of a coastal State in order to fish in the high seas. He could not but reiterate that article 3 must be applicable to the continental shelf and to the continental shelf alone.

39. Mr. YEPES agreed with Mr. Lauterpacht that the Commission must either alter its definition of the continental shelf, or agree that the term "natural resources" covered not only the sea-bed and the subsoil but sedentary fisheries as well. Actually, the Commission was failing to distinguish between two very important principles of international law: the freedom of the seas; and the rights of coastal States to control zones wherein they could exploit the riches of the sea for the benefit of their people.

40. Too much emphasis had been placed on the principle of the freedom of the seas at the expense of the principle of the coastal State's right to take steps to protect the essential interests of its population. The first sentence of the draft article in the Special Rapporteur's fourth report would limit the right of a State to regulate sedentary fisheries in areas of the high seas contiguous to its territorial sea to cases where such fisheries had long been maintained and conducted by its nationals. If they had not been maintained and conducted by its nationals for such a period, the State would be powerless in that respect. In its comments, reproduced in the same report (mimeographed English text, pp. 75-77; printed French text, No. 154), the Chilean Government had rightly said that the Commission's text should be re-examined in the light of the situation which had arisen since the proclamation of the United States President on 28 September 1945.[6] As the Chilean Government said, "the seas are in reality dominated, used and — it may almost be said — possessed by States maintaining powerful navies, fishing and merchant fleets, bases, supply ports, docks and shipyards. The nationals of those States are the only persons who fully enjoy all the privileges of the 'freedom of the seas'.... It is a well-known fact that fishing fleets under the direct control of the great sea powers engage in activities prejudicial to the States bordering upon the Pacific coast".

41. Such had been the situation until recently. Throughout North and South America, however, increasing resistance had developed to the "*beati possidentes*". The proclamation by the United States President, declaring his country's right to establish fishery conservation zones in the high seas areas contiguous to the coasts of the United States of America, had been followed, as the Chilean Government had pointed out in its comments, by similar declarations made by the Governments of Mexico, Argentina, Chile, Peru, Costa Rica, El Salvador and Honduras, all proclaiming their national sovereignty over the seas adjacent to their coasts within the limits necessary to conserve the natural resources found on, within and below those seas, for the benefit of their inhabitants. The Chilean Government concluded: "All this is ground enough for saying that the doctrine that the State may establish exclusive zones of control and protection of maritime fishing and hunting in areas of the high seas contiguous to its territory, known as 'continental seas or waters', has become part of the American international system."

42. It was because those considerations and that system had been somewhat overlooked in the text presented by the Special Rapporteur that he had felt it necessary to draw attention to them at some length.

43. The CHAIRMAN pointed out that the Commission had a specific question to decide, namely: whether an article on sedentary fisheries should be kept, and, if so, what its form should be; or whether the point of view advanced by Mr. Pal and Mr. Alfaro should prevail.

44. Mr. HSU said that it should be clearly understood that, although the entry into force of whatever provision the Commission adopted would not abolish established rights, neither would it deprive the coastal State of its right to press for the abandonment of such rights.

45. Mr. KOZHEVNIKOV thought that the Commission should avoid formulating any too rigid or dogmatic rules. Its task was to reconcile the principle of the freedom of the seas and the principle of the coastal State's right to protect the essential interests of its population. He had no doubt that the article in question was required, and that even with the words "natural resources" substituted for "mineral resources" article 2 of part I did not fully meet the case. For that article referred only to "exploration and exploitation" of the natural resources of the continental shelf, and thus did not apply to fisheries.

46. Mr. ZOUREK felt that before voting on article 3, the Commission should define its exact scope, making it clear whether it related to sedentary fisheries outside the continental shelf as well as to sedentary fisheries situated upon it. The Special Rapporteur had suggested that the question of sedentary fisheries outside the

[6] See text in *Laws and regulations on the régime of the high seas*, vol. I (United Nations publication, Sales No.: 1951.V.2), p. 38.

continental shelf would not in practice arise, but Mr. Lauterpacht seemed to be of the opinion that such fisheries could exist, for example, where a submarine plateau was separated from the continental shelf proper by a deep channel.

47. The article as drafted by the Special Rapporteur did not solve the case where the nationals of one State maintained sedentary fisheries on the continental shelf of another State. Moreover, the second sentence seemed to imply that permission from the coastal State would be required before the nationals of another State could conduct sedentary fisheries in areas of the high seas contiguous to the former's territorial sea. Such was not the case, and the wording used was inappropriate.

48. He agreed with Mr. Kozhevnikov that an article on sedentary fisheries was required, despite the substitution of the term "natural resources" for "mineral resources" in article 2 of the draft articles on the continental shelf itself. The wording of article 2 was in other respects inapplicable to the actual fish, and he considered that although the stakes, pots and other equipment attached to the sea-bed and used for catching the fish were covered by it, the fish themselves were not.

49. Mr. FRANÇOIS said that he wished to withdraw the text which he had presented in his fourth report (A/CN.4/60, Chapter IV, Part II) and to propose the following clearer and shorter text:

> "The regulation of sedentary fisheries in areas of the high seas may be undertaken by a State either on its continental shelf or in other areas where such fisheries have long been maintained and conducted by nationals of that State. In both cases, the rights acquired by nationals of other States must be protected."

50. The new text which he proposed drew a distinction between sedentary fisheries on the continental shelf and sedentary fisheries in other areas; in the former case it was not necessary that such fisheries should have been long maintained and conducted by nationals of the coastal State; in the latter case it was. Even though the case of sedentary fisheries outside the continental shelf might be purely hypothetical, there could be no harm in providing for it.

51. There was a further difference between the new text and that contained in his fourth report. The text approved at the third session had contained a proviso to the effect that non-nationals should be permitted to participate in the fishing activities on an equal footing with nationals. A number of objections to that provision had been made. In particular, the United Kingdom Government had expressed the view that "where the coastal State has in the past permitted non-nationals to participate in the fishing, then there is no right to exclude such non-nationals in the future; where, however, the coastal State has in the past reserved the fishing exclusively for its own nationals, then non-nationals have no right under international law to participate in the fishing in the future".[7] Mr. Young had observed that it was doubtful "whether the Commission's proposed admission of non-nationals reflects existing practice with respect to many sedentary fisheries, where non-nationals of one class or another appear often to be excluded".[8] He felt that those objections were valid, and it was for that reason that in the new text he had introduced the concept of acquired rights.

52. Mr. SPIROPOULOS wondered whether the term "acquired rights" expressed exactly what the Commission had in mind. How were the rights acquired, and by whom? If by individuals, as seemed to be implied, was it to be taken that they lapsed with the death of those individuals?

53. Mr. ALFARO agreed with Mr. Spiropoulos. He recalled that the classic definition of an acquired right was: "a right legally and duly acquired by a person in accordance with the law existing at the time the right had been acquired." It was, therefore, very difficult to see how the term could be applied in international law not by States, but by persons in respect of which it was impossible to say what was the international law in force at a certain time and at what time the right was acquired.

54. It was also not sufficient to refer to "the regulation" of sedentary fisheries. It must be made clear whether or not such regulation extended to the right to exclude the nationals of certain States.

55. Finally, he was in complete agreement with Mr. Pal that the traditional freedom of the seas could not be limited to the extent of giving the coastal State the right to regulate fishing beyond the limits of its continental shelf.

56. Mr. SCELLE said that the wording used in the last sentence of Mr. François' new proposal, in which he referred to the acquired rights of nationals of States other than the coastal State, raised extremely important questions relating to the legal status of the high seas. To provide that individuals could acquire rights under international law would be to make them subjects of international law, and although he personally would be warmly in favour of such a step, it was essential that the Commission should realize what it was doing; the wording proposed by the Special Rapporteur ran absolutely counter to the traditional concept of international society as a community of States.

57. Mr. KOZHEVNIKOV said that as he had only the French text before him, he must reserve the right to comment further on Mr. François' new proposal at a later stage. For the present, he could merely say that he was afraid he did not agree with Mr. François that it was clearer than the text in his fourth report. Previous speakers had already pointed out a number of weaknesses in the new text, the most serious of which was the suggestion, implicit in the second sentence, that the subjects of international law were individuals, not States. Again, he drew attention to the curious position when he had to defend the first text proposed by the Special Rapporteur against the Special Rapporteur him-

[7] See document A/CN.4/60 (mimeographed English text, p. 119; printed French text, para. 86).

[8] *Ibid.*

self. Since Mr. François had withdrawn the proposal contained in his fourth report, he (Mr. Kozhevnikov) would take it over.

58. Faris Bey el-KHOURI said that the new text proposed by the Special Rapporteur would be quite meaningless in the Arab world, as in Moslem law rights could only be "acquired" for a definite period of time. Moreover, no rights could be acquired over *domaine public*. The text proposed was therefore unacceptable.

59. Mr. LAUTERPACHT felt that the points which had been raised had been raised unnecessarily. "Rights acquired by the nationals of other States" was an expression often used in international treaties, and no abstruse and complicated points were ever raised concerning its meaning such as had been raised in connexion with Mr. François' new proposal. He supported that proposal, and hoped that the vote on it would not be long delayed.

60. Mr. YEPES agreed with Mr. Alfaro that it was going much too far to provide that a State could regulate sedentary fisheries in areas other than its continental shelf, and proposed that the new text proposed by the Special Rapporteur should be amended to read:

> "The regulation of the sedentary fisheries established in the high seas included in its continental shelf shall be undertaken by the coastal State itself."

61. Mr. FRANÇOIS drew Mr. Kozhevnikov's attention to the fact that the proposals he submitted as Special Rapporteur were not so much the expression of his own views as an attempt to find a basis for agreement within the Commission. It was therefore only natural that he should sometimes have to make more than one such attempt, even though his first attempt might commend itself to certain members.

62. He agreed that the term "acquired rights" was not altogether happy, but, as Mr. Lauterpacht had said, every jurist knew what it meant. If adopted, the text could be referred to the Drafting Committee.

63. Although the reference to the regulation of sedentary fisheries by a State in areas other than its continental shelf might be unnecessary, he could not agree with Mr. Yepes and Mr. Alfaro that it was dangerous, having regard to the qualification which accompanied it, namely: "where such fisheries have long been maintained and conducted by nationals of that State". In cases where a kind of customary law had been built up in that way, he did not see how the Commission could consider that the practice should stop.

64. Finally, replying to another point raised by Mr. Alfaro, he said that it was his intention that "regulation" should cover the right to prohibit the nationals of certain States from fishing in a given area.

65. Mr. SANDSTRÖM proposed that the Commission should adopt the text provisionally approved by it at the third session, which read:

> "The regulation of sedentary fisheries may be undertaken by a State in areas of the high seas contiguous to its territorial waters, where such fisheries have long been maintained and conducted by nationals of that State, provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Such regulation will, however, not affect the general status of the areas as high seas."[9]

66. Mr. SPIROPOULOS supported Mr. Sandström's proposal. The new text proposed by Mr. François covered areas outside the continental shelf, and Mr. François himself had just said that the right of regulation should include the right of excluding non-nationals from fishing activities. It would be going much too far to allow a coastal State to exclude the nationals of another State from fishing in an area of the high seas outside its continental shelf.

67. Mr. ZOUREK said that one obvious difference between the new text proposed by the Special Rapporteur and that contained in his fourth report was that the former contained no safeguards for navigation. He also agreed with previous speakers that it went much too far. Above all, however, he objected to the use of the term "acquired rights". There was no rule of international law by which any such rights could have been acquired, and he failed to see how a State, let alone an individual, could acquire rights over the high seas.

68. After some discussion of the order in which the various text proposed should be put to the vote, in the course of which Mr. LIANG (Secretary to the Commission) pointed out that the text proposed by Mr. Sandström was in a different category from the rest, since it had already been approved by the Commission, and that it should therefore be voted on last, the CHAIRMAN suggested that he should first put Mr. Yepes' amendment to the vote, then the Special Rapporteur's new proposal itself, then Mr. Kozhevnikov's proposal (the text contained in the Special Rapporteur's fourth report) and finally Mr. Sandström's.

It was so agreed.

69. Mr. KOZHEVNIKOV and Mr. ZOUREK requested that the vote should be deferred until the next meeting, when the various proposals would be available in English, French and Russian.

It was so agreed.

The meeting rose at 1.55 p.m.

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

208th MEETING

Friday, 3 July 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART II: RELATED SUBJECTS

Article 3: Sedentary fisheries (continued)

1. The CHAIRMAN recalled that it had been agreed at the close of the previous meeting that voting on the various texts proposed for article 3 (Sedentary Fisheries) of part II of the revised draft articles on the continental shelf and related subjects should be deferred till the present meeting and that the texts should be put to the vote in the following order: first Mr. Yepes' amendment[1] to the Special Rapporteur's new proposal, then the Special Rapporteur's new proposal itself,[2] then Mr. Kozhevnikov's proposal[3] and finally Mr. Sandström's.[4] Finally, he recalled that Mr. Kozhevnikov had reserved the right to comment further on the texts proposed, once he had them before him in the Russian translation. Before proceeding to the vote, therefore, he would call on Mr. Kozhevnikov.

2. Mr. KOZHEVNIKOV suggested that now that the proposals for articles 1 and 2 were available in mimeographed form and in translation as well as the text proposed for article 3, it would be more logical to vote first on the proposals for article 1, then on those for article 2 and finally on those for article 3.

3. With regard to the last named, his only further question was whether the amendment proposed by Mr. Yepes conferred an exclusive right on the coastal State to regulate the sedentary fisheries on its continental shelf in such a way as to exclude non-nationals of that State, and whether it did not present a danger to international navigation and to the freedom of the high seas.

4. Mr. YEPES replied that his amendment made regulation of the sedentary fisheries a duty placed upon the coastal State instead of a right which could or could not be exercised by it at its discretion. Naturally such regulation would have to be undertaken in accordance with the rules of international law, and in particular in accordance with the provisions of the other articles which the Commission had already approved. It must not be left to States to regulate sedentary fisheries or not, as they chose. Protection of the interests of the international community required that such regulations should be treated as a bounden duty and not merely as an optional right.

5. Mr. FRANÇOIS (Special Rapporteur) could not accept Mr. Yepes' amendment. The whole purpose of article 3, as he saw it, was to place restrictions on the coastal State's right to regulate the sedentary fisheries on its continental shelf. The text proposed by Mr. Yepes merely reaffirmed that right and placed no restrictions on it.

6. Faris Bey el-KHOURI said that he could not vote for or against Mr. Yepes' amendment before knowing what effect it would have on the existing rights of States other than the coastal State, and whether the regulations adopted by virtue of it would be binding on them. He therefore agreed with Mr. Kozhevnikov's suggestion that articles 1 and 2 should be voted on first, and if that suggestion were not adopted, he would have to abstain from the vote on Mr. Yepes' amendment.

7. Mr. CÓRDOVA felt that the considerations put forward by Faris Bey el-Khouri applied with even greater force to the new text proposed by the Special Rapporteur. It would be quite impossible for him to vote on that text without knowing whether a permanent international body was to be set up to make the necessary regulations in cases where the States concerned were unable to agree among themselves, as provided in article 2 of the draft contained in the Special Rapporteur's report.

8. The CHAIRMAN very much hoped Mr. Kozhevnikov would not press his suggestion, and that the Commission would abide by the decision it had taken at the previous meeting.

9. Mr. SCELLE said that he was not in favour of the

[1] See *supra*, 207th meeting, para. 60.

[2] *Ibid.*, para. 49.

[3] *Ibid.*, para. 57.

[4] *Ibid.*, para. 65.

second part of Mr. Yepes' amendment, which consisted in deleting all reference to sedentary fisheries outside the continental shelf and to the rights of other States; but he was in favour of the substitution of the word "shall" for the word "may". It was of the utmost importance that no State should permit its nationals to despoil the resources of the sea, whether within the limits of its continental shelf or beyond them. As soon as its nationals engaged in fishing activities, a State by very reason of its sovereign status, had a duty — towards its own nationals, towards the nationals of other States, and towards the concept of the high seas as "*domaine public*" — to regulate their fishing activities. Until that was generally agreed, it was useless to consider what further progress might be made, for example by the establishment of a permanent international body. It was for that reason that it was logical to vote on article 3 before voting on articles 1 and 2.

10. Mr. KOZHEVNIKOV said that he was opposed to the use of the word "shall", since with it the text could be interpreted as placing a binding obligation on States and was therefore incompatible with the principle of their sovereignty.

11. The CHAIRMAN put to the vote the amendment proposed by Mr. Yepes to the new text proposed by the Special Rapporteur.

Mr. Yepes' amendment was rejected by 7 votes to 4, with 2 abstentions.

12. Mr. HSU asked the Special Rapporteur whether he did not agree that in the new text which he proposed, a comma should be inserted after the words "either on its continental shelf" in the English text, so as to leave no possible room for doubt that the qualifying clause, "where such fisheries have long been maintained and conducted by nationals of that State", applied only to the words "other areas".

13. Mr. FRANÇOIS agreed.

14. Mr. ALFARO requested that the two sentences of the Special Rapporteur's new proposal should be voted on separately.

The first sentence was adopted by 8 votes to 4, with 2 abstentions.

The second sentence was rejected by 5 votes to 4, with 4 abstentions.

The Special Rapporteur's new proposal, as amended, was rejected by 6 votes to 4, with 3 abstentions.

15. Mr. FRANÇOIS explained that he had voted against the proposal in its amended form as he could only have supported it with the second sentence included.

16. The CHAIRMAN recalled that the next text to be voted on was that proposed by Mr. Kozhevnikov, the text contained in the Special Rapporteur's fourth report (A/CN.4/60, Chapter IV, Part II).

17. Mr. ALFARO, after pointing out that the Commission had had no opportunity of discussing Mr. Kozhevnikov's proposal, proposed the deletion of the second sentence of the text contained in the Special Rapporteur's fourth report, which read as follows: "Where the coastal State had in the past permitted non-nationals to participate in the fishing, it has no right to exclude them in the future." That sentence would enable non-nationals to return to an area where they had fished in the past, regardless of any abuses they might have committed or any damage they might have done there.

18. Mr. LAUTERPACHT suggested that the Chairman should rule Mr. Kozhevnikov's proposal out of order, as the text he proposed was incompatible with the articles which the Commission had already adopted on the continental shelf.

19. The CHAIRMAN recalled that he was reluctant to give rulings from the Chair, except when circumstances compelled him to do so. It was for the Commission to decide whether or not it wished to adopt the text proposed.

20. Mr. CÓRDOVA asked Mr. Kozhevnikov whether adoption of the text he proposed would not mean that sedentary fisheries would remain unregulated in cases where they had not "long been maintained and conducted by nationals of [the coastal] State".

21. Mr. KOZHEVNIKOV said that he did not intend to reply to any questions on the text, which was not his, but had been submitted by him in an attempt to find a compromise solution, even though the Special Rapporteur had later withdrawn it. In those circumstances he considered that it should be voted on without discussion or delay, and he was not prepared to accept any amendments to it.

The amendment proposed by Mr. Alfaro to Mr. Kozhevnikov's proposal, was rejected by 6 votes to 5, with 3 abstentions.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 3, with 2 abstentions.

22. The CHAIRMAN recalled that the last text on which the Commission had to vote was that proposed by Mr. Sandström, namely, the text which had already been provisionally approved at the third session.

23. Mr. KOZHEVNIKOV asked whether Mr. Sandström would be willing to add to the end of the text the last sentence of the text proposed by the Special Rapporteur in his fourth report, reading as follows:

> "Sedentary fisheries must not result in substantial interference with navigation."

If that sentence were added, he could vote in favour of Mr. Sandström's proposal.

24. Mr. SANDSTRÖM said that he had no objection to the substance of Mr. Kozhevnikov's proposal, but pointed out that the last sentence of the present text, reading: "Such regulation will, however, not affect the general status of the areas as high seas", already met the point.

25. Both Mr. YEPES and the CHAIRMAN, speaking as a member of the Commission, agreed that the addition proposed by Mr. Kozhevnikov was superfluous.

26. Mr. KOZHEVNIKOV agreed that the present text could be interpreted as covering the point he had in mind, but felt it desirable, particularly in view of certain statements which had been made during the debate, to make the point explicitly.

27. Mr. LAUTERPACHT said that he would again suggest that the Chairman rule the proposal under consideration out of order as incompatible with the articles which the Commission had already adopted.

28. Mr. CÓRDOVA agreed with that view.

29. The CHAIRMAN said that he could not accept Mr. Lauterpacht's suggestion. It had never been suggested during the discussion that the text proposed by Mr. Sandström was incompatible with the articles already adopted. He repeated that he was averse to giving rulings except when absolutely necessary, preferring to oblige the Commission to shoulder its responsibilities.

30. Mr. SANDSTRÖM said that he could not accept the suggestion that the text which he proposed was incompatible with the articles already adopted. Those articles did not give the coastal State unconditional rights over the continental shelf, but only certain specific rights which it could exercise for certain specific purposes.

31. Mr. ZOUREK supported Mr. Kozhevnikov's suggestion, and pointed out that in the text which he had proposed in his fourth report (A/CN.4/60, Chapter IV, Part II) the Special Rapporteur had included the sentence which Mr. Kozhevnikov suggested be added as well as the last sentence of the text approved in 1951. He had done so in order to meet objections raised by certain governments to the latter text, and in doing so he had given the whole article a better balance.

32. Mr. SANDSTRÖM said that although the addition suggested by Mr. Kozhevnikov was perhaps unnecessary, it could do no harm and as Mr. Kozhevnikov and Mr. Zourek appeared to attach importance to it, he was prepared to accept it.

33. Mr. CÓRDOVA said that he would be obliged to vote against the text proposed by Mr. Sandström, since it failed to distinguish between sedentary fisheries on the continental shelf and any sedentary fisheries that might exist outside it.

34. Mr. ALFARO proposed the deletion of the words "provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals", for the same reasons as had prompted his amendment to the text proposed by Mr. Kozhevnikov.

The amendment proposed by Mr. Alfaro was rejected by 6 votes to 5 with 3 abstentions.

The text proposed by Mr. Sandström was rejected, 6 votes being cast in favour and 6 against, with 2 abstentions.

35. The CHAIRMAN noted that there would, therefore, after all, be no article dealing with sedentary fisheries.[5]

36. He then expressed his concern at the time spent by the Commission on the question of the continental shelf. He had on several occasions drawn the attention of members to the great deal of work which remained to be done, and to the necessity for avoiding delays. He must remind members that Mr. Spiropoulos and himself, in their capacity as members of the Sixth Committee of the General Assembly, had great difficulty in defending the Commission's cause there.

37. He would invite the Commission to resume consideration of articles 1 and 2 on the resources of the sea.

Articles 1 and 2: Resources of the sea (resumed from the 207th meeting)[6]

38. Mr. FRANÇOIS said that the discussion at the 206th meeting on articles 1 and 2 on the resources of the sea had shown that members were not wholly satisfied with the manner in which the principles had been expressed. Mr. Lauterpacht and he had consequently tried to draft new texts which retained the original conception. Their joint proposal read as follows:

"Article 1

"A State whose nationals are engaged in fishing in any area of the high seas may regulate fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are thus engaged in any area of the high seas, the States concerned shall prescribe such measures by agreement. The measures thus taken are binding only upon the nationals of those States which have accepted or concurred in these measures.

"Article 2

"Whenever a State, or a number of States, regulate the fishing activities of their nationals within an area situated within 100 miles of the territorial sea of a State, that coastal State, even if its nationals do not fish there, shall be consulted in relation to any system of regulation that may be accepted.

"It shall be entitled to participate, if it so desires, on a footing of equality in the carrying out of the regulations thus adopted. The coastal State shall also be entitled to object to any systems of regulation which it considers unreasonable or violative of its rights.

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[5] See, however, *infra*, 209th meeting, paras. 1-16.

[6] See *supra*, 207th meeting, paras. 1-7.

"Article 3

"States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created by the States concerned, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State in cases in which the States concerned have been unable to reach agreement.

"Article 4

"Competence should be conferred on a permanent international body to conduct investigations and to make recommendations concerning fisheries in any area of the high seas and the methods employed in exploiting them.

"Article 5

"States are under a duty to accept, as binding upon their nationals, measures adopted by the coastal State in areas situated within fifty miles of its territorial sea, provided that such measures are not discriminatory against foreign nationals and that they are essential for protecting fisheries against waste or extermination. In cases of disagreement as to the measures thus adopted, the dispute shall be settled by arbitration. Such measures, if objected to, shall not enter into force until the arbitral tribunal has rendered its decision."

39. The Commission would note that article 5 was not new in substance. The point covered therein had been set out in comment 5 to articles 1 and 2 on the resources of the sea in the Commission's report on its third session (A/1858, Annex, Part II). The idea of providing for regulation by a coastal State in a zone contiguous to its territorial waters had been sponsored by Mr. Córdova, but as the vote on the proposal had yielded an inconclusive result — 6 votes being cast in favour and 6 against[7] — the Commission had decided to draft an appropriate comment and include it in its report. The Norwegian Government had expressed itself in favour of the proposal, which had been opposed by the United Kingdom and the Union of South Africa. His exposé of the issue would be found on pages 117-118 of the report (A/CN.4/60).

40. Mr. SANDSTRÖM said that it was not wholly for reasons of conservatism that he preferred the original text. The joint proposal was complicated and had serious shortcomings. Article 1 to some extent conflicted with article 5. The last sentence of article 1 read: "The measures thus taken are binding only upon the nationals of those States which have accepted or concurred in these measures." But under article 5 coastal States were granted the exclusive right to regulate fishing activities in areas situated within 50 miles of their territorial sea. Some adjustment was obviously necessary either by the transposition of article 5 into article 1, or by a cross-reference in the latter.

41. Furthermore, article 2 laid down that the coastal State should be consulted in relation to any system of regulation imposed within 100 miles of its territorial sea and should be entitled to object to that system if it considered it unreasonable or violative of its rights. The contradiction was patent.

42. Three different kinds of international authority were provided for in articles 3, 4 and 5. Article 3 referred to "an international authority"; article 4 referred to "a permanent international body" and article 5 referred to "arbitration" and "an arbitral tribunal". Article 2 as adopted by the Commission at its third session conferred competence on a permanent international body to conduct continuous investigations of the world's fisheries and to make regulations in any area where the States concerned were unable to agree among themselves. The principle of arbitration was therein admitted. In his view, that formula was preferable, in that it would be simpler, more comprehensive and easier to implement. He could see no justification for complex provisions and subtle distinctions which did not lend greater clarity to the issue.

43. He would ask permission to draw attention to his amendment to article 1 which read as follows:

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

44. Mr. SPIROPOULOS agreed with Mr. Sandström that the joint proposal was complicated and unsatisfactory. He would prefer either the text adopted by the Commission at its third session (A/1858, Annex, Part II), or that proposed by Mr. François in his report (A/CN.4/60, Chapter IV, Part II). The new ideas contained in the joint proposal introduced fresh complications, and he would advocate the adoption of one of the earlier versions together with Mr. Sandström's amendment.

45. Mr. ALFARO said that in general the joint proposal covered his objections to Mr. François' redraft of articles 1 and 2. The issues had been set out methodically in the five articles, but he would prefer article 1 to be split into separate paragraphs.

46. He had one question to ask on article 3, in which reference was made first to "States", then to "the States concerned", and lastly to "any interested State". He assumed that "the States concerned" were those responsible for the system of regulation, and that it was only those States which would also be responsible for establishing the international authority. But if the States concerned were very few in number, any such authority as they might set up would not be truly representative. Furthermore, the last sentence was not clear. What exactly was meant by "at the request of an interested State" and "to reach agreement"? Which were the

[7] See *Yearbook of the International Law Commission, 1951*, vol. I, 118th meeting, para. 89.

interested States, and on what were they supposed to reach agreement?

47. Mr. KOZHEVNIKOV also felt that the joint proposal failed to clarify the issues. It had, moreover, the disadvantage of being extremely cumbersome. Quantity at times had a positive value, but at others — as in the present case — it had a negative effect.

48. Articles 3, 4 and 5 reproduced the main ideas of article 2 of the original text, and he had stated his views on that article at the previous meeting.[8] Consequently, if the joint proposal were taken as a basis for discussion and decision, he would vote for the deletion of articles 3, 4 and 5.

49. Would the authors be prepared to amend the second sentence of article 2 by adding the words "establishment and the" before the words "carrying-out of the regulations"? That was merely a suggestion, not a formal amendment.

50. Mr. LAUTERPACHT thought that the discussion would be clearer if members confined their observations to articles 1 and 2 in the new proposal, which represented a redraft of article 1. He must plead with the Commission to recognize that that article as proposed by the Special Rapporteur (A/CN.4/60, Chapter IV, Part II) was not satisfactorily drafted. It dealt with two different issues, that of regulation by a State for the purpose of preserving the resources of the sea, and that of the rights of a coastal State to take part in a system of regulation within a 100-mile area beyond the territorial sea. The new text was much clearer.

51. Mr. SANDSTRÖM was perhaps right in thinking that there was some contradiction between articles 1 and 5. Assuming that the latter were adopted, the words "subject to article 5" might be inserted in article 1. He would be prepared to accept Mr. Kozhevnikov's suggestion, although he felt that the point was covered by the words "shall be consulted" in the first sentence of article 2.

52. It seemed to him that the Commission evidently agreed with the principles stated in the joint proposal, and believed that the matter was simply one of drafting which could be entrusted to the Drafting Committee.

53. Mr. CÓRDOVA appreciated Mr. François' and Mr. Lauterpacht's efforts, but feared that they had not been crowned with success. The whole draft was based on the assumption that in the high seas all States whose nationals fished in a certain area would have absolute authority to impose regulations. The last sentence of article 3 meant that if the States concerned were in agreement, another State would be unable to lodge a complaint. Thus, supposing the United Kingdom, the Netherlands and Sweden had drawn up regulations for an area in the high seas, a fourth State would be unable to have recourse to the international authority since such recourse was provided for only when the States concerned had not reached agreement. That, at least, was how he interpreted the last sentence of article 3.

54. Furthermore, the Commission must decide whether it really wanted to set up an organ with world-wide authority or whether authority should devolve on the States concerned. He had at the 206th meeting advocated the setting up of an organ composed of States which were directly interested in the protection of fisheries.[9] Why should Mexico, for instance, participate in regulations drawn up for the Behring Sea? The Commission must first decide that point, and then revert to article 1 and prescribe the appropriate régime.

55. Article 2 obviously contradicted article 5, as indeed had already been pointed out by Mr. Sandström.

56. Mr. LAUTERPACHT explained that the difference between articles 2 and 5 was the following. If a coastal State had taken certain measures in areas situated within 50 miles of the territorial sea, such measures would be binding upon other States. But, in the other event, if a State or States imposed regulations within an area situated within 100 miles of the territorial sea, then the coastal State, not having taken any measures, had the right to be consulted.

57. Mr. CÓRDOVA said that presumably coastal States would be free to impose regulations within the 50-mile area.

58. Mr. LAUTERPACHT drew Mr. Córdova's attention to the fact that the regulations of other States would be binding only on their own nationals.

59. Mr. CÓRDOVA pointed out that according to article 2 a coastal State was entitled to object to a system of regulation imposed by other States within an area situated within 100 miles of the territorial sea. But that right was withdrawn from the coastal State by the last sentence of article 3, since if the interested States had agreed on a system, the international authority could not intervene and the coastal State's objection would not be valid.

60. Mr. LAUTERPACHT agreed that the point must be clarified.

61. Mr. PAL also felt that the whole issue was one of drafting. When the articles had first been discussed, the Secretary had pointed out that article 1 related to regulations for the conservation of fish. In his first proposal [10] on article 1 submitted at the 206th meeting [11], Mr. Lauterpacht had not dealt with that issue. In the joint proposal emphasis was correctly laid in the first sentence of article 1 on the protection of fisheries against waste or extermination. It clearly and adequately conveyed the views expressed by members.

62. He considered, however, that in view of the intention of the article to ensure protection, the last sentence should be more rigorous, and stipulate that

[8] See *supra*, 207th meeting, paras. 3-6.

[9] See *supra*, 206th meeting, para. 70.

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

[11] Para. 32.

the measures should be binding upon all States, and not only on those which had accepted or concurred in the measures agreed upon by the States concerned.

63. It was not at all clear what was meant by the words "its rights" in the last sentence of article 2. Were they rights of objection or rights of participation or rights of consultation?

64. He would comment later on articles 3, 4 and 5.

65. Mr. SCELLE agreed with Mr. Córdova and Mr. Pal, and wished to make the following points.

66. Article 5 conferred powers of jurisdiction on coastal States within 50 miles of their territorial seas. That meant that the latter could be considered as being 50 miles wide or, alternatively, that the area would be regarded as a contiguous zone. He was opposed to such a provision.

67. He agreed with Mr. Kozhevnikov that articles 1 and 2 of the joint proposal reproduced the main lines of the text adopted by the Commission at its third session. Apart from the contradictions to which attention had already been drawn, they were on the whole an improvement. The last sentence of article 1 was faulty. According to article 3 States engaged in fishing in the high seas were invited to set up a regional organ whose decisions would be binding, but according to the last sentence of article 1 the measures would be binding only on the States which accepted them. It would be more logical to start with the international body. If the States concerned did not agree, there must be some authority to deal with the situation; if they did agree, their agreement must be binding on other States. Article 1, so to speak, fell between two stools. He would therefore propose that the last sentence be deleted. Articles 3 and 4 marked a real advance, and he was prepared to support them.

68. Mr. SANDSTRÖM agreed with Mr. Lauterpacht that the difficulty involved in article 1 was one of drafting, but considered that article 2 differed substantially from the original texts in that it referred to consultation and objection. He agreed with Mr. Scelle that when one State interfered with the application of a system the international authority should be able to act forthwith. That, indeed, was what he had proposed in his amendment.

69. Mr. FRANÇOIS could not but voice his disappointment that the Commission which had criticized his original proposals seemed to find the new text little to its liking. Would members therefore submit amendments to the joint proposal?

70. He would tell Mr. Córdova and Mr. Scelle that their misunderstanding was due to bad drafting. It was not intended that international authority should be exercised only in regard to certain interested States. Mr. Lauterpacht and he himself had agreed on an international authority on which all States fishing in a given area would be represented. Although not opposed to the idea of one organ competent to deal with fisheries in the whole world, he believed that regional organs were preferable.

71. He would be prepared to agree to he deletion of the last clause of the last sentence of article 3, which read: "in cases in which the States concerned have been unable to reach agreement."

72. Mr. SCELLE was strongly in favour of the proposed deletion. There was nothing to prevent South African fishermen from fishing in the North Sea. That last clause might prove dangerous.

73. Mr. ALFARO considered that the texts of articles 1, 2 and 5 were in harmony with each other and dealt with clearly defined siutations. Articles 3 and 4 dealt with the question of an international authority. Rational procedure required that articles 1, 2 and 5 should be considered together, the question of the international authority being examined afterwards.

74. Mr. KOZHEVNIKOV was unable to agree that articles 1, 2 and 5 were in harmony, and suggested that each article be taken separately, beginning with article 1.

75. Mr. SCELLE concurred with Mr. Kozhevnikov, and said that he would ask that the joint proposal be voted upon article by article. He intended to propose the deletion of the last sentence of article 1 on the grounds of its incompatibility with article 3.

76. That sentence was in keeping with existing law, but it approached the issue from the treaty aspect. Agreement between States in a certain region constituted a treaty. Should that treaty be invalidated on the pretext that another State wished to exploit the resources of the sea in the same area? The correct procedure was for that State to be invited to accede to the treaty and to the regional organ. The last sentence led straight back to anarchy. If a State had objections, means must be found to deal with them either by arbitration or through the permanent body envisaged in article 4. It did not matter which solution was adopted. What mattered was that the sovereignty of a third party should not be taken into account, since that would undermine the foundations of the work.

77. Mr. LAUTERPACHT said that Mr. Scelle's argument raised difficulties. He presumably did not mean to suggest that the adoption of measures by one State should be binding on all other States.

78. The binding nature of the regulations imposed by the international authority was provided for in article 3.

79. Mr. SCELLE said that an international authority set up by two or three States could be acceded to by others. As in the case of a treaty, States which acceded to an international organ after it had been set up had exactly the same rights as the original members.

80. Mr. LAUTERPACHT considered that the joint proposal went very far towards meeting Mr. Scelle's views, but maintained that two or three States could not by means of a treaty impose regulations on the nationals of other States which were not parties to the treaty or the agreement.

81. As regards Mr. Pal's question about the meaning of the words "violative of its rights" in the last sentence of article 2, the matter admittedly required clarification.

82. Mr. KOZHEVNIKOV asked whether the authors of the joint proposal would be prepared to add the words "and control" after the words "may regulate" in the first sentence of article 1.

83. Mr. CÓRDOVA agreed with Mr. Lauterpacht that it was impossible to require that a contract concluded between several States should be binding upon other States. But if the Commission desired that the authority of the international body should have the effect of law for all States, the last sentence of article 1 should be amended to read as follows: "When such regulations have been approved by the international authority referred to in article 3, they shall be binding... etc."

84. Mr. ZOUREK wished to confine his comments to article 1, reserving his position in regard to the others. On the whole, article 1 as now drafted in the joint proposal was acceptable, and he would oppose the deletion of the last sentence. It was wholly inadmissible that an international treaty should be imposed upon States which were not parties thereto. The question of an international authority did not arise in regard to article 1, which dealt with regulations intended to protect fisheries against waste and extermination. The possibility had been mentioned that fishermen from South Africa might go to fish in the North Sea. Examples of that type could be adduced in any domain. In such cases if a dispute ensued, settlement must be reached in accordance with the normal methods.

85. The structure of article 1 should be maintained unaltered.

86. The CHAIRMAN, speaking in his personal capacity, agreed with Mr. Sandström, and said that he would vote in favour of the text proposed by the Special Rapporteur in his report together with Mr. Sandström's amendment thereto. He also agreed with Mr. Zourek's views on the last sentence of article 1 in the joint proposal and its interpretation in international law.

87. Mr. PAL thought Mr. Scelle has been misunderstood. The proposed articles were subject to acceptance by States. Normally, if article 1 were accepted, it would be binding, like a treaty. That was why Mr. Scelle argued that if the first sentence were accepted, there was no reason why it should not be binding on all parties.

88. Mr. LAUTERPACHT assumed that the discussion on articles 1 and 2 was finished, and asked the Chairman which proposal he intended to take as a basis for decision.

89. Mr. ZOUREK pointed out that he had not yet spoken on article 2.

90. Mr. CÓRDOVA considered that the Commission would get into endless difficulties unless it retained the joint proposal as a basis for discussion. Mr. Sandström's proposal should be treated as an amendment thereto.

91. Mr. SCELLE agreed with Mr. Córdova.

92. The CHAIRMAN stated that the Commission would in due course vote on article 1 as drafted in the joint proposal, subsequently taking up article 2 and following the logical order in which the articles had been set out. Discussion at the next meeting should be confined to amendments to the joint proposal.

93. Mr. KOZHEVNIKOV supported the Chairman.

The meeting rose at 1 p.m.

209th MEETING

Monday, 6 July 1953, at 2.45 p.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART II: RELATED SUBJECTS

Article 3: Sedentary fisheries (*resumed from the 208th meeting*) [1]

1. Mr. FRANÇOIS (Special Rapporteur) said that, as it seemed to have been the general feeling of the Commission that it would be deplorable if, as a result of the rejection of all the proposals submitted, there were no article at all on sedentary fisheries, he had felt it his duty as Special Rapporteur to make one further attempt

[1] See *supra*, 208th meeting, paras. 1-35.

to provide a basis for a compromise agreement on the subject. With that end in view, he submitted the following text:

"Sedentary fisheries on the continental shelf of a State shall be regulated by that State. Discrimination against nationals of another State shall only be permitted if it is not contrary to undertakings entered into by the coastal State with the State in question or to existing customary law of the region in question concerning the use of the sedentary fishery by nationals of the other State."

2. It would be noted that he had omitted any mention of sedentary fisheries outside the continental shelf; it was extremely doubtful whether such fisheries did in fact exist outside the shelf, but in so far as they did, they constituted quite exceptional cases, and could safely be left out of account.

3. If the text he proposed were adopted, it would be logical to include it with the articles on the continental shelf itself, since, in the form he proposed, it related only to that subject.

4. Mr. LAUTERPACHT supported the new text proposed by Mr. François, which was consistent with the articles already adopted by the Commission.

5. Mr. SPIROPOULOS was unable to support the new text. Apart from numerous points where the wording was obscure or illogical, he did not understand what was intended by introducing the idea of customary law; reference had been made on a number of occasions during the discussions to "existing rights" or "acquired rights" in connexion with sedentary fisheries, but, so far as he knew, no reference had yet been made to customary law.

6. Mr. LAUTERPACHT, replying to Mr. Spiropoulos, said that all those best acquainted with the subject under discussion agreed that a customary law had developed, with regard to that very subject, in certain areas of the world.

7. Mr. SCELLE said that, leaving aside questions of drafting, he feared he could not vote for any text which conferred on a State sovereignty over an area of the high seas.

8. He saw no legal grounds for applying different systems to an area of the high seas above the continental shelf and to an area of the high seas not above the continental shelf, and although the fact that it had been made the coastal State's duty, and not its right, to prescribe the necessary regulations constituted an improvement, he could not accept the new text.

9. Mr. CÓRDOVA drew Mr. Scelle's attention to the fact that sedentary fisheries were situated in the high seas not above the continental shelf, but on the continental shelf; now that the Commission had recognized that the coastal State had certain rights over the continental shelf, it was only logical to provide that it should have the right to regulate the sedentary fisheries on the shelf.

10. Mr. ALFARO agreed with Mr. François that there was a need for an article on sedentary fisheries, which were not covered by the terms of article 2 of the draft articles on the continental shelf itself. In principle, he supported the proposed new text, even though he felt that its drafting might be improved.

11. Mr. YEPES also supported the new text in principle, and especially welcomed the Special Rapporteur's decision to limit it to sedentary fisheries on the continental shelf, since he understood that it was in fact impossible for sedentary forms of marine life to exist at depths greater than that fixed as marking the limit of the continental shelf.

12. Mr. SANDSTRÖM said that, although he could perhaps agree to the new text proposed by Mr. François, with certain modifications, if it were left in part II, he could not agree to its being placed in part I, among the articles on the continental shelf itself.

13. Mr. KOZHEVNIKOV felt that the objections raised to Mr. François' new proposal showed that it would be unwise to attempt to go into the questions under consideration in too great detail.

14. Mr. François had suggested that, if adopted, the text proposed should be inserted in part I, but the Commission had surely completed its work on part I, except for voting on it as a whole, and was now engaged in studying part II.

15. Mr. SPIROPOULOS, on a point of order, recalled that at the previous meeting the Commission had rejected all the proposals submitted with regard to sedentary fisheries.[2] By doing so, it had exhausted its discussion of that question. Before considering any new proposals on the question at the present session, therefore, it must, under its rules of procedure, decide that it wished to reopen the subject. He therefore requested that, before allowing the discussion to proceed, the Chairman should ascertain whether that was in fact the Commission's wish.

16. The CHAIRMAN said that the point of order raised by Mr. Spiropoulos was pertinent, and accordingly put to the vote the question whether the Commission wished to re-open the discussion on sedentary fisheries.

It was decided by 6 votes to 4, with 4 abstentions, not to re-open the discussion on sedentary fisheries.

17. Mr. SPIROPOULOS, explaining his vote, said that he had voted against re-opening of the discussion, not because he thought an article on sedentary fisheries was not necessary, but because he considered that the differences of view were such as to preclude all hope of a compromise solution at the present time. In those circumstances it would be a waste of time to re-open the discussion, although he hoped that a compromise would be reached at a later session, when the Com-

[2] *Ibid.*, para. 35.

mission came to consider the general régime of the high seas.

Articles 1 and 2: Resources of the sea *(resumed from the 208th meeting)*[3]

18. The CHAIRMAN recalled that at the previous meeting the Commission had begun to consider the five articles[4] which Mr. François and Mr. Lauterpacht proposed should replace articles 1 and 2 of part II of the Special Rapporteur's fourth report.

19. Mr. CÓRDOVA said that he agreed with the criticisms of the text proposed by Mr. François and Mr. Lauterpacht because, first, it gave the right to regulate fishing activities off their coasts to only a limited number of States, and secondly, it unduly restricted the competence of the proposed international body. It had always been his view that the fish in the high seas were the common property of all mankind, and that all fishing activities in those seas should be regulated by an international authority, whose powers should not be limited to conducting investigations and making recommendations, as proposed by Mr. François and Mr. Lauterpacht, but should include enforcement measures.

20. He therefore wished to propose that the joint proposal be replaced by the following text:

"Article 1

"Within the frame of the United Nations an international authority shall be created for the purpose of protecting against waste or extermination the resources of the high seas.

"The authority shall consist of a permanent body composed of three neutral members technically competent in matters related with the resources of the sea and its exploitation.

"Article 2

"The authority shall have competence to conduct investigations and to make recommendations concerning fisheries in any area of the high seas and upon the methods employed in exploiting them. It shall have competence to regulate the fishing activities in the high seas. The authority shall also have jurisdiction to decide upon the differences between States with regard to fishing in any area of the high seas.

"Article 3

"All States shall be under a duty to accept, as binding upon their nationals, any system of regulation prescribed or any decision taken by the international authority; provided first that before issuing any regulation or decision it shall consult with the States whose nationals are engaged in fishing in the particular region in which the regulations are to be applied, and provided further that, if the regulations or decision are to be applied in an area situated within a hundred miles of the territorial sea of a State, the authority, even if the nationals of that State are not engaged in fishing there, shall nevertheless consult with such coastal State.

"Article 4

"The regulations and decisions of the international authority shall be carried out by the States whom the authority shall designate from among those which the authority must consult, in each particular area of the high seas, according to Article 3."

21. Mr. SPIROPOULOS, on a point of order, said that the text proposed by Mr. Córdova was an entirely new proposal and could not be regarded as an amendment to the joint proposal. The Commission should base its discussions on the joint proposal and take up the various points contained in the new proposal only as the points to which they corresponded in the joint proposal were reached.

22. Mr. KOZHEVNIKOV agreed that the Commission should consider and vote on each of the five articles proposed by Mr. François and Mr. Lauterpacht in turn, together with any amendments directly relating to them.

23. The CHAIRMAN agreed, and recalled that Mr. Kozhevnikov had suggested that the words "and control" be inserted after the words "may regulate" in article 1 of the joint proposal.[5]

Mr. Kozhevnikov's suggestion was adopted by 5 votes to 1, with 8 abstentions.

24. Mr. SANDSTRÖM proposed that the words "where the nationals of other States do not carry on fishing" be inserted after the words "high seas" in the first sentence of article 1. He recalled that he had already proposed that the last sentence be replaced by the following text:

"In case nationals of other States want to fish in the area and these States do not abide by the regulations, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article..."[6]

Mr. Sandström's amendment to the first sentence of article 1 was adopted by 8 votes to none, with 6 abstentions.

25. Mr. KOZHEVNIKOV and Mr. SPIROPOULOS pointed out that it would be premature to vote on Mr. Sandström's amendment to the last sentence, and thereafter on the article as a whole, until a decision had been taken on article 3 of the joint proposal.

It was so agreed.

26. Mr. ZOUREK, after recalling that the Commission had not completed its discussion of article 2 of

[3] *Ibid.*, paras. 38-93.

[4] *Ibid.*, para. 38.

[5] *Ibid.*, para. 82.

[6] *Ibid.*, para. 43.

the joint proposal, said that in his view that article did not go far enough to attain what was clearly its purpose, namely: to safeguard the interests of the coastal State in areas within one hundred miles of its territorial sea, even if its nationals did not fish there.

27. The proposed text stated that such a State would be "consulted in relation to any system of regulation that may be accepted", that it would be entitled to participate "in the carrying out of the regulations thus adopted" and that it would be "entitled to object to any system of regulation which it considers unreasonable or violative of its rights". It was not clear what consultation entailed; it was important that the coastal State should be able to participate in drawing up the regulations as well as in carrying them out. It went without saying that it would be entitled to object to any system adopted, but what would happen if its objections went unheeded.

28. The proposed text was also too restrictive inasmuch as it limited the area of the coastal State's interest to within one hundred miles of its territorial sea. Its fisheries within the territorial sea might quite conceivably be affected by the fishing activities of nationals of other States more than one hundred miles away — for example, in the case of migrant fish.

29. Mr. KOZHEVNIKOV agreed with Mr. Zourek's criticisms, particularly with regard to the question of consultation. He recalled that he had suggested the insertion of the words "the establishment and" before the words "the carrying out of the regulations thus adopted",[7] and his impression was that Mr. Lauterpacht had accepted his suggestion.

30. Mr. SANDSTRÖM proposed, for the reasons advanced by Mr. Zourek, that article 2 be replaced by the following text, which in substance was identical with the third sentence of the first article of part II, in the form in which it had been approved at the third session:

> "In any area situated within 100 miles from the territorial sea, the coastal State (or States) is (are) entitled to take part on an equal footing in any system of regulation, even though its (their) nationals do not carry on fishing in the area."

31. He should mention at that point that it was his intention in due course to propose the deletion of article 5 of the joint proposal, which would become redundant if his proposal were adopted.

32. Mr. YEPES supported Mr. Sandström's proposal which recognized the enjoyment by the coastal State of a right which was inherent in the nature of things. Furthermore, it safeguarded the principle of the equality of all States before the law.

33. Mr. LAUTERPACHT recalled that he had already said that he had no objection to the addition suggested by Mr. Kozhevnikov, if the latter did not agree that his point was met by the first paragraph of article 2. Unless the reference to participating on a footing of equality in establishment of the regulations implied the power of veto, it seemed to him (Mr. Lauterpacht) to mean no more than that the coastal State should be consulted, as provided in the first paragraph.

34. He could not agree with Mr. Zourek that article 2 of the joint text failed to provide ample safeguard to the coastal State, particularly if the addition suggested by Mr. Kozhevnikov were made. The coastal State would take part on an equal footing in the establishment and implementation of the regulations, and would be entitled to object to any system of regulation which it considered to be unreasonable or to violate its rights. Any such objection would be referred to an independent tribunal, so that the coastal State would enjoy every assurance that if it were justified, it would receive due attention.

35. He would, however, have no objection to the text proposed by Mr. Sandström, provided its author made clear what he had in mind by the words "take part on an equal footing in any system of regulation".

36. Mr. CÓRDOVA could not support Mr. Sandström's proposal since, in his view, it was essential that the coastal State should enjoy more than equal rights with regard to any system of regulation laid down for fisheries off its coasts, even if its nationals did not fish there.

37. For the sake of clarity, it might be advisable to add at the end of article 2 of the joint text, the words "and the international authority provided for in article 3 shall decide the question".

38. Mr. SANDSTRÖM said that by the words "the coastal State or States is entitled to take part on an equal footing in any system of regulation" he meant the same as had been meant by the Special Rapporteur in the text approved at the third session, namely: that the coastal State should be entitled to take part in all the discussions concerning establishment and implementation of the regulations and that, if no agreement was reached, the matter should be referred to the international authority provided for in article 3. In his view, the coastal State's interests would be much better protected in that way than under the procedure provided for in the joint proposal.

39. Mr. KOZHEVNIKOV said that he could accept the joint proposal, with the addition suggested by himself. He could also accept Mr. Sandström's proposal, provided it was clearly understood that regulations must be based on the agreement of the parties mainly concerned.

40. The CHAIRMAN put Mr. Sandström's proposal to the vote.

Mr. Sandström's proposal was adopted by 8 votes to none, with 6 abstentions.

41. The CHAIRMAN invited members to consider article 3 of the joint proposal, in which Mr. Sandström had proposed the insertion of the words "existing or"

[7] *Ibid.*, para. 49.

before the words "to be created by the States concerned".

42. He would also remind the Commission that the Special Rapporteur had proposed the deletion of the last clause of the last sentence of the article; that clause read: "in cases in which the States concerned have been unable to reach agreement".

43. Mr. KOZHEVNIKOV said that he had already had the opportunity of expressing his opinion on articles 3, 4 and 5, where the setting-up of an international authority was proposed. In accordance with article 3, that authority would be empowered to draw up regulations and to undertake arbitral functions. He was opposed to a proposal of that kind. It went without saying that the States concerned could set up an international organ if they so wished, but the Commission was not called upon to anticipate such action.

44. He therefore formally moved the deletion of article 3.

45. Mr. SANDSTRÖM considered that article 3 formed the pivot of the draft, the value of which would be greatly diminished without it. Like Mr. Kozhevnikov, he interpreted the article to mean that the international authority would be competent to settle disputes by means of arbitration in the absence of agreement between States.

46. The Chairman had already drawn attention to the amendment he (Mr. Sandström) had submitted.

47. Mr. LAUTERPACHT agreed with Mr. Sandström that the conception of an international authority was of crucial importance to the draft, since three cases were prescribed when the international authority would come into play: first, under article 1 in the event of absence of agreement on measures to be taken; secondly, in relation to Mr. Sandström's amendment to insert the words "wherein nationals of other States do not carry on fishing" after the words "high seas", discussion having been deferred upon that amendment; thirdly, under article 2, in cases where a coastal State disagreed with other States.

48. Mr. Kozhevnikov, however, did not subscribe to Mr. Sandström's interpretation of article 2, and held that, in the absence of agreement, the term "on an equal footing" was to be interpreted as meaning that there would be no regulation.

49. In view of the importance of the issue, he wished to raise some general questions. When the Commission referred to an international authority already in existence or to be created, did it know exactly what it meant? Who was to assume responsibility for setting up such an authority? By what means should that be done, and by what procedure should its decisions become binding? Unless those issues were clarified, it would be impossible for the Commission to take effective action on article 3 or those other articles which article 3 was intended to implement. That led him to Mr. Córdova's amendment. He would, however, only say that it required careful study and prolonged discussion.

50. Replying to the CHAIRMAN, he added that in principle he was in favour of an international authority, but must frankly admit that he was not clear about what form it should take.

51. Mr. KOZHEVNIKOV said that Mr. Lauterpacht had not interpreted his (Mr. Kozhevnikov's) position quite correctly. He would therefore reiterate that the setting up of an international authority was the responsibility of States. Governments were competent and able to decide whether they needed an international organ or not. He was opposed to stipulations which involved anticipating any decision governments might take in the matter. As to the competence of such an organ to initiate arbitral procedure, he was in principle opposed to the imposition of an obligation to have recourse to arbitration, since States must be free to choose their methods of settling disputes.

52. Mr. SANDSTRÖM said that, on reflection, he felt that his amendment to article 3 was not very clear and that it would be preferable to include the reference to existing international organs in the commentary rather than in the text.

53. He therefore withdrew his amendment.

54. Mr. SCELLE contended that if it were held that the Charter had value, then Mr. Córdova's amendment also had value. Article 52 of the Charter dealt with regional arrangements, and was just as vague, if not vaguer, than Mr. Córdova's proposal. It was negative in its approach to the problem, and he would suggest that if the Commission wished to stipulate regional agreements, it should at least do so in positive form.

55. He had not been very much impressed by Mr. Lauterpacht's arguments.

56. Mr. CÓRDOVA appreciated Mr. Lauterpacht's hesitations about the functioning of the proposed international body. Assuming that the parties agreed to set it up, the situation would be clear, but how would it be possible for the body to come into existence when the parties were not in agreement? That was why he had stipulated that it should be set up within the framework of the United Nations, but he must point out that the effect of that proposal would be to give the matter a political connotation, and make it dependent upon decision by the General Assemby. He was convinced that if the Commission really wanted a permanent body with jurisdictional powers to settle matters relating to the protection of the resources of the high seas, such a body would have to be set up independently of the interested parties.

57. The CHAIRMAN considered that the Commission had at least taken a step forward in admitting the possibility of an international authority. He consequently did not see why doubts should be expressed about it. The Commission must make a proposal, and it would be for the States themselves to find the appro-

priate formula for setting up the body. But at least the Commission would have stated a principle.

58. Mr. ZOUREK pointed out that, although reference had been made to the crucial importance of article 3, no reasons had been given to support such a view. A great many treaties existed relating to fishing on the high seas, and no special authorities were required. In 1951, at the Commission's third session, the issue had not been accorded crucial importance, with the result that it had been cast in the form of a mere recommendation. Furthermore, the proposed text was, as Mr. Lauterpacht had indicated, open to misinterpretation and to misgivings. Which were the States concerned? Coastal States or States whose nationals were engaged in fishing? He feared that the lack of precision would lead to endless difficulty.

59. As to the jurisdiction of the proposed international authority, it was to impose regulations that would be binding on States. Was that not tantamount to requesting States to surrender a portion of their sovereignty in a certain domain? That was something he could not accept: nor could he accept the interpretation that the proposed organ would be able to function as an arbitral tribunal. It seemed to him that there was a tendency to express new ideas in doctrinaire form. To impose obligatory arbitration would, he feared, be to court rejection of the whole draft by governments.

60. Mr. SPIROPOULOS said that the Commission must reach a sound decision as quickly as possible. Article 1, as adopted at the third session (A/1858, Annex, Part II), was drafted vaguely. No strict obligation was imposed therein. The joint proposal submitted by Mr. François and Mr. Lauterpacht was more precise, and Mr. Córdova's amendment thereto was absolute; he set out the whole question of the international authority, so to speak, in words of one syllable. The question was which of the three was the best text? Presumably the modifications which the Commission sought to embody in a new text tended to fulfil the aim of the progressive development of international law and not the aim of codification. In other words, the Commission was framing new rules, and not codifying existing practice. He liked Mr. Córdova's text, but doubted whether it was expedient to go into so much detail. What, for instance, did Mr. Córdova mean by "a permanent body composed of three neutral members"? Presumably members not engaged in fishing activities. Such a point must be elucidated, and the Commission had no time to study a proposal which it would be more appropriate to submit to a conference where expert technical knowledge was available.

61. On the other hand, he could not follow Mr. Kozhevnikov all the way. Some provision must be made to fill a gap in international law. The choice for the time being lay between the general formula of 1951 or the joint proposal. Whichever text might finally be adopted, the Commission could do no more than give governments a synopsis of its views in the form of a recommendation.

62. The CHAIRMAN, speaking as a member of the Commission, was glad that Mr. Spiropoulos's views coincided with his own. The Commission had studied the question of the protection of the resources of the high seas. It had considered the hypothesis of agreement between States, and the alternative hypothesis of a central organ. It could go no further. Indeed, although it had been hinted to him that it was as yet too early to close the discussion, he believed that no further arguments could shake members' convictions, and he would accordingly recommend that the Commission vote on article 3, glancing in due course at Mr. Córdova's interesting proposal.

63. He noted with some concern that Mr. Lauterpacht, who had joined the Special Rapporteur in drafting a composite text, was now shifting his position. He must appeal to him to be content with proposals which he himself had sponsored.

64. Mr. LAUTERPACHT agreed with the Chairman that if the Commission accepted article 3 as set out in the joint proposal, it would have lent its authority to the expression of a new and important principle. Article 3 clearly laid down that "States should be under a duty to accept... any system of regulation...". That meant that international regulation would be binding. The Commission must, however, realize that it would have done little else than accept a principle. Mr. Córdova had asked what would happen in cases when States were not in agreement. What provisions had been made for that eventuality? He had put the same question to Mr. Sandström, but had as yet received no reply.

65. As to Mr. Scelle's comments, he did not consider the analogy of the Charter to be satisfactory. The working of the Charter of the United Nations could not be invoked as an example for the effective regulation of the matters with which the Commission was concerned in the present draft.

66. Article 3, as proposed by Mr. François and himself, was open to the objection that the reference to the international authority was extremely vague. How was that authority to be constituted? What would be its procedure? Certainly, Mr. Córdova's amendment was more specific, but he had not explained how the three neutral members of the permanent body proposed by him would function.

67. Unless the Commission could propose something more definite, it might be wise to defer the whole question until the next session. If, however, a quick and limited decision were preferred to deferment, and the Special Rapporteur were still satisfied with article 3, he would vote in favour of it, despite the anxiety he always felt when voting on issues which were open to the reproach that they had been framed in artificial language.

68. The CHAIRMAN, speaking as a member of the Commission, could not see what grounds there were for thinking that the Commission would do any better in twelve months' time. He did not agree with

Mr. Kozhevnikov and Mr. Zourek on the fundamental principles to which they so frequently referred, but he did feel that the Commission must keep in mind the fact that States were able to act together in defence of their common interests. In adopting the draft on the resources of the sea, the Commission would have indicated its views about the usefulness of the international organ. He certainly would not be able to go further than that next year. Indeed, by voting for article 3 he would already have made a concession. He would do so because it was permissible for the Commission to inform States that if they wished to protect fisheries against wasteful extermination they must agree on appropriate measures among themselves, and have recourse to an international organ set up for the purpose if they were unable to agree.

69. Mr. CÓRDOVA said that it was clearly the Commission's duty to submit the results of its work to the General Assembly. For him, the essence of the problem was whether the international body should or should not be set up, and, if it should, what its jurisdiction and scope should be. He took the view, differing there from Mr. Lauterpacht, that if the States failed to agree, no agreement would be possible within the international organ. He did not accept the premise that legislation affecting the principle of the freedom of the seas should be drawn up by a few States, namely, "the States concerned", but considered that the proposed body should be truly international in character and should consequently be placed within the framework of the United Nations. In accordance with those views he would formally move that article 3 be amended by the inclusion of the words "within the framework of the United Nations" after the words "to be created", the last clause of the last sentence of the article being deleted. If article 3 were adopted in that form, any State would be in a position to submit its case to the international authority.[8]

70. Mr. KOZHEVNIKOV wished to draw attention to his formal motion that article 3 be deleted. The more the discussion continued, the clearer it became that that was the only sound solution both on grounds of principle and for the sake of facilitating the Commission's task.

71. Mr. YEPES felt that the Commission had reached an impasse. Certainly an international authority would be useful, but had the Commission the right to frame its views in mandatory form? He would suggest that the recommendation be phrased conditionally: "an international authority which the States concerned *should* create".

72. Furthermore, article 3 was badly drafted. It should be turned round, first stipulating the setting up of an international authority, perhaps with reference to Article 52 of the Charter, and then laying down that the regulations of that authority should be binding.

73. Mr. SANDSTRÖM felt that it would be regrettable to defer a decision until the next session. In his view, the joint proposal was preferable to the article adopted by the Commission at its third session, because the former envisaged the setting up of a regional body or bodies, whereas the latter implied the exercise of international authority on a world-wide scale.

74. The effect of Mr. Córdova's amendment to article 3 would be to impose a supra-national authority acting on its own initiative. Like Mr. Spiropoulos, he felt that such a solution would be premature.

75. The CHAIRMAN held that the views of members were sufficiently clear to permit a vote to be taken. Mr. Kozhevnikov's proposal that article 3 be deleted was the furthest removed from the original text. Mr. Yepes had made a suggestion which amounted to a drafting change, and Mr. Córdova had submitted an amendment. It was clear that the Special Rapporteur had proposed, and the Commission had accepted, the deletion of the last clause of the last sentence of the article.

76. Faris Bey el-KHOURI said that before article 3 was put to the vote he would remind the Commission that the Food and Agriculture Organization of the United Nations (FAO) was competent to undertake the functions proposed for the international authority. Why should a new body be set up? The Economic and Social Council should be invited to consider the matter. Such an approach would, he believed, facilitate acceptance of the draft by governments.

77. The CHAIRMAN said that it had been indicated to him that there was no need to put Mr. Kozhevnikov's motion to the vote since Mr. Kozhevnikov could record his attitude by voting against the article.

78. Mr. SPIROPOULOS said that if article 3 were rejected, he would propose the adoption of the text as drafted by Mr. François in his report.

Mr. Córdova's proposal that the words "within the framework of the United Nations" be inserted after the words "to be created" was adopted by 11 votes to 2, with 1 abstention.

Article 3 was adopted, as amended, by 12 votes to 1, with 1 abstention.

79. Mr. KOZHEVNIKOV said that he had not participated in the vote on article 3 because he had moved its deletion. He did not agree with the Chairman that a motion for deletion need not be put to the vote. On the contrary, in his view, such a motion raised a question of principle, and should have been decided first.

80. The CHAIRMAN replied that he had been guided by the advice of the Secretary to the Commission, but that he would go into the matter fully and give his considered opinion to Mr. Kozhevnikov in due course.

81. He invited members to consider article 4 of the joint proposal.

82. Mr. KOZHEVNIKOV said that he would formally move the deletion of article 4, for the reasons which

[8] See *supra*, para. 44.

had prompted him to move that of article 3. He felt even more strongly on the matter in the present instance. The regulation of fishing in the high seas must be carried out by the States concerned and the setting up of an international organ would encroach upon their sovereign rights. That was why article 4 should be deleted.

83. Mr. SANDSTRÖM shared Faris Bey el-Khouri's hesitation about imposing yet another organ to conduct investigations and to make recommendations, particularly as the organ envisaged in article 4 was to be set up on a worldwide scale.

84. Mr. CÓRDOVA considered that the functions of investigation and recommendation should be allotted to the international body referred to in article 3. Alternatively, the functions envisaged in article 4 could be undertaken by FAO, but the decision on that point was, as he had already previously pointed out, a political one and dependent upon action by the General Assembly.

85. Mr. SCELLE was under the impression that FAO had never been alluded to. He had all along assumed that the international authority contemplated in article 3 would be an entirely different organ. Article 4 had no *raison d'être*. The reference to investigations and recommendations should be included in article 3.

86. Mr. LIANG (Secretary to the Commission) submitted that article 4, which followed the Commission's line of thought at its preceding session, did in point of fact refer to FAO. But article 3 went much further than article 4. He would submit that the competence conferred on the international body under article 4 fell within the general competence of FAO; that was hardly so in the case of the competence conferred on the international body under article 3. Presumably, the international authority set up in accordance with the last-mentioned article would also be empowered to conduct investigations and make recommendations. Thus there would be only one body created by international agreement.

87. Mr. ALFARO drew attention to the fact that Mr. Sandström's amendment to article 4, whereby the words "Competence may also be given to the authority mentioned in article 3" would be substituted for the words "Competence should be conferred on a permanent international body", did away with the necessity for setting up two different organs.

88. Mr. SANDSTRÖM said that he had submitted his amendment to article 4 on the understanding that the international authority contemplated under article 3 would be regional in character. Now that the authority contemplated was to be world-wide, since it had been placed within the framework of the United Nations, he would withdraw his amendment to article 4.

89. The CHAIRMAN considered that it would be premature for the Commission to vote on article 4.

The meeting rose at 6 p.m.

210th MEETING

Tuesday, 7 July 1953, at 9.30 a.m.

CONTENTS

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

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

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

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

PART II: RELATED SUBJECTS

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

1. The CHAIRMAN recalled that at the previous meeting Mr. Kozhevnikov had formally moved the deletion[1] of article 4 of the joint proposal by Mr. François and Mr. Lauterpacht.[2] The Commission's rules of procedure did not permit a vote on deletion pure and simple, anyone who so desired being free to vote against an article or a proposal. Since, however, he wished to take Mr. Kozhevnikov's attitude into consideration, he would ask the Commission to allow him to put the question of principle to the vote in the following form: did the Commission admit the principle expressed in article 4 of the joint proposal? The text thereof read as follows:

"Competence should be conferred on a permanent international body to conduct investigations and to

[1] See *supra*, 209th meeting, para. 82.

[2] See *supra*, 208th meeting, para. 38.

make recommendations concerning fisheries in any area of the high seas and the methods employed in exploiting them."

The principle expressed in article 4 of the joint proposal was rejected by 8 votes to 6.

2. The CHAIRMAN stated that article 5 of the joint proposal had been withdrawn by the authors, and invited the Commission to resume consideration of article 1 together with Mr. Sandström's amendment to the last sentence thereof.[3]

3. Mr. ZOUREK considered that Mr. Sandström's amendment was unnecessary, since article 1 was concerned with cases where one State whose nationals were engaged in fishing in any area of the high seas regulated fishing activities in that area, or with cases where two or more States were so engaged, the regulation being then dependent upon agreement between them. The cases where there was no agreement were covered by other articles in the joint proposal, particularly article 3.

4. Mr. SANDSTRÖM was not sure that Mr. Zourek's interpretation was wholly correct. Provision must be made for a case when the nationals of a State which was not party to the agreement engaged in fishing activities in a given area. It was true that that point might be mentioned in the commentary, but he still considered that it would be preferable to refer to it in the text itself.

5. The CHAIRMAN drew attention to the fact that the main purpose of article 1 was to ensure the protection of fisheries against waste or extermination. Was it necessary to assume that nationals of States not parties to the agreement would endanger the resources of the sea?

6. Mr. CÓRDOVA considered that Mr. Sandström's amendment was covered by article 3.

7. The CHAIRMAN said that he would put Mr. Sandström's amendment to the vote forthwith. That amendment consisted in replacing the last sentence of article 1 by the following text:

"In case nationals of other States want to fish in the area and these States do not abide by the regulation, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3."

Mr. Sandström's amendment was adopted by 5 votes to 4, with 5 abstentions.

8. Mr. YEPES wished to emphasize that article 1 would be wholly inadequate if the first sentence were retained in the optional form in which it was drafted. It read: "A State... may regulate...". In his view it was the duty of States to regulate fishing, and the Commission should impose that responsibility upon them. He therefore proposed that the word "must" be substituted for the word "may".

9. The CHAIRMAN, speaking as a member of the Commission, thought that Mr. Yepes' amendment was open to the objection that governments might ask in virtue of what powers and what competence the Commission sought to impose duties or obligations upon them.

10. Mr. SCELLE said that the Commission was a body of jurists; that was why it could and should try to impose certain duties upon States.

11. The CHAIRMAN replied that, being a body of jurists, the Commission well knew that certain rules existed and were capable of formulation. He doubted, however, whether the Commission could express a preference for one rule over another or one system over another, and impose such preferences upon governments.

Mr. Yepes' amendment was rejected by 8 votes to 2, with 4 abstentions.

12. Mr. CÓRDOVA asked the Special Rapporteur what the situation would be in regard to those fish which were to be found not only in certain well-defined areas but everywhere. Article 1 would suffice for salmon or tunny, but what would be the position in respect of whales?

13. Mr. FRANÇOIS (Special Rapporteur) saw no necessity for identical regulations in all parts of the world. Should difficulties arise, the international authority would deal with them.

14. Mr. KOZHEVNIKOV said that he had already expressed his opinion on article 1. He would regretfully be obliged to vote against it, now that it incorporated Mr. Sandström's amendment, which referred to the international body.

15. Mr. LAUTERPACHT asked whether there was any necessity for the Commission to vote on the articles as a whole.

16. Faris Bey el-KHOURI asked that before any article was put to the vote as a whole the text should be read out by the Secretary and included in the summary record.

17. The CHAIRMAN *ruled* that articles 1, 2 and 3 be put to the vote as a whole.

18. Mr. LIANG (Secretary to the Commission) read out the text of articles 1, 2 and 3, as amended:

"Article 1

"A State whose nationals are engaged in fishing in any area of the high seas where nationals of other States do not carry on fishing, may regulate and control the fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are thus engaged in any area of the high seas, the States concerned shall prescribe such measures by agreement. In case nationals of other States want to fish in the area and these States do not abide by the

[3] See *supra*, 209th meeting, para. 24.

regulation, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3.

"Article 2

"In any area situated within 100 miles of the territorial sea, the coastal State (or States) is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area.

"Article 3

"States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."

19. Mr. ALFARO suggested that, in order to enable Mr. Kozhevnikov to vote in favour of the first two sentences of article 1, that article be divided into two, the last sentence, namely Mr. Sandström's amendment, forming a separate article.

20. Mr. CÓRDOVA did not consider that any useful purpose would be served by such a course, since Mr. Kozhevnikov would in any case vote against the set of articles, because he was opposed to the creation of an international authority.

21. The CHAIRMAN stated that Mr. Alfaro's suggestion would be taken into consideration by the Drafting Committee.

Articles 1, 2 and 3 of the joint proposal were adopted as amended by 12 votes to 2.

22. Mr. ZOUREK, in explanation of his vote, said that he would have been able to accept article 1 without Mr. Sandström's amendment. The adoption of that amendment had obliged him to vote against the article.

Article 4: Contiguous zones

23. Mr. FRANÇOIS, introducing article 4 on contiguous zones (A/CN.4/60, Chapter IV, Part II), said that, generally speaking, governments had approved the proposed text, most of the changes suggested being of a drafting nature. A more substantive suggestion had been that punishment should be referred to as well as prevention. He had consequently redrafted the second clause of the first sentence to read as follows: "A coastal State may exercise the control necessary to prevent *and punish* the infringement." The Norwegian Government had urged that in the last sentence the demarcation of the control area should run, not from the coast, but from the base lines forming the inner limit of the territorial sea. He had modified the text accordingly. He would further draw attention to the point that governments interpreted the term "customs regulations" as meaning not only regulations concerning import and export duties, but also all other regulations concerning the import and export of goods, and immigration and emigration. That point could be mentioned in the commentary.

24. Mr. KOZHEVNIKOV stated that, had the rules of procedure permitted, he would have proposed the deletion of article 4 on the grounds that it was based on a premise which the Commission should consider in relation to territorial waters. Moreover, the article would be an unnecessary addition to a text which was already unwieldy. He would therefore ask the Chairman to put the issue of principle to the vote in the following form: Could the Commission endorse the principles laid down in article 4 on contiguous zones?

25. Mr. CÓRDOVA agreed with Mr. Kozhevnikov that the article prejudged consideration of the question of the breadth of the territorial sea. If the contiguous zones, being zones adjacent to the territorial sea, could not extend beyond twelve miles from the inner limit of the territorial sea, the breadth of the territorial sea would necessarily be limited to less than twelve miles. That issue apart, the article was acceptable and necessary. He would therefore suggest that the limits of the contiguous zones should not be specified. In any case, the breadth of the zones should be measured from the outer limits of the territorial sea.

26. Mr. SCELLE said that he was wholly in favour of the article, which aimed a blow at the doctrine of the territorial sea. The concept of contiguous zones, which had been generally accepted by the Hague Codification Conference in 1930, substituted control zones for territorial waters, thus avoiding encroachment by coastal States on the high seas. Mr. François had been right in selecting the base lines as the point of departure for the measurement since it was more precise than the coast.

27. The CHAIRMAN, speaking as a member of the Commission, said that it was impossible to overlook the fact that there was no unanimity about the breadth of the territorial sea, the Soviet Union, for instance, claiming twelve miles.

28. Mr. LIANG (Secretary to the Commission) considered that the questions of the resources of the sea and of contiguous zones were not intrinsically related to the problem of the continental shelf. He believed it would be preferable to divide the draft into three parts — continental shelf, resources of the sea, contiguous zones — under the general heading of the régime of the high seas.

29. Turning to the article on contiguous zones, and Mr. Kozhevnikov's suggestion that it ought to be deleted, he would point out that in theory those zones were conceived by writers on the subject as areas contiguous to the high seas, and not to the territorial waters. At the Hague Codification Conference the Committee entrusted with the study of the problem of the territorial sea had devoted a great deal of time to the subject of contiguous zones. The Commission would have to tackle that problem, whether in relation to the régime of the high seas or in relation to that of the territorial sea. A procedure had been proposed for the

delimitation of those zones, but no figure could be fixed unless and until the breadth of the territorial sea had been determined. In view of that difficulty it might perhaps be advisable to refrain from dimensional definition, and to confine the article strictly to questions of jurisdiction.

30. Mr. FRANÇOIS recalled that when the question of contiguous zones had first been discussed at the Hague Codification Conference, agreement on a uniform limit of the territorial sea had proved unattainable, and certain rights had been granted in the high seas in the hope that claims for the extension of the breadth of the territorial sea might be kept within reasonable bounds. It was impossible to argue that the question of contiguous zones was independent of the breadth of the territorial sea. A breadth of twelve miles would do away with contiguous zones as at present conceived. But the latter were obviously necessary if the territorial sea was to be only three miles wide. He was consequently unable to accept Mr. Córdova's point of view that the contiguous zone should be measured from the outer limits of the territorial sea.

31. He was naturally aware that the provisions of the article would not be considered satisfactory by States which claimed a wider territorial sea.

32. Mr. SANDSTRÖM expressed his wholehearted agreement with Mr. François, and wished to draw attention to a point of drafting. The expression "base lines forming the inner limit of the territorial sea" was not entirely accurate. The drafting Committee should consider the point.

33. Mr. SPIROPOULOS felt in duty bound to recall that he had on several occasions criticized the system underlying the report on the régime of the high seas. The Commission had unfortunately not heeded his warnings, with the result that the report entitled "Fourth report on the Régime of the High Seas" (A/CN.4/60) dealt with questions which related to the territorial possessions of States. The continental shelf was part of the high seas, but at the same time the Commission had accepted the view that it constituted a prolongation of a State's territory. Now the Commission had been dealing with three problems under the heading of "Related subjects", a title that was valid in respect of sedentary fisheries, but that question had been voted out of existence. He was prepared to admit that the problem of the resources of the sea and of the contiguous zones formed part of the problem of the high seas. Yet the Secretary's question was perfectly admissible: was there any point in considering contiguous zones under the régime of the high seas and at the same time relating them to the territorial sea? The Hague Codification Conference had tackled the problem of contiguous zones in relation to the territorial sea and had been right to do so.

34. He entirely agreed with Mr. Scelle that the freedom of the seas should not be restricted, but unfortunately the realities of the situation must be taken into account. States recognized the existence of territorial seas and of contiguous zones; the Commission was entrusted with the task of codifying existing practice. But obviously the time was not ripe for decision.

35. The CHAIRMAN, speaking as a member of the Commission, said that when the problem had first arisen lawyers had held notions about the contiguous zones which he would venture to describe as sacrosanct. Remarkable works had been written as a result of the Hague Codification Conference. It was an accepted principle that the contiguous zones formed part of the high seas. But the realities of the situation were that States wished to exercise certain controls in areas beyond the territorial waters. In that connexion he need hardly mention again the classic instance of the effects of prohibition policy in the United States of America, when by using fast vessels, that country had extended its control to twenty miles and beyond. As a result, the problem of the relationship between the contiguous zone and the territorial sea had acquired urgency, and the Commission had tackled the subject in full awareness of the fact that no confusion should be allowed to persist. How could one attribute to States fragments of rights in a sea which was common to everyone?

36. In view of those considerations, he was inclined to advocate the acceptance of a text on contiguous zones that made no reference to limits.

37. Mr. KOZHEVNIKOV pointed out that the Commission was holding a very interesting discussion on the problem of territorial waters. Obviously, when it came to tackle that item of its agenda, it should take up the question of contiguous zones as well. But the proper place for the article was not in the report on the régime of the high seas. That was why he was in favour of deleting it.

38. Certain comments had been made concerning Soviet law. He represented the Soviet system of law, a system which had clearly defined the breadth of the territorial waters, fixing it at twelve miles. That definition was in accordance with existing international law, whereby each State laid down the breadth of its own territorial sea. The question of sanctioning that decision did not arise, since it was sanctioned by international law.

39. Mr. PAL said that in his view the article was not out of place, although it did not quite seem to fit in with the title given to chapter IV of the report: "Revised draft articles on the continental shelf and related subjects, prepared by the International Law Commission". He would submit that, since States had been granted sovereign rights over the continental shelf, apprehension might arise lest the superjacent waters be affected by the régime drawn up for the continental shelf. Such apprehensions would be dispelled by the article on the contiguous zones.

40. It was most unfair to accuse the Special Rapporteur of trying by implication to fix the breadth of the territorial sea. The article dealt with the infringe-

ment of certain rules and regulations applied by coastal States, which were empowered to pursue offenders up to a certain limit. Whence Mr. François' calculation. The twelve miles referred to in the text had nothing whatsoever to do with claims by States regarding the breadth of their territorial waters.

41. He would suggest that the words "adjacent to its territorial sea" be deleted, since what mattered in the present instance was the limit from the coast, whether fixed at ten, twelve or sixteen miles.

42. Mr. YEPES felt some hesitation about the substance of article 4 and its relevance to the problem of the continental shelf. The issue should be deferred until the Commission had examined the problem of the territorial sea. The solution, implicit in the article, of the latter problem was incorrect. The limits of the territorial sea should be extended, and he was under the impression that American international law admitted a greater breadth. The last sentence of article 4 would tend to favour those States which claimed and enjoyed rights over a three-mile territorial sea. Moreover, the article violated the principle of the legal equality of all States by stipulating that control might not be exercised more than twelve miles from the base lines forming the inner limit of the territorial sea.

43. Mr. CÓRDOVA felt that the main objection to the article was the reference to the twelve-mile limit. The solution represented a compromise offer to those States which wanted to have full sovereign rights for certain purposes beyond the three-mile limit of the territorial sea, claiming the need for control over a broader area for fiscal and other purposes. There could be no doubt that the word "contiguous" meant contiguous to the territorial sea and not the coast. The Commission should try to avoid the mistake made by the Hague Codification Conference, which had been unable to agree about the breadth of the territorial sea. Actually, there was no reason why the important issues covered by article 4 should not be studied on their own merits, so to speak, without reference to that thorny issue.

44. The problem of contiguous zones should be tackled on the assumption that coastal States must be granted certain extended rights for fiscal and police purposes.

45. Mr. SANDSTRÖM was unable to let pass Mr. Kozhevnikov's statement that the twelve-mile limit claimed by the Soviet Union was sanctioned by international law. That was a wholly untenable premise, and he need only recall the recent discussions between the Soviet Union and other States on the subject. The Soviet Union had refused to submit the question to international authority. That, however, was not the issue which the Commission was discussing, except incidentally.

46. A possible way out might be to state in the commentary that a claim by a State to a wider area of the territorial sea necessarily entailed a corresponding reduction in the contiguous zone.

47. Mr. LAUTERPACHT recalled, with regard to the question whether the subject of contiguous zones should be disposed of at the present session, that in their comments reproduced in Mr. François' fourth report (A/CN.4/60) only two governments had voiced their preference for its being deferred until the Commission had considered the régime of the territorial sea. The others apparently had no objection to the subject being examined in connexion with the régime of the high seas, and he agreed, since otherwise it would be put off indefinitely.

48. The text presented by the Special Rapporteur avoided any reference to the question of the outside limit of the territorial sea. It was therefore not the case, as Mr. Córdova had seemed to suggest, that it was intended as some kind of compromise in that respect. However, although the text proposed had no direct bearing on that question, he believed that, if it could be accepted by the Commission, it might well eliminate some at least of the major difficulties which at present attached to the subject. Moreover, as Mr. Pal had already pointed out, the fact that the Commission had drafted provisions for the continental shelf made it imperative to remove any suspicion that the régime thus formulated amounted to an indefinite extension of the notion of the contiguous sea, both in substance and extent.

49. With regard to the text proposed by Mr. François, it could not be disputed that it was the present practice of States to claim and to exercise certain rights in areas of the high seas adjacent to their territorial seas. That practice was reasonable. It did not basically violate the principle of the freedom of the seas, and he considered that in those circumstances it was the Commission's duty to give it its formal endorsement.

50. His only doubt, in fact, was whether it would be possible to reach agreement on the text proposed. For, although Mr. Córdova had accepted the principle of contiguous zones, he had expressed the view that no outer limit should be laid down for them. That would rob the concept of contiguous zones of its whole purpose, which was severely practical, namely, that a coastal State should be able, in the words used in the text proposed, "to prevent and punish the infringement, within its territory or territorial sea, of its customs, fiscal or sanitary regulations". In that connexion, he noted that in the commentary the Special Rapporteur interpreted the term "customs regulations" as covering regulations concerning immigration and emigration. That was surely stretching the meaning of the term too far, and he suggested that the word "immigration", be inserted in the text after the word "customs".

Mr. Lauterpacht's suggestion was adopted.

51. Mr. PAL pointed out that the article presented by the Special Rapporteur would not apply to States which already claimed a territorial sea twelve miles or more in breadth. That was perfectly justifiable. The purpose of the article was not to extend the jurisdiction of States beyond the outside limits of their territorial seas,

wherever those limits might be placed, but to give them certain specific rights which they needed, in cases where they did not exercise those rights, and more than those rights already.

52. The CHAIRMAN feared that Mr. Pal was being unrealistic in thinking that States would not claim a contiguous zone whatever the width of their territorial sea.

53. Mr. KOZHEVNIKOV said that if the principle of contiguous zones were adopted, a coastal State would certainly claim a contiguous zone outside the limit of its territorial waters, and would have a perfect right to do so, on the principle of equality for all States. He would not stress that point further, however, since, as he had already made clear, it was his view that consideration of the whole article should be postponed.

54. In reply to Mr. Sandström, he wished to stress that a coastal State had no need of international sanction to fix the width of its territorial waters, since there was no rule of international law in the matter. It lay solely within the sovereign competence of each State to fix the width of its territorial waters, having regard only to such rules of international law as did exist.

55. Mr. HSU said that, although he had first been of the opinion that the subject of contiguous zones should be deferred, he had been so disturbed by the claim that no outside limit should be fixed for such zones that he now felt it most desirable that the subject be regulated without delay. For that purpose, he supported the text presented by the Special Rapporteur. The latter had been prudent in dissociating the subject from the question of the outside limit of the territorial sea. Practice had shown that it was sufficient, to meet the purely practical needs which they were designed to meet, for such zones to extend to twelve miles from the coast. Those States which had already extended their territorial sea that far had no need of a contiguous zone, and the text proposed should therefore give rise to no difficulties in practice.

56. Mr. SPIROPOULOS pointed out to Mr. Lauterpacht that governments had only been asked to comment on the substance of the text approved at the third session; the fact that only two of them had expressed the view that consideration of the article in question should be deferred did not therefore necessarily mean that that view was not shared by others. Contiguous zones were zones adjacent to the territorial sea, and should therefore, in his view, be dealt with at the same time as the territorial sea. That, in fact, was how they always had been dealt with, not only at the Hague Codification Conference, but also in the treatises produced by those very members of the Commission who were now proposing that the two subjects should be dealt with independently.

57. He shared the views of those members of the Commission who considered that restrictions should be placed on the coastal State's right to extend its territorial sea, but he did not agree with those of them who apparently considered that the article at present under consideration offered a suitable opportunity of doing so.

58. Mr. ZOUREK said that the fact that contiguous zones had always been regarded as adjuncts to the territorial sea made it illogical to measure them, as proposed in the text presented by the Special Rapporteur, from the base lines forming the inner limit of the territorial sea. To do that would lead to regrettable confusion, since the coastal State exercised full sovereignty up to the outside limits of the territorial sea. As a representative of the legal system of the people's democracies, he would remind the Commission that Bulgaria and Rumania, for example, had already fixed the width of their territorial seas at twelve miles. The article in its present form would therefore have no meaning for them.

59. He agreed with those members of the Commission who felt that the whole subject of contiguous zones should be deferred until the Commission had considered the subject of the territorial sea, to which it was so closely and directly related. Practice in the matter, moreover, varied so much that the subject was more involved than appeared at first sight, and the Commission could not spare the time to consider all its aspects at the present session. It had been suggested that to defer the subject until the Commission had considered the régime of the territorial sea would be tantamount to abandoning it indefinitely; the Commission, however, had had a draft on the latter subject before it at the present session, and, although it had deferred its discussion until the sixth session, there was no reason why it should not be examined then.

60. Mr. ALFARO said that he was in complete agreement with the view expressed earlier by Mr. Scelle. As he saw it, two questions were involved: that of the principle of contiguous zones, which was dealt with in the first sentence of the text presented by the Special Rapporteur; and that of their extent, which was dealt with in the second. He thought all members of the Commission could accept the first sentence, but there was no doubt in his mind that adoption of the second would to some extent be equivalent to determining the outside limits of the territorial sea. It had therefore been his intention to propose that the article be divided into two, but since Mr. Córdova had proposed the deletion of the second sentence, he would await the outcome of the vote on that proposal.

61. The CHAIRMAN *ruled* the discussion closed, and put to the vote Mr. Kozhevnikov's proposal that further discussion of the subject of contiguous zones should be deferred.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 4, with 1 abstention.

62. The CHAIRMAN put to the vote Mr. Córdova's proposal that the second sentence of article 4 be deleted.

Mr. Córdova's proposal was rejected, 7 votes being cast in favour and 7 against.

63. Mr. SPIROPOULOS, explaining his vote, said that he had voted in favour of Mr. Córdova's proposal, not because he was opposed to the substance of the second sentence, but because he did not think that any provision on the subject should be adopted at the present time.

64. Mr. ALFARO requested that each of the two sentences of the article be made an article, and voted on separately.

65. Mr. SANDSTRÖM was opposed to such a course, as he could only accept the first sentence if qualified by the second.

66. Mr. ALFARO pointed out that other members of the Commission might be in the position of being unable to vote for the first sentence so long as it was qualified by the second.

67. The CHAIRMAN regretted that he could not agree to Mr. Alfaro's request. The Commission had rejected a proposal that the second sentence be deleted. It only remained for it to vote on the article as a whole, with the amendment made at Mr. Lauterpacht's suggestion.

Article 4, on contiguous zones, was adopted, as amended, by 9 votes to 5.

The text read as follows:

> "On the high seas adjacent to its territorial sea, a coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised more than twelve miles from the base lines forming the inner limit of the territorial sea."

68. Mr. CÓRDOVA explained that he had voted against the article because he considered it wrong to attempt to limit the width of the territorial sea by limiting the width of contiguous zones by the procedure adopted. There could be no doubt that the article would be interpreted as constituting such an attempt.

69. Faris Bey el-KHOURI said that he had voted against the article, and for Mr. Córdova's proposal, for the same reasons as Mr. Córdova.

70. Mr. KOZHEVNIKOV said that he had voted against the article because he had already proposed its deletion, since it had no direct bearing on the draft under consideration. He reserved the right to revert to the question of the outer limit of the territorial waters at the proper time, and felt that the Commission had been unwise to prejudge that issue.

71. Mr. YEPES explained that he had voted against the article for reasons he had already made clear, and particularly because he considered that it was contrary to the principle of the legal equality of States.

72. Mr. ZOUREK explained that he had voted against the article for reasons he had already given, but also because it had been insufficiently discussed, and because it would certainly be interpreted as prejudging the question of the outside limit of the territorial sea.

PART I: CONTINENTAL SHELF

Proposal for reconsideration of article 2

73. Mr. SANDSTRÖM moved that the Commission reconsider the text which it had adopted for article 2 of the draft articles on the continental shelf which read:

> "1. The continental shelf is subject to the sovereignty of the coastal State.
>
> "2. The exclusive rights of the coastal State are limited to the rights of user, control and jurisdiction for the purposes of exploration and exploitation of the natural resources of the sea-bed and its subsoil."[4]

74. He recalled that the vote on the first paragraph[5] had been taken in his absence; had he been able to be present, the result would have been a tied vote, and the paragraph would have been rejected. He had other reasons for believing that that paragraph did not really represent the considered views of the majority of the Commission, and he thought it most undesirable that a provision of such importance should be included in the draft articles unless it clearly did so represent them.

The motion that article 2 in part I be reconsidered was adopted by 9 votes to 4, with 1 abstention, having obtained the required two-thirds majority.

75. Mr. SANDSTRÖM proposed that the first paragraph of article 2 be deleted. He had no need to explain the grounds for his proposal, since the matter had already been discussed at length.

76. Mr. LAUTERPACHT pointed out that some members of the Commission had had no knowledge of Mr. Sandström's intention to move that the article in question be reconsidered. It was clearly important that all members of the Commission should have sufficient time to consider their attitude on the proposal that the first paragraph of the article be deleted, and it was also desirable that it should be fully discussed. He therefore felt that further discussion of Mr. Sandström's proposal should be deferred.

77. Mr. KOZHEVNIKOV agreed that the whole question would have to be further discussed, in order to enable the Commission to hear the views of Mr. Sandström and Mr. Córdova, who had not been present during the concluding stages of the debate.

78. Mr. SPIROPOULOS said that to give members of the Commission food for thought in the interval before the matter was again discussed, he would reintroduce the text which he had proposed for article 2,[6] but which he had subsequently withdrawn[7] as it had not appeared likely to bring the Commission nearer agreement at that time. That proposal read as follows:

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[4] See *supra*, 200th meeting, para. 83.
[5] See *supra*, 198th meeting, para. 38.
[6] See *supra*, 200th meeting, para. 22.
[7] *Ibid.*, para. 47.

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

79. After further discussion, Mr. LAUTERPACHT suggested that reconsideration of article 2 of part I be taken at a further meeting.[8]

Mr. Lauterpacht's suggestion was adopted.

[8] See *infra* 215th meeting.

211th MEETING

Wednesday, 8 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64)

1. The CHAIRMAN drew attention to Mr. Córdova's "Report on the Elimination or Reduction of Statelessness" (A/CN.4/64) and asked whether it was the Commission's wish to hold a general exchange of views, during which each member might speak once, before proceeding to examine article by article the two draft conventions proposed.

2. Mr. YEPES felt that a general exchange of views was unnecessary, in view of the lengthy discussions on the subject that had taken place at the fourth session.

3. Mr. AMADO did not agree. A general exchange of views would provide the best introduction to the subject.

4. Mr. LAUTERPACHT thought a general exchange of views was necessary, in order to enable the Commission to decide whether it wished to concentrate on the draft Convention on the Elimination of Future Statelessness or on the draft Convention on the Reduction of Future Statelessness, or whether it wished to discuss both drafts.

It was agreed to hold a general exchange of views, during which each member could speak once, after the Special Rapporteur had introduced his report.

5. Mr. CÓRDOVA (Special Rapporteur) said that he sincerely regretted the fact that it was to him that it fell to present the report on the elimination or reduction of statelessness, instead of to his eminent predecessor, Judge Manley O. Hudson, to whose scholarly work on the subject of nationality and statelessness he would begin by paying tribute. When it appointed him in Mr. Hudson's place, the Commission had made it clear that his report was expected to cover only one aspect of the general problem of nationality, namely, the question of statelessness; it had also agreed that he should leave existing cases of statelessness, for example, those resulting from refugee movements occasioned by the second World War, out of account.[1] It had instructed him to prepare two conventions — one for the elimination of future statelessness and one for its reduction, and had agreed that the draft convention should be in the form of articles, accompanied by comments. In the report which he now had the honour of submitting (A/CN.4/64) he had endeavoured faithfully to follow the Commission's instructions.

6. For the substance of his report he had drawn on the relevant resolutions adopted by the Institute of International Law at Venice in 1896, on the report of the Committee on Nationality and Naturalization, adopted by the International Law Association at Stockholm in 1924, on the Draft Law of Nationality prepared by the Harvard Research in preparation for the 1930 Hague Codification Conference, on the Convention on Certain Questions Relating to the Conflict of Nationality Laws and the Protocol Relating to a Certain Case of Statelessness adopted by that Conference, and on the Convention on Nationality, signed at Montevideo in 1933, and the Draft Convention on Nationality and Statelessness prepared by the Inter-American Juridical Committee in 1952. He had also been greatly assisted by the documentary material assembled by the Secretariat in its two reports, "The Problem of Statelessness" (E/2230) and "A Study of Statelessness",[2] as well as by the "Report on Nationality including Statelessness" (A/CN.4/50) prepared by Mr. Hudson.

7. In addition, he had had before him the memoranda (A/CN.4/66 and A/CN.4/67) prepared by Mr. I. S. Kerno, whom the Commission had appointed as expert on the subject of nationality including statelessness. The Commission had also requested him to prepare extracts from Mr. G. Kaeckenbeeck's book "The Inter-

[1] See *Yearbook of the International Law Commission, 1952*, vol. I, 163rd meeting, para. 79.

[2] United Nations publication, Sales No.: 1949.XIV.2.

national Experiment in Upper Silesia", but when he had found that Mr. Kerno already had that work in hand, he had left it to him, and Mr. Kerno's paper on the subject had been reproduced as document A/CN.4/65.

8. As the problem of statelessness was only one aspect of the general problem of nationality, it had seemed to him that the articles he drafted should avoid creating cases of double nationality, which was no less undesirable than statelessness. Both of the draft conventions he had prepared were based on the thesis that international law did not permit States to enact or to retain laws which would create cases of statelessness. He realized that that thesis might still be considered arguable, but he himself was convinced of it. He would frankly warn the Commission, however, that any undue insistence on the principle of national sovereignty would render a solution along the lines he proposed unfeasible. The Commission must decide which draft convention it wished to discuss first. In his view, its work would be facilitated if it considered first the draft convention which was governed by the principle that future statelessness must be entirely eliminated, and only turned its attention to the second if and when it appeared necessary to attenuate that principle with regard to certain categories.

9. Finally, he drew attention to the synoptic chart of possible sources of statelessness annexed to his report. That chart was wholly compiled from materials contained in "A Study of Statelessness". He believed that it was comprehensive, and he also believed that the first draft convention which he proposed would eliminate all future cases of statelessness arising from all those sources.

10. Existing cases of statelessness, resulting from past wars, were, however, more numerous than all which were likely to arise in future. He therefore urged the Commission to reconsider its decision to leave existing cases of statelessness out of occount. Many thousands of innocent people all over the world had lost their nationality as the result of events for which they were not responsible, and were looking to the United Nations for help. The United Nations and its various organs were under a moral obligation to give them all the assistance they could.

11. The CHAIRMAN thanked Mr. Córdova for his clear and able introduction to the subject and for his valuable report and invited members to take part in the general exchange of views.

12. Mr. LAUTERPACHT wished first to pay a tribute to the report presented by the Special Rapporteur. Within the limits which Mr. Córdova had set himself, his report was the most exhaustive and valuable treatment of the subject of statelessness which had so far appeared; it was distinguished not only by its scholarly qualities, but by its humanity and courage, which must eventually prove useful to the Commission as a whole.

13. Although it might appear superfluous, he would recall four points which should never be forgotten in connexion with statelessness. First, statelessness was an evil, and was generally recognized as such. It involved hardship and inhumanity offensive to human dignity. It was often unnecessary, petty and vindictive. Secondly, statelessness was contrary to the structure of international law as at present constituted. Nationality at present afforded the only link beween the individual and international law, and only by possession of a nationality could the individual enjoy benefits which international law was designed to confer upon him. Thirdly, statelessness was not demanded by any vital interest of any State, or by any fundamental concept of any system of law. For no one ground for the deprivation of nationality was universally admitted, and in most States the apparently contradictory principles of *jus soli* and *jus sanguinis* had been combined without any detriment to the prevailing system of law. Lastly, as could be seen from the replies reproduced in the report entitled "The Problem of Statelessness" (E/2230), the reduction or elimination of statelessness had increasingly become part of the deliberate and conscious policies of States. The General Assembly, the Economic and Social Council and the other competent organs of the United Nations had also adopted resolutions to the same end. To that extent, but only to that extent, it was true that the proposals presented by the Special Rapporteur were in the nature of codification, and the Special Rapporteur had perhaps somewhat exaggerated the progress which had been made in the existing law.

14. Although the Special Rapporteur, acting in strict accordance with his instructions, had prepared two draft conventions, one for the elimination and the other for the reduction of statelessness, he had clearly and courageously shown his preference for the first. Possibly the present draft of the first draft convention did not eliminate all future cases of statelessness. That applied to the case of persons who were not permanent inhabitants of a territory which was transferred from one State to another. There were also other, somewhat exotic, examples such as births on installations connected with the continental shelf, or in territories under a condominium, or in *terra nullius*. Those exceptions apart, however, he agreed that the first draft convention, for the elimination of future statelessness, would cover all cases.

15. In substance, the second draft convention, for the reduction of statelessness, differed from the first but little. In that draft the Special Rapporteur had provided for the deprivation of nationality for certain reasons, although, surprisingly, he had not included among them disloyalty and high treason. He proposed, however, that any child which acquired no nationality at birth either *jure soli* or *jure sanguinis* should acquire the nationality of one of its parents. That proposal was of the greatest interest, since it overcame objections which certain members of the Commission had raised to the corresponding text previously proposed.

16. The Commission might indeed consider that even the second draft convention proposed by the Special Rapporteur was unlikely to prove generally acceptable to

States. Any convention which really contributed to a solution of the problem, however, would necessarily, to however small an extent, conflict with the existing laws of States and further restrict their freedom of action. He hoped, therefore, that the Commission would not pay too much attention to the argument that the texts proposed conflicted with existing national laws, and that it would not neglect the opportunity presented of restoring order in a sphere which at present was in a state of chaos. However timid the Commission's proposals, experience showed that years would elapse before they were ratified. It would be prudent, therefore, to be bold. If the Commission presented a text designed to eliminate future statelessness, there was some chance that it would be ratified, with no greater delay than any text designed merely to reduce future statelessness, by those States, such as the United Kingdom, under whose existing laws statelessness was already virtually abolished. Such a convention, signed and ratified by a few States, could then serve as a goal towards which the others might strive, in the full assurance that it was in no way inimical to their interests.

17. In any case it was for the Commission, even if it adopted alternative drafts, to express its preference for a definite course. The General Assembly could not decide the basic question of legal principle. That responsibility lay with the Commission, and with it alone.

18. Mr. HSU also paid tribute to the Special Rapporteur for having shown the courage of his convictions. The International Law Commission had been established for the purpose of codifying and developing international law, not as a research institute concerned solely with the study of positive law.

19. He agreed that the Commission should reconsider its decision to leave out of account the cases of statelessness existing as a result of the refugee movements caused by the first and second world wars, since it was those cases which had riveted public attention on the problem of statelessness.

20. He suggested that, in view of the continued importance of the principle of *jus sanguinis,* cases of double nationality were perhaps, at present, a necessary evil, even though it was to be hoped that it would prove possible to eliminate them in the future.

21. On the assumption that the Special Rapporteur's introduction to the two draft conventions would be included in the Commission's report on the subject, further consideration should, in his view, be given to paragraph 17, since he did not quite see the relevance of the reference to the "principle of the priority of the rules of international law over those of municipal law".

22. Mr. ALFARO also congratulated the Special Rapporteur on his report. The draft Convention on the Elimination of Future Statelessness was inspired by motives of humanity and justice, and the main lines of the solutions proposed in it had a sound basis in international law. Altogether that convention formed an excellent basis for the Commission's discussions, although he had objections to certain of its provisions. He agreed with Mr. Lauterpacht that the Commission should present the General Assembly with a single text. That text should be aimed at the elimination of statelessness, even if, with regard to certain categories, it was found necessary to seek only its reduction.

23. The CHAIRMAN said that he was by no means sure that the Commission should submit only one text to the General Assembly. It might, for example, be found that opinion in the Commission was divided on a number of fundamental provisions; in that case, he thought it would be wise to prepare two conventions, one for those States which were ready to eliminate statelessness altogether, and another for States which, though they could not go so far, were willing to take some more modest steps towards that end. If the course advocated by Mr. Lauterpacht were adopted, he feared that there would be a considerable risk of no progress at all being made.

24. Mr. PAL said that he could add little to what had already been said by Mr. Córdova and Mr. Lauterpacht. He would only point out that the right of nationality was a basic human right, and that every case of statelessness was proof that that right had been violated. He appreciated the point of the Chairman's remarks, but considered that the International Law Commission had a clear duty to press for the total elimination of statelessness; if it tolerated any cases at all, it would be conniving at the violation of a basic human right. It could not compromise on the question, and the attitude of the political bodies to which its recommendations would be referred was not its concern.

25. Mr. SANDSTRÖM joined his tributes to those already paid to the Special Rapporteur, with the main lines of whose report he could agree. He had also listened with the greatest interest to Mr. Lauterpacht's remarks, and he suggested that, where relevant, they might well be included in the commentary.

26. With regard to the procedure which the Commission should follow, he found himself in agreement with the Chairman, although he personally felt that the best way of promoting progress might not be by means of a convention at all but by the establishment of some such machinery as already existed in the field of refugees, in the shape of the High Commissioner's Office, for direct negotiation with the governments concerned.

27. Mr. KOZHEVNIKOV said that the Special Rapporteur's report undoubtedly represented the fruits of a considerable amount of work. It contained in some instances useful factual data and certain general considerations, on the basis of which Mr. Córdova had prepared certain texts.

28. There was no disagreement about the fact that the purpose of international law was to regulate relations between States, which were independent and sovereign entities. The rights of the individual lay outside the

direct scope of international law, and it was only by virtue of the legal bond which existed between the individual and the State that his rights could be protected. Statelessness was of course an evil. It seemed to some people that the blame for it lay with States. In his view it was impossible to generalize in that connexion; in a number of cases it was the individual who, by severing the bond which had tied him to his country of origin, deprived himself of the benefits which would be conferred on him by the existence of normal relations between him and the State.

29. He had been frankly astonished by the texts proposed by the Special Rapporteur. In some other matters, Mr. Córdova had shown himself to be aware of the paramount need for upholding the principle of the sovereignty of States, but he now seemed to be turning his back on that principle, notably in the preamble to both Conventions, where he asserted that, as concerned the nationality of persons, "all nations should in this matter abide by the principle of priority of international law over national legislation". The idea that international law should have priority over the sovereign rights of States was quite unacceptable. It sought to make of international law something standing above States, whereas, as he had already pointed out, the whole purpose of that law was to govern relations between them. He was resolved to resist an idea which would make nonsense of international law, and in doing so he was confident that he would enjoy the support of the vast majority of democratically-minded people throughout the world.

30. Mr. YEPES associated himself with the congratulations which had been addressed to the Special Rapporteur on the courageous and scientific report he had produced. He found himself in agreement with nearly all that was said in that report. In his view, the key article, which should be placed first, was article VI of the draft Convention on the Elimination of Future Statelessness, which read as follows:

"1. No State shall deprive any person of its nationality by way of penalty.

"2. No State shall deprive any person of its nationality on any other ground unless such a person, at the time of deprivation, acquires the nationality of another State."

31. If that article was not accepted, the effect of the remainder of that draft convention would be vitiated, and he therefore suggested that it should be discussed first.

32. In their discussions of the whole problem of statelessness, members of the Commission should constantly bear in mind the text which had been adopted by the General Assembly as article 15 of the Universal Declaration on Human Rights,[3] namely:

"1. Everyone has the right to a nationality.

"2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

33. The International Law Commission could not accept the thesis of the unlimited sovereignty of States, since the whole of its work rested on the principle that States were subject to international law. International law had no meaning if the principle of unlimited State sovereignty was accepted. If it were admitted that international law was limited by the absolute sovereignty of States, then the international law which they were trying to codify would be a mere fiction. It must not be forgotten that since the Judgement of the Nürnberg Tribunal on war criminals and the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, the individual, that was, the human person, had become a subject of international law.

34. Mr. AMADO said that one could speak for hours on a subject so serious, so painful and so moving. He was glad that, despite the emotional content of the problem of statenessness, the Special Rapporteur had confined himself to studying the principles and investigating the issues objectively and conscientiously. It was not for the Commission to go into those aspects of personal tragedy which lent poignancy to the problem. He was the happier to be able to pay that tribute, since the Special Rapporteur came from a country that was a neighbour of his own.

35. The Commission's duty was to meet the Economic and Social Council's request to prepare the necessary draft international convention or conventions for the elimination of statelessness (Council resolution 319 B III (XI) of 11 August 1950). The Commission had the choice of two approaches: it might seek to devise solutions which would prove acceptable to the Economic and Social Council and governments, or it might dare to formulate principles which would be a landmark in international law. Which method of approach would best help genuinely to solve the problem? A number of States would have constitutional difficulty in accepting principles. From that point of view, one of the merits of Mr. Córdova's report was that he had submitted a practical draft which expressed the maximum that could be done. It was essential that in studying the problem members should act impersonally, and dissociate themselves from their national points of view. There he must pay tribute to Mr. Pal, whose words had shown that there was unity in the world and that hope could be entertained for the future. Mr. Córdova, who was a ceaseless champion of sovereignty, had done his duty to himself and to the various cultures of the Latin-American Continent, by showing the way. Concessions must inevitably be made. Mr. Córdova, like Mr. Scelle, perhaps accentuated too much the supremacy of international law; Mr. Kozhevnikov had already expressed another standpoint.

36. Mr. Lauterpacht wanted the Commission to think in terms of conventions in which principles of law would be expressed. Mr. Sandström had argued that the Com-

[3] United Nations publication, Sales No.: 1949.I.3.

mission should inform the Economic and Social Council that the problem must be dealt with on political lines, and that all that the Commission could do was to formulate existing law. He agreed with Mr. Sandström and the Chairman that the Commission could best serve the cause by proposing a convention which would be complete, juridically sound, and at the same time acceptable. The slow evolution of social thought was a factor which must perforce be taken into account — as must also the constitutional difficulties of States which were entities that had been moulded by historical forces. It would be unfortunate to do disservice to the cause by proposing unacceptable solutions.

37. Faris Bey el-KHOURI said that there was no conflict on the necessity of eliminating future statelessness. Article 15 of the Universal Declaration of Human Rights laid down that each individual had the right to a nationality. That principle, which had been accepted by all States Members of the United Nations, must be examined in conjunction with article VI of the draft Convention on the Elimination of Statelessness (A/CN.4/64), which laid down that no State should deprive any person of its nationality by way of penalty, and article 1, which stated the general rule. If the principle of *jus soli* were generally accepted, statelessness would in future be eliminated. But if States declined to accept the principle, how would the solution be found? The report was silent on that point.

38. Nor did the report seem to refer to the nationality of children born of stateless persons. It could be deduced from the two draft conventions included in the report that such persons would acquire the nationality of the country of their birth.

39. He was surprised that the Special Rapporteur should have neglected to consider how statelessness originated; it could do so in a number of ways. An individual might discard his nationality, destroying all documentary proof thereof; no reference was made to that possibility in the report. He might be expelled from his country and deprived of his nationality; that possibility was covered by article 6. He might also come to one country from another country where the concept of nationality as such did not exist. And last, but not least, he might take part in the general exodus of a people from its country of origin. With regard to the last case, he would draw attention to the millions of Armenians who had been expelled from Turkey after the first world war, having been refused Turkish nationality. Syria was sheltering 200,000 such persons. What was to be done with them? On the basis of *jus soli,* the children of those people would become Syrians, but the parents remained stateless. The Special Rapporteur had failed to go into that issue. Today, there was hardly any need to refer to the million Arabs expelled from Palestine, except to emphasize that the importance of that problem was still growing, despite all the resolutions and recommendations of the General Assembly. The partition of Korea had created statelessness in yet another region of the world. Should the Commission make recommendations concerning those homeless, stateless and destitute groups? How far could the Commission go in attacking a problem which was political, and as such outside its competence? He believed that at the least a reference should be made to it in the report.

40. Despite certain omissions, the report would serve as a basis for the Commission's work; the articles of the two draft conventions should be examined *seriatim.*

41. Mr. ZOUREK wished to define his ideas on certain aspects of a report which had been well and thoroughly prepared. Statelessness was an evil in international relations; it was an evil alike for individuals and for national administrations which were called upon to solve individual cases. It was generally postulated that statelessness was due to action by governments. That could be so; statelessness did sometimes arise from gaps in domestic legislation. But it should not be forgotten that individuals very often brought statelessness upon themselves. It was therefore essential for the Commission first to clarify its ideas in order to prepare a solid basis on which to work.

42. Certain members seemed to suggest that a general law existed in regard to nationality. Actually, apart from several conventions binding the parties, which had been referred to in the report, no general rule on nationality existed in international law. Unless the Commission started from that premise, it would lose itself in a cloud of illusions. The Universal Declaration of Human Rights was, as the report and the preamble to the first draft convention rightly pointed out, simply a programme for the future. It was not a rule.

43. Furthermore, where lay the cure and by what means should it be undertaken? He was convinced that the solution lay in measures taken by governments within the framework of their domestic legislation. In that connexion, he would refer to the recent law enacted in Czechoslovakia on 24 April 1953 (law No. 34), whereby persons of German origin domiciled in Czechoslovakia were given back the Czech nationality of which they had been deprived during the Hitler régime, the law being also applicable to wives and minor children domiciled in the country.

44. Turning to the draft Convention on the Elimination of Future Statelessness, he noted the view that the Special Rapporteur had sought to impose the principle of *jus soli* to countries which applied that of *jus sanguinis.* In such cases the tie of nationality would become purely fortuitous. The tie was far stronger under the principle of *jus sanguinis.* Consequently, he did not consider that the application of the principle of *jus soli* pure and simple was acceptable.

45. Reference had already been made to article VI. There the Special Rapporteur enunciated principles which had been rejected by a large majority of the Commission at the fourth session. In his view, the article was based on an erroneous conception of nationality. Nationality imposed duties on the individual as a citizen. If an individual cut himself off from a community of

his own free will — by committing high treason, for instance, or by disloyal action — could his State be denied the right to deprive him of his nationality? The practice of governments described in the Secretariat's memorandum, "National Legislation concerning Grounds for Deprivation of Nationality" (A/CN.4/66), clearly showed that it would be vain to propose such a principle. It would not be accepted.

46. Such were his preliminary observations. He reserved the right to speak later on each separate article.

47. Mr. SPIROPOULOS congratulated Mr. Córdova on his work, and said that his own ideas had already been expressed by other members. He need not therefore delay the Commission by repeating them.

48. Mr. CÓRDOVA thanked the Commission for its appreciation of his work. He would first tell Mr. Kozhevnikov that the report was not really inconsistent with his (Mr. Córdova's) attitude to the sovereign rights of States. He admitted that he was inclined to recognize on behalf of the individual State the rights admitted in international law. In other words, he defended the rights of States against the imposition of other rights, but always *within* the framework of international law. Thus, with regard to the doctrine of the territorial sea he did not go so far as to maintain that the coastal State could take unilateral decisions concerning its territorial sea. For him, the priority of international law was the fundamental premise. International law must prevail against the will of States; indeed, if States possessed unlimited sovereignty, there would be no international law. His attitude was not inconsistent.

49. Mr. Hsu and Faris Bey el-Khouri had referred to the absence from the report of any reference to existing statelessness. He was the first to deplore an omission which was due to the Commission's own decision. At the 163rd meeting (fourth session) Mr. Lauterpacht had proposed that the Commission request the Special Rapporteur to give further consideration to the possibility of reducing existing cases of statelessness by juridical means. That proposal had been rejected by 5 votes to 4 with 3 abstentions.[4] In his report (A/CN.4/64, para. 21) he had quoted his own words during the discussion, namely, "...even if the Commission could hope for a little practical success when dealing with what was primarily a political problem, it would be subjected to much criticism if it did not a least consider the problem of reducing existing cases of statelessness..."; and thereto he had added the following comment: "A noble and very useful purpose would be served, if the Commission decides to explore the possible solutions for reducing existing cases of statelessness. It seems to the Special Rapporteur that this is a solemn duty of the Commission towards thousands of stateless persons, now living under great hardship and duress, without any protection, and who look up to the United Nations as their last refuge and only hope for the solution of their human problems." He was perfectly willing that the Commission should reverse its decision, but if the problem of existing statelessness was to be tackled, he would like to know in good time what the Commission expected of him.

50. Further, a distinction must be drawn between statelessness which was juridical and statelessness which was not. A political exile whose country of origin had not deprived him of his nationality was not juridically stateless, although *de facto* he could derive no benefit from having a nationality. But a refugee who had been expelled from his country and forcibly deprived of his nationality was juridically stateless.

51. Faris Bey el-KHOURI, intervening, asked how Mr. Córdova defined persons who wished to go back to their country and were not accepted by it.

52. Mr. CÓRDOVA replied that those persons had a nationality and were therefore not juridically stateless. Certainly, for practical purposes, their nationality was of no use to them, but that was not the point.

53. Continuing, he said that there were two possible solutions: it could be proposed that a State which deprived any person of its nationality should restore it; or, alternatively, that a State wherein a refugee was domiciled was under the obligation to grant him its nationality. The latter was a sound solution in that refugees having been accepted as such by the country of asylum and being willing to remain, their children would be brought up there. States could not fail to be concerned with the problem. On the one hand, refugees could not be sent back to their country of origin; on the other, they should not remain as a living and expanding group of foreigners within a community. Rapid assimilation was undoubtedly the best thing.

54. Faris Bey el-KHOURI asked why States should accept intruders.

55. Mr. CÓRDOVA replied that he was attempting to feel his way towards a juridical solution.

56. Some members had spoken of the fact that the report included two conventions, one on the elimination of future statelessness, and one on the reduction of future statelessness. Mr. Sandström had suggested that the Commission recommend to the Economic and Social Council that it advocate that the countries concerned make the appropriate changes in their domestic legislation. That proposal was practical and relevant to existing circumstances, but would not contribute to the elimination of the problem in future. He was inclined to share Mr. Lauterpacht's view that there should be only one convention, and, moreover, one which would serve to eradicate the problem entirely. Indeed, the Commission was in the position of a doctor with two medicines, one of which would effect a complete cure whereas the other would only serve as a palliative. The Commission should have the courage to propose the complete cure, telling States that it was for them to choose whether to take the prescription, whether not to take it, or whether to take it in their own way.

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 163rd meeting, para. 79.

57. There was yet another point, which had been raised by Mr. Yepes. If the Commission first took up the draft convention on the elimination of future statelessness, he was not sure that Mr. Yepes' suggestion that article VI should be examined first was wholly wise. That article dealt with deprivation of nationality, and he felt that the preceding articles would perhaps have greater effect in eliminating statelessness. He would be inclined to follow the order suggested by Mr. Hudson in his report (A/CN.4/50), namely: statelessness arising from conflict of laws; statelessness arising from deprivation of nationality; finally, statelessness arising out of treaties on transfers of territory. Obviously the Commission must first decide upon its method of work. He would suggest that the first step was to decide on the definition of the concepts of "inhabitant" and "domicile".

58. The CHAIRMAN said that the illuminating discussion had exactly fulfilled the purposes for which it had been held, namely, that of finding the correct approach to the work. Any other comments which members wished to make could be made in relation to the individual articles.

59. Clearly members were divided as to whether there should be one or two conventions. He would therefore suggest that a start be made with the first convention — that on elimination of future statelessness. The results would show whether it would be opportune to consider the second convention or whether the first was so good as to be capable of standing alone.

60. The Special Rapporteur had raised the point of the possible study of existing cases of statelessness. His feeling was that that issue also should be settled after an examination of the juridical question as to how the future increase of statelessness could be prevented.

61. If there were no objections, he would close the general discussion and invite members to begin their examination of the first convention after first deciding whether the logical order of the articles should be followed or whether, in accordance with Mr. Yepes' suggestion, they should begin with article VI.

It was so agreed.

62. Mr. YEPES felt obliged to press his proposal, because in his view, article VI was the focal point of the whole draft, and raised an issue of principle which affected all other issues. The Special Rapporteur's comment on that article put the matter perfectly and he could do not better than quote it:

> "...the Special Rapporteur feels it his duty to state that if the members of the Commission reject this principle, they might as well reject the whole draft convention because if they leave the possibility of statelessness open in this article of the draft convention, every effort made in the other articles to attain the elimination of statelessness becomes entirely useless. The application of article I, for instance, although drying up all sources of statelessness at birth would be utterly insufficient to eliminate statelessness if, on the other hand, the Commission would accept the survival of this unhuman and very absurd situation by rejecting the principle that no State shall deprive a person of its nationality, unless, in so doing, it does not produce statelessness. In other words, the Commission should bear in mind the very important and fundamental fact that we are dealing here with a draft designed to eliminate future statelessness." (A/CN.4/64, comment to article VI, section III, E)

63. Mr. Zourek's argument that States had the right to deprive individuals of nationality for such offences as high treason was superficially impressive but was in reality founded on a confusion of the concepts of citizenship and nationality. States could apply very efficacious sanctions to punish traitors without depriving them of their nationality and thereby creating problems for other States. They could, for example, deprive them of all political rights, a practice followed by a number of Latin American States.

64. The CHAIRMAN, intervening, requested Mr. Yepes to confine his remarks to the point at issue.

65. Mr. YEPES said that his remarks were intended to prove the need for taking article VI first. The State was sufficiently armed against traitors, whom it could deprive of their rights of citizenship without depriving them of their nationality.

66. Mr. SANDSTRÖM held that there was no valid reason for changing the order of the articles, a question which was in any case of secondary importance and could be suitably examined by the Drafting Committee.

67. The CHAIRMAN invited the members to vote on Mr. Yepes' proposal that article VI of the draft Convention on the Elimination of Future Statelessness be examined first.

Mr. Yepes' proposal was rejected by 7 votes to 1, with 5 abstentions.

68. Mr. AMADO, speaking in explanation of his vote, said that he had abstained because Mr. Córdova had suggested that the second convention was in the nature of a palliative. He noted, however, that article VI of that convention envisaged the problem of deprivation in a manner which might well prove acceptable to states. It was better than a palliative. Further, he would draw attention to paragraph 3 of article VII of the second Convention which opened with the words "No State shall deprive any person of its nationality on any other ground..." He considered that that article also might well be acceptable. Indeed, he appreciated the motives which had inspired Mr. Yepes' proposal, but felt that on the whole it was preferable to start at the beginning.

69. Mr. KOZHEVNIKOV hoped that it was not too late for him to remind the Commission that it should define its attitude to the preamble of the draft Convention on the Elimination of Future Statelessness.

70. The CHAIRMAN said that, in accordance with the usual procedure, the preamble would be examined after the body of the text. He called upon Mr. Córdova

to introduce the discussion on article I of the draft Convention on the Elimination of Future Statelessness.

Draft Convention on the Elimination of Future Statelessness

Article I [1]

71. Mr. CÓRDOVA said that article I was the most important article in the two draft conventions. It was wider in scope than the articles rejected by the Commission at its fourth session. In drafting it, he had followed the main line adopted by Mr. Hudson in his report (A/CN.4/50). The main cause of statelessness resided in the conflict of law, and all methods of resolving that conflict had been directed towards extending the principle of *jus soli* to countries which applied the doctrine of *jus sanguinis*. The converse did not offer a permanent solution. Article I was in harmony with decisions taken by other United Nations organs, namely, with article 15 of the Universal Declaration of Human Rights, and with the Economic and Social Council's resolution requesting the Secretary-General to undertake studies for the purpose of making the Universal Declaration of Human Rights effective. The Secretary-General had decided that article 15 of the Universal Declaration could best be implemented by eradicating statelessness. That, indeed, was the purpose of the present draft convention and of his own work.

72. Article I covered a number of cases described in the synoptic chart of possible sources of statelessness annexed to the report. Indeed, the whole problem was somewhat intangible unless related to practical examples.

73. Thus, article I applied to cases of children born abroad in (1) a *jus sanguinis* country of parents of a strict *jus soli* country; and (2) a *jus sanguinis* country from a second or third generation of parents nationals of a *jus sanguinis* country.

74. It also applied in the case of children born in a *jus sanguinis* country with one parent stateless, whether legitimate (stateless if father stateless) or illegitimate (stateless if mother stateless), and to foundlings, who were the perfect examples of statelessness. It should be noted that according to article II a foundling should be presumed to have been born in the territory of the Party in which it was found. He would not pursue his analysis further, but would draw attention to the fact that he had been obliged to use wording different from that of Mr. Hudson [5] and from that proposed by the draft "Law of Nationality" prepared by the Harvard Research in International Law.[6] He had, as a matter of fact, been guided by Mr. Alfaro's formula.[7] He had deleted the words "if no *other* nationality is acquired at birth" from Mr. Hudson's wording, because it gave priority to the *jus sanguinis* principle. Moreover, the wording warranted the interpretation that the country of birth might be deprived of the right to impose its nationality. That was obviously not the intention.

75. Mr. AMADO drew attention to the unsatisfactory form of the article in the French text: "*s'il n'acquiert* pas". The verb "*acquérir*" was wrong. A child *was*; it acquired nothing. What mattered was the fact of birth.

76. The CHAIRMAN suggested that the words "soit *jure soli*" be deleted as superfluous.

77. Mr. SANDSTRÖM said that he entirely agreed with the idea which the Special Rapporteur had sought to express in article I, but feared that the drafting was defective. It was very difficult to find a really satisfactory formula to express that clear and simple notion. He would try and put it thus: "Every child born, who otherwise would become stateless, shall acquire at birth the nationality of the Party in whose territory he is born".

78. The CHAIRMAN said that Mr. Sandström's amendment would be distributed.

[5] "(i) If no *other* nationality is acquired at birth, every person shall acquire at birth the nationality of the State in whose territory he is born. This would extend *pro tanto* the applicaiton of the *jus soli* rule in many countries." (A/CN.4/50, Annex III, Section VI, point 2). Also quoted in A/CN.4/64, Part I, comment to article I, section III, A.

[6] "Article 9. — A State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth." (*American Journal of International Law*, Vol. 23 (1929), Special Supplement, p. 14) Also quoted in A/CN.4/64, Part I, comment to article I, section II, D.

[7] "Every person born in a State where nationality is not conferred *jure soli* and who does not acquire at birth another nationality *jure sanguinis* shall acquire at birth the nationality of the territory where he is born." (A/CN.4/64, comment to article I, section III, F)

The meeting rose at 1 p.m.

212th MEETING

Thursday, 9 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris

* The number within brackets corresponds to the article number in the Commission's report.

Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. Radhabinod PAL, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article I [1]

1. The CHAIRMAN invited members to continue discussion of article 1 of the draft Convention on the Elimination of Future Statelessness (A/CN.4/64, Part I), and drew attention to Mr. Sandström's amendment, which read as follows:

> "Every child born, who otherwise would become stateless, shall acquire at birth the nationality of the Party in whose territory he is born." [1]

2. Speaking as a member of the Commission and as a representative of a country which applied the principle of *jus sanguinis,* he wished to express his serious objections to article I, which would have the effect of linking nationality to the sole fact of birth in a territory. The doctrine of *jus sanguinis* meant that birth in a territory was not enough to create between the State and the individual the relationship which was necessary for, and in keeping with, the juridical concept of a nation. He must straightway emphasize that his objections were not political, but juridical. The text of article I was based on a concept of a nation which the *jus sanguinis* countries could not accept. Any person who took the same attitude would have considerable difficulty with regard to the treatment of and the voting upon articles so conceived. No possible objection could be entertained to the negotiation of a convention between *jus soli* countries for the purpose of applying that principle among themselves. Indeed, he would not vote against such a convention, on the understanding that those who held the opinions which he had just expressed did not consider such a convention to offer a satisfactory solution, since it would never be accepted by *jus sanguinis* countries. It followed therefrom that if the Commission accepted such a convention, a second convention would prove necessary.

3. Mr. LAUTERPACHT said that before answering Mr. François, he wished to raise two points concerning Mr. Sandström's amendment.

4. In the first place, the proposal was fully acceptable. It disposed of certain doubts which arose from the Special Rapporteur's text, and it was shorter and commendable in that it immediately introduced the main issue, namely, the avoidance of statelessness. For that reason, it was particularly welcome.

5. His second observation was perhaps somewhat pedantic. It was at least theoretically possible that, even with the proposed formulation, cases of statelessness might occur. There existed territories, such as trust territories and condominiums, which were not incontrovertibly under the sovereignty of a single State; again, the status of leased areas granted in perpetuity was controversial. As examples, he would mention, of the first, the condominium of the United Kingdom and France over the New Hebrides, and of the second, the Panama Canal Zone. There were other cases, which he would describe as "exotic"; birth on an installation in the high seas, or on an uninhabited island, or on a raft on the sea. The Commission might therefore consider it advisable either to add a paragraph to the article, or to include a reference in the comment to the effect that in such cases a child should acquire the nationality of one of the parents.

6. Turning to Mr. François' statement that article I was not acceptable, and never would be, to his country, which applied the *jus sanguinis* principle, and that consequently a second convention might be necessary, he would draw attention to the fact that the article was not intended fundamentally to affect the *jus sanguinis* system. The latter would be maintained subject to numerically few exceptions — cases where a child was born and did not acquire the nationality of his parents' country in virtue of *jus sanguinis.* He would have thought that in the Netherlands not more than 10 to 20 persons were born each year who would come under the article. In any case, the Netherlands had already made exceptions to the rule. If the convention were generally accepted, the number of stateless persons and children born to persons who were stateless would decrease. It was as well to keep a sense of proportion concerning the numbers involved, and he must once more emphasize that the question of making *jus soli* generally applicable did not arise.

7. A sense of proportion should also be kept in regard to legal theory. He did not know what exactly the Chairman meant by the statement that the issue was related to the whole juridical concept of a nation. Those were high-sounding words, but in point of fact in something like 85 to 95 per cent of States the juridical concept of a nation was very elastic, *jus soli* being in practice combined with *jus sanguinis.* He felt that Mr. François had been somewhat extreme in his statement, and too pessimistic in affirming that the Netherlands would never accept article I. At the time of the Hague Codification Conference in 1930, many governments had declared that other States would not alter their position with regard to the nationality of married women — a matter which they considered bound up with the very basis of their law of nationality. But various changes had been made since then without affecting the juridical concept of a nation on fundamental notions of its jurisprudence.

[1] See *supra,* 211th meeting, para. 77.

8. The CHAIRMAN, speaking as a member of the Commission, wished first to defend himself against the charge of exaggeration. Since the second world war, the number of stateless persons in the Netherlands had risen to 73,000; the general birth-rate was 23 per thousand. It was clear from those figures that Mr. Lauterpacht's estimate of 10 to 20 stateless persons born each year did not tally with the facts. He could not agree that the principle of *jus sanguinis* was of limited importance and that the difference between it and *jus soli* was limited in its effects. The principle expressed in article I and Mr. Sandström's amendment thereto would not apply to stateless persons alone, but to any child whose nationality might be dissimulated by its parents, who would be able to claim that since they had no nationality their offspring must be granted nationality *jure soli*. The burden of proof in respect of the possible nationality of the parents would fall on the State, and would involve it in considerable difficulties.

9. Mr. ALFARO said that he would be prepared to accept either formula, since both would implement article 15 of the Universal Declaration of Human Rights and fulfil the request addressed to the Commission by the Economic and Social Council. On the whole, he preferred Mr. Córdova's text, although certain doubts had been expressed thereon. The matter was surely very simple; a child was born in the territory of State 'A' (say, the Netherlands), which did not confer nationality *jure soli*. The parents of that child had the nationality of State 'B', which did not recognize nationality *jure sanguinis*. In such a case, the child could acquire nationality neither *jure sanguinis* nor *jure soli*, and it was there that it proposed to apply the solution *jure soli*, which was the easiest and the most humane, and had been recognized by jurists ever since the days of Francisco de Vitoria. Mr. Sandström's formula would have the same effect, but he would draw attention to the fact that the word "born" was missing from the French text. In any event, the amendment needed re-drafting, and he would suggest that the word "State" be used instead of the word "Party". Perhaps a more satisfactory wording would be the following: "Every child who at birth would have become stateless, shall acquire at birth... etc."

10. Mr. LIANG (Secretary to the Commission) felt that the import of Mr. Sandström's amendment might be regarded as wider than that of the Special Rapporteur's text. If Mr. Lauterpacht's premise that article I was the key article were conceded, the wider interpretation might be preferable.

11. There was one point to which he would draw attention in connexion with the first clause of the amendment. It must be made perfectly clear that the text referred to statelessness at the moment of birth, and not at any other time when the child might become stateless. He would therefore suggest the following wording: "Every child, who otherwise would be stateless at birth..." A child might become stateless during its infancy through the operation of the law of the State, and it should be made clear that the article was not intended to cover that contingency.

12. Another point which should be considered was the effect of the provision on municipal law — an issue to which Mr. François had already referred. The draft convention was clearly intended to constitute, by means of a convention, international legislation — to use Mr. Hudson's expression — involving changes in domestic law. Once the convention was accepted, it would acquire the force of law in the States parties to it, and would, to that extent, affect the application of domestic law.

13. Faris Bey el-KHOURI said that he represented a group of States in the Middle East, all of which applied the principle of *jus sanguinis*. He did not know to what extent those States would be prepared to assume the obligation to change their domestic legislation. He confessed that he entertained doubts about their readiness to do so. If the provision was only to apply to a few rare cases, States might envisage the solution, but they could hardly accept the imposition of such a rule in respect of hundreds of thousands of persons. In his statement at the previous meeting, he had referred to the growth of the refugee problem and had quoted several examples.[2] He would therefore only add that in certain States in the Middle East, the influx of refugees was so great that their number now exceeded that of the indigenous population. In the Hashemite Kingdom of Jordan, for instance, there were 20 or 30 per cent more refugees than there were nationals of the kingdom. The figures were equally significant for Lebanon and for Syria. Furthermore, it should be borne in mind that those refugees came from different countries and belonged to different races — they came from Yugoslavia, Albania, the Caucasus, and from the countries of eastern and western Europe. Many of them dared not return to their conutries of origin, by which they had been rejected.

14. He would reiterate that the problem of refugees should be referred to in the Commission's report in order that the attention of the General Assembly might be drawn to it. The necessity for so doing was the greater since the problem was having a detrimental influence on the maintenance of peace. He was unable to subscribe to the texts proposed by the Special Rapporteur and Mr. Sandström, since they would make the acceptance of the principles mandatory.

15. Mr. KOZHEVNIKOV said that the discussion clearly showed the great difficulties of the problem. The general comments made by Mr. François and Faris Bey el-Khouri deserved the closest attention. The Commission was attempting to draft a general convention which would necessitate serious legislative changes, and possibly even constitutional changes. It would not be realistic to rely on an easy acceptance by States. As he had stated at the previous meeting,[3] his impression was that the question related to the domestic jurisdiction of States.

[2] *Ibid.*, paras. 37-40.
[3] *Ibid.*, para. 27-29.

16. He would take the opportunity, in that connexion, to answer the suggestions made at the preceding meeting by Mr. Córdova[4] to the effect that he was a partisan of absolute sovereignty. That was not so, and he must deny the charge. That notion was alien to the Soviet concept of law which, as was well known, was based on the recognition that collaboration between States was desirable and necessary, even if their economic and social systems differed. The Soviet Union was consistently in favour of such collaboration.

17. He (Mr. Kozhevnikov) was opposed to the imposition of rules on States and the prejudgement of issues. The provisions of the draft convention sought to impose rules and as such were contrary to the principles of sovereignty. Agreement between *jus sanguinis* and *jus soli* countries was possible on the basis of mutual understanding.

18. As to Mr. Sandström's amendment, he would ask for an explanation of the precise meaning of the word "otherwise". What actual cases would be covered by it? Indeed, he could see no advantage in Mr. Sandström's amendment as compared with the original text proposed by the Special Rapporteur.

19. Mr. PAL said that the principle expressed in both texts was acceptable to him. The question of nationality involved both the claims of a State and its obligations. If a State could claim a child as being its national, it must also accept the obligations to recognize it as its national. In the light of present international circumstances, stress should be laid on the obligations of States in that respect. The question was not how to find a general solution for the conflict between *jus sanguinis* and *jus soli*. What article I sought to do was to solve a case of statelessness by providing that nationality should be acquired *jure soli* in the case of children who did not acquire nationality *jure sanguinis*. He would add in passing that the existing freedom of movement between countries made it possible to concede that the mother's presence in the country of the child's birth would be legitimate.

20. On the whole, he preferred Mr. Sandström's formula, but felt that it would be preferable to substitute the word "State" for the word "Party".

21. Mr. SANDSTRÖM, replying to Mr. Kozhevnikov, said that he interpreted the word "otherwise" as referring to the moment of birth. It was perhaps the verb "become" that was confusing, and it might be preferable to substitute the verb "be", so that the first clause would read: "Every child born, who otherwise would be stateless..."

22. He would like to make clear that the Commission should look at his amendment in the light of his general statement at the previous meeting.[5] The fact that he had submitted an amendment in no way implied that his government would be prepared to accept the convention. Sweden had amended its nationality laws in 1950, bringing them nearer the principle expressed by the Special Rapporteur in the draft convention on the reduction of future statelessness. In fact, he had submitted his amendment without any reference to the possibility of wide acceptance by States or to political considerations. But he must point out that he had advocated that the Commission offer States the alternative of the second convention.

23. Mr. YEPES said that he was in favour of the elimination of future statelessness, and that it was in the light of that attitude that he wished to make the following comments. The draft referred *passim* to contracting States. It had been set out in the form of a convention, but he doubted the wisdom of that procedure since a convention involved acceptance and ratification. He concurred with Mr. Kozhevnikov that difficulties would arise. He was more in favour of drafting a series of principles for submission to the General Assembly or to the Economic and Social Council, either of which could draft a convention on the basis thus provided.

24. Turning to the text of article I, he wondered whether it would be possible to impose upon *jus soli* States the obligation to grant, without any other formalities, nationality to a child born in their territory. So absolute a rule could hardly be imposed. As the Special Rapporteur had shown in his report (A/CN.4/64, Part I, comment to article 1, B), even *jus soli* countries made the acquisition of nationality by birth in their territories conditional. That, for instance, was so in the case of Colombia. The fact of birth in the territory was not the sole criterion. The place of birth was a matter of chance, and nationality could hardly be left to chance. Indeed, so much importance attached to the ties of nationality that in many countries persons were excluded from the highest functions of the State unless they fulfilled certain conditions which reinforced the link between them and the community. Even if a person had acquired nationality *jure soli*, there were such factors as attitude of mind to be taken into account. Did article I limit the competence of States to impose such conditions? If so, he would hesitate to vote in favour of it.

25. The final clause of article I needed some elucidation. Would it prevent a State from imposing its nationality on a person? He interpreted the article as meaning that children born in a country would be nationals of that country as from birth unless they acquired another nationality. But if they did acquire another nationality, would the State wherein they were born be able to decide whether they were or were not its nationals?

26. His vote would depend on the answers given to those questions.

27. Mr. HSU said he was prepared to accept either text, subject to certain essential drafting changes. The arguments of those who opposed the principle had not convinced him, since they were mostly concerned with whether the article would or would not be acceptable to States. Its juridical soundness had not been contested.

[4] See *supra*, 211th meeting, para. 48.
[5] *Ibid.*, paras. 25-26.

After all, the Commission had been requested by the Economic and Social Council to draft a convention, and it was its duty to do its best. How could the Commission really find out whether governments would object? Whenever international law was embodied in conventional form, the acceptance of States was reluctant, despite the fact that very often they acted on the principles. That was the natural consequence of the conservatism of States. The instruments drawn up by the Hague Codification Conference did not differ from existing practice, but had secured very few ratifications. The fact that States hesitated to accept conventions did not mean that the latter were useless. The influence exerted by the Hague Codification Conference had been very great.

28. Last but not least, article I was ultimately designed for the future. It might be that it would prove impossible to eradicate statelessness at the present time, but by adopting a sound juridical principle the Commission might do good service to the future.

29. Mr. AMADO also wished to stress that the draft convention was intended to eliminate future statelessness. That was the whole point. He had been surprised to hear Mr. Lauterpacht introduce notions which he (Mr. Lauterpacht) himself had described as somewhat pedantic. Such considerations were irrelevant for those who were anxious to lend positive and constructive assistance. Like Mr. Sandström and Mr. François, he (Mr. Amado) was anxious to do so, and was therefore putting his national point of view aside. To seek absolute perfection was not realistic, and therefore not to be commended.

30. He noted in passing that the Special Rapporteur seemed very much concerned about dual nationality. He could not himself see that it mattered very much. How much better for an individual to have two nationalities than to be stateless! He did not understand how Mr. Yepes, who had expressed such an earnest desire to secure the elimination of statelessness and had advocated that the Commission start with article VI, holding it to be of fundamental importance, could now ask whether it was expedient for the Commission to undertake the drafting of a convention. If members really wanted to serve the cause, they should study the texts not only with attention but with love, and love was a precise and steadfast thing. For his part, he would do his very best to get Brazil to go as far as it possibly could in the direction of implementing article I. That article was simple and, in that simplicity, suited to times of tension. He did not wish to imply that he failed to appreciate the point of view of the Soviet Union or of the Arab States, but why should those who seemed to favour the principle hamper the work?

31. He would vote in favour of article I. As for article VI, difficulties would certainly arise with regard to it since, to mention only one aspect, it was hardly possible to deny States the right to protect themselves against traitors.

32. Mr. ZOUREK said that at first glance the two texts proposed for article I seemed attractive in their clarity and capable of offering a solution, but a closer analysis showed that they would in certain cases create purely artificial relationships between the individual and the State. As was made clear in the Special Rapporteur's comments on existing legislation, even *jus soli* countries did not apply the principle in its integrity. Chile, the Dominican Republic and Honduras imposed certain conditions by excluding the children of transients (A/CN.4/64, Part I, comment to article 1, section I, A). Let it be supposed that a child was born in a *jus soli* country — that principle being applied in its integrity — and thereby acquired the nationality of that country, without any further requirements whatsoever. The child might leave the territory and grow up in entirely different surroundings, having nothing in common with the country of its birth. The child's parents might then die and the child be left distitute but still able to claim the right of admission. Clearly such an extension of *jus soli* was wholly unacceptable to the *jus sanguinis* countries. The Special Rapporteur had dealt with that objection in his report (A/CN.4/64, Part I, comment to article I, section IV, K). His (the Special Rapporteur's) answer, which read as follows, was not convincing:

> "Countries where this principle obtains are not in fact opposed to attribute their nationality to children born within their territory even by accident or to transient parents; and they continue to attribute their nationality to persons who, having been born within its territory, nevertheless live practically all their lives in a different country. Therefore the objection is not a valid one against the theory that, in order to avoid statelessness, *jus sanguinis* countries should apply the *jus soli* principle in the case above referred to."

33. He must reiterate that the principle could not be accepted because of the economic and social conditions which influenced the conception of nationality in *jus sanguinis* countries. He did not consider that Mr. Lauterpacht's argument about the small number of cases that would be affected by article I was valid. A State with a definite conception of national links would find it difficult to admit a different system. For those reasons the article was not satisfactory. In a number of cases it would make nationality a matter of chance. The formula would therefore not be acceptable to the majority of States and the Commission should keep that point in mind if it wished to establish rules of international law.

34. Finally, he would draw attention to an error in the report. The Czechoslovak requirements for the granting of nationality to persons born in the country were quoted as "father and mother citizens". The text should read "father *or* mother citizens".

35. Mr. CÓRDOVA, on a point of order, said that he understood that the Commission had decided to discuss first the draft convention on the elimination of future statelessness, and then the draft convention on the reduction of future statelessness; although it was in order, therefore, to criticize the former on the grounds that it would not result in the complete elimination of future statelessness it did not seem to him to be in order, at the present stage, to argue that with regard to

such or such a category the reduction of future statelessness was all that could be aimed at.

36. The CHAIRMAN replied that what the Commission had in fact decided was to leave in abeyance the question whether to consider the second draft convention until the Commission had completed its consideration of the first. It therefore seemed to him to be quite in order, during discussion of the first draft convention, to argue that the principle to which it sought to give expression could not be fully adhered to in such or such a case. If it thought that that would facilitate its work, the Commission was of course at liberty to decide that it would in any case discuss the second draft convention; and if it did so, it could limit discussion on the first in the way which the Special Rapporteur had suggested.

37. Mr. CÓRDOVA said that he would not press the matter further, since it was clear that members wished, in their statements, to range beyond the limits he had suggested.

38. Mr. ALFARO pointed out that the Commission was considering a great, dramatic, human problem, which was clearly stated in the Economic and Social Council's resolution 319 B III (XI), of 11 August 1950, in which that body, after pointing out "that statelessness entails serious problems both for individuals and for States, and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness" and "that these different aims cannot be achieved except through the co-operation of each State and by the adoption of international conventions", had noted with satisfaction "that the International Law Commission intends to initiate as soon as possible work on the subject of nationality, including statelessness", and had urged the Commission to "prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". The emphasis was on the term "elimination".

39. Some members appeared to harbour doubts whether the Commission had necessarily to prepare a draft convention; the terms of the resolution he had quoted surely left no room for doubt about that, or about the fact that the convention was a convention for the elimination of statelessness. Ratification of the convention would naturally entail some sacrifice on the part of States, but such sacrifice was, in most cases, not so great as it might seem. Nearly all countries applying the rule of *jus soli* gave their nationality, *jure sanguinis*, to children born to their nationals abroad. So far as statelessness at birth was concerned, therefore, the Commission's main concern was with the children born to stateless persons in countries applying *jus sanguinis*, and no solution of that problem, other than along the lines proposed by Mr. Córdova and Mr. Sandström, had ever been suggested. For some countries, such as the Hashemite Kingdom of Jordan, the sacrifice which the adoption of some such provision entailed might be too great in present circumstances; it was clearly unreasonable to expect any State to jeopardize its very existence by accepting as nationals large numbers of persons who were not bound to it by any tie whatsoever. Such countries would be unable to accept the convention, at any rate without reservations. Exceptional cases of that kind, however, were no reason for jettisoning the principle. The Commission had to all intents and purposes abandoned hope of eliminating existing cases of statelessness, but the scourge of statelessness must not be allowed to continue indefinitely; it would continue indefinitely, however, however, unless some such provision as that proposed by Mr. Córdova or by Mr. Sandström was adopted.

40. Deprivation of nationality was an entirely separate matter, which did not affect article I. He could vote for that article either in the form proposed by Mr. Córdova or in that proposed by Mr. Sandström.

41. Mr. LAUTERPACHT said that the discussion, in which members doubted the likelihood of their governments accepting legislative changes, had taken a turn which made him wonder whether the Commission was not wasting its time in discussing further either the draft Convention on the Elimination of Future Statelessness or the draft Convention on the Reduction of Future Statelessness. As he had already pointed out, the differences between the two were small, and the main objection raised to the former — that it would require changes in domestic legislation that States would be unable to accept — applied equally to the latter. That objection had been expressed by a large number of members, perhaps by the majority, of the Commission. Mr. Kozhevnikov's views had at least the merit of being clear. He was opposed to any convention on statelessness, which he said would be contrary to the principle of the sovereignty of States. He (Mr. Lauterpacht) did not understand Mr. Kozhevnikov's argument that such a convention would be "imposed" on States, since they would of course be free to adhere to it or not. Nor did he understand why Mr. Kozhevnikov should be concerned to improve the wording of an article to the substance of which he was irrevocably opposed; such an attitude was contradictory.

42. Faris Bey el-Khouri, from the point of view of his country, saw insurmountable obstacles to adoption of the legislative changes which a convention would entail. That country, however, was in a very special situation with regard to the whole problem. Its difficulties, and those of other countries in a similar position, might be met by a reservation, essentially temporary in nature, that the article did not apply in cases where there had been a large influx of stateless refugees.

43. What had particularly contributed to his present doubts, however, was the attitude of Mr. François and Mr. Sandström. The latter had said, if he had understood him correctly, that his amendment to article I was merely designed to assist the Commission in drafting, and that it did not imply his support for the principle contained in that article; from what Mr. Sandström had said, moreover, it seemed that in his view it was unlikely that the Swedish Government would accept the draft convention under consideration. The question of the likelihood of the convention's acceptance by States,

however, was a secondary one, since the Commission was concerned only with the intrinsic reasonableness of the text; and while not inclined to support the text proposed for article I, neither Mr. Sandström nor Mr. François had given any grounds for doubting its intrinsic reasonableness.

44. Mr. François had not replied to his remarks on the question of the relevance of supposedly fundamental jurisprudential notions, but had stated that the number of persons to whom the Netherlands would be obliged to grant Dutch nationality each year under the proposed article would be nearer a thousand than twenty. Even if it were, he (Mr. Lauterpacht) did not understand what the Netherlands would gain by refusing nationality to those persons, unless it wished to remain free to expel them at any time. So long as they remained in the Netherlands it was surely to the advantage of the country that they should not be in an anomalous position. It might be argued that if they went abroad, the Netherlands Government was at present under no obligation to extend to them its diplomatic protection, but would be if they were Dutch nationals. It was well known, however, that in practice States retained full freedom of action in that respect and were under no international obligation to grant diplomatic protection to their nationals abroad. If a claim for protection were not meritorious, it could be treated accordingly. If it were a case of real injustice and oppression, an enlightened government would not avoid its duty of intercession in reliance upon the statelessness of the person concerned. It had also been argued that such persons might return to the country when elections were being held and influence the voting; but that could be prevented by means other than refusal of nationality.

45. He had developed his argument at some length in order to show that there were no adequate grounds for doubting what he had called the "intrinsic reasonableness", as distinguished from the likelihood of its acceptance by governments, of the proposed convention. Until those members of the Commission who did not hold extreme views on the matter came to regard it from that point of view — that of the intrinsic reasonableness of the proposed convention — he doubted whether there was any purpose in continuing the discussion of the individual articles. Once the basic point of principle was decided, but not till then, the Commission could profitably turn to the task of making each article of the first draft convention as watertight as possible, and ensuring that it covered cases which the Special Rapporteur might have overlooked.

46. Mr. CÓRDOVA said that he had raised his point of order because the discussion had appeared to be developing in a way which would lead to the rejection of the draft Convention on the Elimination of Future Statelessness, a convention which the Commission had been specifically urged by the Economic and Social Council to prepare. The only reason he intervened again was to make clear that in his view both conventions should be submitted to the Council. The Commission could explain that, in addition to the draft Convention on the Elimination of Future Statelessness, suitably amended to cover the few categories he had overlooked, it had prepared a draft Convention on the Reduction of Future Statelessness which those States which were at present unable to accept the former convention might be willing to accept as a first step. Some States, it seemed, would be unable to accept either convention, but that was no reason for not taking a step which would lead to the total elimination of future statelessness in some countries and to its substantial reduction in others.

47. There remained the problem of the unwillingness of *jus sanguinis* States to grant their nationality to stateless refugees on their territory. Failing mass expulsion, the States in which such refugees now were had no option but to keep them, and he agreed with Mr. Lauterpacht that it was surely to those States' own interest to endeavour to absorb them and their children and make of them nationals in every sense of the word. In a few countries that might be impossible, in present circumstances, but the position of those countries could be met by adding to article I a rider to the effect that it did not apply to countries which had suffered from a mass influx of refugees, in so far as the grant of nationality to children born to those refugees was concerned.

48. It had been suggested that some persons claiming a certain nationality for their children under article I might fraudulently conceal the fact that they possessed a nationality which would be acquired also by the children. That was, of course, true, but it was not a problem of international law, but a criminal problem, quite outside the scope of any convention on statelessness.

49. Members from countries which applied *jus sanguinis* also opposed his proposal on the grounds that the mere fact of an individual's having been born in a country formed an insufficient link between him and it. But did the fact of having been born of parents possessing the nationality of a given country form any stronger link? In both cases everything depended on what happened subsequently.

50. He preferred his own text to that proposed by Mr. Sandström. There were only two ways of acquiring nationality at birth, *jure soli* and *jure sanguinis*, and he did not see why that should not be stated bluntly. The term "otherwise" was unnecessarily vague.

51. Mr. Amado had described as excessive his concern with the problem of dual nationality. He was convinced, however, that dual nationality was as great an evil as statelessness. For not only could it result in the individual's falling between two stools and being deprived of effective protection; it could also result in friction between States.

52. He hoped that, when voting on article I, members would consider only its appropriateness for the purpose for which it was intended, namely, that of eliminating statelessness at birth. If it were rejected on any other grounds than its inadequacy for that purpose, such rejection would be tantamount to rejection of the whole

of the first draft convention, and the abandonment of any hope of eliminating future statelessness altogether.

53. Mr. KOZHEVNIKOV said that he had not intended to speak again, but as Mr. Lauterpacht had declared his inability to understand his argument, and had appeared to detect some contradiction in his attitude, he felt it his duty to make his views quite clear and to demonstrate that his attitude was not contradictory.

54. He could not accept the basic legal concept behind the draft Convention on the Elimination of Future Statelessness, namely: that of the supremacy of international law over national legislation. Such a concept was completely at variance with the fundamental principle of the sovereignty of States. He did not, of course, suggest that such sovereignty was absolute, but he was irrevocably opposed to its being whittled down under the cloak of the "supremacy" of international law. Mr. Lauterpacht had argued that there was no question of imposing the convention on States, but, as he had already pointed out, the text proposed for the preamble stated clearly that "All nations should in this matter abide by the principle of the priority of international law over national legislation".

55. With regard to the suggestion that there was some contradiction between his fundamental objections to the text and his action in submitting drafting amendments to it he need only point out that the fact that he was opposed to the draft convention as a whole did not mean that he would necessarily have to speak against every article in it.

56. Mr. SANDSTRÖM said that Mr. Lauterpacht had also apparently misunderstood what he had said. He had not said that the Swedish Government would be unlikely to accept the draft convention, but only that the fact that he had submitted an amendment did not imply that it would be prepared to do so. The Commission had been urged by the Economic and Social Council to prepare a draft convention or conventions for the elimination of statelessness. It would be for the Council to decide, in the light of political and other considerations, the fate of the draft produced by the Commission, whose members were elected as individual experts in international law and should be guided solely by considerations of international law. The fate of the convention or conventions which the Commission submitted to the Council would, in his view, depend less on the form in which they were drafted than on the way in which they were introduced.

57. The CHAIRMAN, speaking as a member of the Commission, said that he wished to make it quite clear that he fully recognized that progress often called for legislative change. Neither he nor his country would resist progress on those grounds. His objection to the article under consideration was that the elimination of statelessness was not the only, or even the most important, consideration which the International Law Commission had to bear in mind; it had to ensure that its proposals for the elimination of statelessness would not result in violation of certain fundamental rights of the State. The article proposed by Mr. Córdova was contrary to a basic principle of law to which the Netherlands attached great importance, namely, that there should be a link between countries and the individuals to whom they granted their nationality. For a small country like his own, it was of the utmost importance that the essential characteristics of the nation should be preserved intact, and it was for that reason that the Netherlands naturalization laws were so strict. It would be exceedingly difficult for it to agree to grant Dutch nationality to persons who happened to be born on its territory but were bound to it by no other ties. It was true, as Mr. Lauterpacht had said, that while they were on its territory the Netherlands Government had in any case to look after such persons, but they did not take part in national life. Mr. Lauterpacht had also suggested that if they went abroad the Netherlands Government would be at liberty to refuse them its diplomatic protection, but surely one of the main purposes of the proposed convention was that such persons should have an assurance of diplomatic protection when they travelled. There was a further point; if they were Dutch nationals, the Netherlands Government would be obliged to re-admit such persons to the country, even if they had no means of subsistence, and there was therefore the danger that the State might incur the additional burden of having to support large numbers of persons who were in no way bound to it, merely because they happened to have been born on its territory.

58. The fact that, for legal reasons, he did not see how a country which applied the principle of *jus sanguinis* could accept article I did not mean that he would vote against that article; other members in the same position as himself had already expressed their intention of voting for it, though he himself would probably abstain. The Special Rapporteur had already agreed that, even if the draft Convention on the Elimination of Future Statelessness were adopted, the draft Convention on the Reduction of Future Statelessness would have to be discussed, in order to meet the needs of those countries which could not accept the former.

59. Mr. YEPES said that he had listened carefully to the remarks of Mr. Córdova and Mr. Lauterpacht, but that nothing they had said removed the difficulties which the article would create for *jus soli* countries, like his own and the majority of the Latin-American countries. To obviate those difficulties he proposed the addition of a new paragraph reading as follows:

> "This provision shall not exclude the right of the State to establish special conditions to enable a person born within its territory to be regarded as a national by right of birth."

60. Replying to a question by the CHAIRMAN, Mr. YEPES explained that Colombian law distinguished between nationality acquired "by right of birth", and nationality acquired by other means. To acquire nationality by right of birth it was not sufficient to be born in Colombia; either one of the parents must be a native or, if both parents were aliens, they must be

domiciled in the country. Only Colombian nationals by right of birth enjoyed certain political rights, such as, for example, the right to stand for the Presidency.

61. Mr. CÓRDOVA felt that the amendment proposed by Mr. Yepes was incompatible with the purpose of the draft convention under consideration, which was designed to eliminate statelessness entirely. The appropriate time to discuss it would be in connexion with article I of the draft Convention on the Reduction of Future Statelessness.

62. Mr. LAUTERPACHT said that if Mr. Yepes agreed that adoption of his amendment might result in some statelessness, he shared the views expressed by the Special Rapporteur.

63. Mr. YEPES said that if his amendment were not adopted as an amendment to article I of the draft convention at present under consideration, he would move it as an amendment to article I of the second draft convention.

64. Mr. AMADO said that he could accept article I in the form proposed by Mr. Córdova, for the legal considerations which he had already put forward. His attitude was not affected by considerations of whether or not the article was compatible with his country's constitution. Mr. Yepes' amendment lay outside the scope of article I, and he could not support it.

65. The CHAIRMAN asked whether Mr. Yepes did not agree that, by opening the door to a distinction between one type of national and another, and not defining the rights which the latter should enjoy, the Commission would be in danger of reducing the acquisition of nationality to a matter of little importance. It had so far been the Commission's aim to place persons who would otherwise be stateless on the same footing as those enjoying all the rights conferred by the nationality which they acquired.

66. Mr. YEPES pointed out that in Colombia the only difference between the two types of nationality was that one did not confer certain political rights reserved to citizens by birth.

67. Mr. SPIROPOULOS pointed out that the texts proposed by Mr. Córdova and Mr. Sandström referred only to the acquisition of nationality, not to the rights which that nationality carried with it. Mr. Yepes' amendment was therefore unnecessary, for, even without it, a State could, if it wished, deprive certain categories of its nationals of certain of their rights.

Further discussion of article I was postponed.

The meeting rose at 1.5 p.m.

213th MEETING

Friday, 10 July 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article I [1] (continued)

1. The CHAIRMAN observed that at its preceding meeting the Commission had held a thorough discussion of article I of the draft Convention on the Elimination of Future Statelessness. He would accordingly suggest that the Commission should proceed to the vote as soon as possible and that after the vote had been taken, members should explain their position, since attitudes were widely divergent. Such explanations would be of help to the General Rapporteur.

2. Amendments had been submitted to article I by Mr. Sandström and Mr. Yepes, whose respective texts read as follows:

(Mr. Sandström)

"Every child born who otherwise would become stateless, shall acquire at birth the nationality of the Party in whose territory he is born".

(Mr. Yepes)

"This provision shall not preclude the State from enacting special conditions to ensure that a person born within its territory can be regarded as a national by right of birth".

3. Mr. Yepes' text was farther removed from the Special Rapporteur's, and would therefore be put to the vote first.

4. Mr. SANDSTRÖM felt it undesirable to place on record differences of opinion by taking votes on different texts. He would therefore suggest that the vote be taken on the Special Rapporteur's text, it being left to the Drafting Committee to take the amendments and drafting suggestions into consideration. That was how he would like his own amendment to be dealt with. The Commission would therefore have to vote only on the Special Rapporteur's text (A/CN.4/64) and on Mr. Yepes' proposed addition thereto.

5. Mr. YEPES wished to clarify the position concerning his amendment. In a number of Latin-American countries, such as Colombia, Venezuela and others, the sole fact of birth in the territory was not enough for the acquisition of nationality. Colombia, for instance, required that one of the parents should be Colombian, or that, in the case of aliens, both parents should be domiciled in the country. The constitutions of a number of other Latin-American countries contained practically identical provisions. Persons who did not fulfil the conditions imposed were precluded from exercising certain political rights or discharging the highest functions in the State.

6. Such provisions did not have the effect of making categories of citizens any more than did the withholding of the right to vote from minors. The conditions imposed were based on a profound sense of conservatism and the philosophical concept of nationality.

7. Article I was wholly at variance with the constitutions of a number of Latin-American States, and if adopted as drafted by the Special Rapporteur would give rise to very serious difficulties. The mere fact of birth could not serve as the sole criterion for acquiring a nationality, since there must be a genuine relationship between the individual and the nation. Present-day facilities for movement must be taken into account, and some precautions taken in order to ensure the unity and continuity of the community.

8. He was perfectly ready to concede that article I was progressive, and would even withdraw his amendment if the Commission requested him to do so, provided his right to insert it in the second draft convention on the reduction of future statelessness was respected.

9. The CHAIRMAN pointed out that the Commission had no right to request the withdrawal of any amendment or proposal. All it could do was to vote against it.

10. Mr. CÓRDOVA (Special Rapporteur) felt that Mr. Spiropoulos' comment at the previous meeting had put the whole question into proper perspective.[1] According to Mr. Yepes' argument a *jus soli* country would confer nationality but withhold certain political rights. Thus, for instance, a woman would have the nationality of, say Colombia, but would not be able to become President of the Republic. That was an entirely different matter, and he therefore considered Mr. Yepes' amendment to be irrelevant.

11. Mr. AMADO held that Mr. Yepes' amendment covered cases in which a person could acquire full nationality after a certain period of time. In Brazil, a child born of Brazilian parents, but outside Brazil, could choose his nationality. In the United States of America, a foreigner by birth could become a senator, and he could cite cases of persons who had taken up their domicile in that country only recently but were now government servants.

12. He, too, considered that Mr. Yepes' amendment was irrelevant to the special problem with which the Commission was seeking to deal through Article I. It did not really matter whether an individual had less than full citizenship (*une nationalité mitigée*). He would urge Mr. Yepes not to press his amendment, since the second draft convention would include a list of qualifications.

13. Mr. ZOUREK presumed that the purpose of Mr. Yepes' amendment was to allow States to enact certain conditions, according to which the mere fact of birth on their territory would not be sufficient for acquiring their nationality.

14. Mr. YEPES wished to give the following example with special reference to the remarks made by Mr. Amado and Mr. Córdova. A person born in Colombia or Venezuela would have no nationality through the sole fact of his birth unless he was a child of nationals or unless his parents, being foreign, were domiciled in the country. Article I, on the contrary, postulated that the sole fact of birth sufficed to give full nationality.

15. The CHAIRMAN asked Mr. Yepes whether, if his amendment were adopted, a stateless person born in Colombia of non-Colombian parents would possess Colombian nationality.

16. Mr. YEPES replied that, unless the parents were domiciled in Colombia, he would not.

17. Mr. ALFARO considered that the use of the verb "to ensure" in Mr. Yepes' amendment would give rise to misinterpretation, since it suggested that the aim of the State should be to enact special conditions to enable persons to be regarded as its national by right of birth, and not to exclude them from the enjoyment of full nationality. Actually, Mr. Yepes had in mind restrictions rather than facilities, the idea being that the status of nationality would be subject to a State's relevant laws and regulations. Such legislation could cover a great many aspects of life — the right to vote, the exercise of the liberal professions and so on.

18. He would suggest that the amendment be so modified as clearly to convey Mr. Yepes' point, or that,

[1] See *supra*, 212th meeting, para. 67.

alternatively, it be withdrawn. An explanation of Mr. Yepes' point of view should be included in the report.

19. Mr. SPIROPOULOS said that Mr. Yepes' amendment raised very delicate issues. It might be interpreted as meaning that the State was entitled to declare that a person was its national but had no rights. Such an interpretation would of course constitute an abuse, but it was conceivable and should be guarded against.

20. Mr. YEPES wished once more to emphasize that his difficulty with article I was that it laid down that nationality could be acquired through the sole fact of birth. He was convinced that acceptance of such a principle would lead to very serious difficulties. There was no other course open to him but to abstain from the vote on the article.

21. Mr. LIANG (Secretary to the Commission) pointed out that the French and English texts of Mr. Yepes' amendment did not really tally, since the English text used the word "ensure" which was not to be found in the French text. Mr. Yepes' difficulty was a real one, since surely it was the purpose of article I to render impossible the application of conditional *jus soli*. On the other hand, there was clearly a difference between the acquisition of nationality and conditions imposed on the enjoyment thereof. The latter aspect of the problem had no immediate bearing on article I, and he would presume that it must obviously be left for regulation by municipal law.

22. Mr. LAUTERPACHT recalled that at the previous meeting he had raised the question of territories which were not under the exclusive sovereignty of one State.[2] Since the problem was limited, he did not think that it was necessary to refer to it in the body of the text. It would, however, in his view, be appropriate to include some reference to it in the report.

22a. The CHAIRMAN declared the discussion on article I closed, and put Mr. Yepes' amendment to the vote.

Mr. Yepes' amendment was rejected by 7 votes to 3 with 3 abstentions.

23. Faris Bey el-KHOURI explained that he had voted in favour of Mr. Yepes' amendment, because adoption of the Special Rapporteur's text in its original form or as amended by Mr. Sandström would deprive a State of the right to make such regulations as it saw fit, and the acquisition of nationality through the sole fact of birth would imply the right of the acquirer to exercise all rights in the State concerned. In his view, article I could not be interpreted in any other way.

24. Mr. ALFARO said that he had abstained from voting because, although he agreed with Mr. Yepes' ideas, the amendment was badly drafted and in any case its purpose was covered by article I. As the national of a State, an individual was subject to that State's laws in respect of his rights and obligations.

25. Mr. KOZHEVNIKOV said that he had abstained from voting because his views were based on the principle that citizenship was a matter which fell within the domestic jurisdiction of States.

26. Mr. YEPES said that he stood by the explanation given by Faris Bey el-Khouri.

27. Mr. AMADO said that he had voted in favour of the amendment, States being competent, in his opinion, to enact special conditions.

28. The CHAIRMAN invited members to vote on article I as drafted by the Special Rapporteur (A/CN.4/64), which read:

> "If no nationality is acquired at birth, either *jure sanguinis* or *jure soli*, every person shall acquire at birth the nationality of the Party in whose territory he is born."

Article I was adopted by 7 votes to 2, with 5 abstentions.

29. Mr. YEPES explained that he had abstained from voting on article I because in his view it forbade a State from laying down special conditions for granting nationality by birth to a person born on its territory.

30. The CHAIRMAN invited members to examine article II.

Article II [2]

31. Mr. CÓRDOVA said that no particular difficulties arose with regard to article II, since all legislations admitted the presumption of a foundling. The only point to be stressed was that article II implied that, until the contrary was proved, a foundling was presumed to have been born in the territory in which it was found. Proof of the contrary meant proof that the foundling had been born in another unidentifiable territory, with the result that he would have no nationality.

32. Mr. PAL said that he was in agreement with the principle expressed in article II, but drew attention to the fact that the final clause "until the contrary is proved" might be interpreted negatively. He considered that the proof should be positive, namely, that the foundling was born in the territory of another State.

33. Mr. CÓRDOVA pointed out that if it could not be established where the foundling was born, article I would not apply.

34. Mr. AMADO considered that the words "shall be presumed" set up a *juris tantum* presumption, with the result that the words "until the contrary is proved" were redundant.

35. Mr. CÓRDOVA accordingly suggested that the words "until the contrary is proved" should be deleted. The article would then rest on the *juris et de jure* presumption.

36. The CHAIRMAN asked up to what age a person could be considered to be a foundling.

[2] *Ibid.*, para. 5.

37. Mr. CÓRDOVA replied that once a foundling always a foundling.

38. Mr. LAUTERPACHT thought that, since article II dealt with cases which were on the whole infrequent, the Special Rapporteur's text might be accepted without further ado.

39. Mr. AMADO said that the best answer to the Chairman's question was that provided by Oscar Wilde in "*The Importance of Being Earnest*".

40. Answering Mr. YEPES and Mr. SCELLE, who had asked whether it was intended to eliminate the *juris tantum* presumption, the CHAIRMAN pointed out that Mr. Córdova had himself proposed the deletion of the words "until the contrary is proved".

41. Mr. SANDSTRÖM drew attention to the fact that article II opened with the words "For the purpose of article I", which disposed of the question of age.

42. Mr. ZOUREK suggested that the difficulty might be turned by adding the words "in infancy". As a consequence of the war there were numerous cases of older children whose parentage could not be established.

43. He noted that article II was founded on the assumption of birth, and related to article I. Would it not be simpler to base article II on the assumption of nationality, without referring to article I?

44. Faris Bey el-KHOURI said that the place of birth would either be known or unknown. He thought, therefore, that the most satisfactory solution would be to insert the words "whose place of birth is unknown" after the word "foundling".

45. Mr. CÓRDOVA maintained that the text of article II as drafted exactly met Faris Bey el-Khouri's point.

46. Mr. YEPES was opposed to the deletion of the clause "until the contrary is proved".

47. Mr. SCELLE agreed with Mr. Zourek that there was no need to relate article II to article I. He was accordingly in favour of the deletion of the words "For the purpose of article I".

48. Mr. LAUTERPACHT drew attention to the fact that, since articles II, III, and IV were ancillary to article I, Mr. Scelle's proposal would destroy the structure of the draft convention.

49. Mr. SCELLE agreed. He could see no reason why the elimination of statelessness should be made wholly a question of *jus soli*.

50. Mr. LIANG (Secretary to the Commission) thought that from the point of view of future reference it would be better not to have several articles each of which began with the same words, namely: "For the purpose of article I". It was more than likely that the articles would be examined independently of one another, and it would be less confusing if the opening words were not identical.

51. He wondered whether Mr. Scelle's and Mr. Zourek's point would not be met if the formula for the acquisition of nationality were stated *passim*. The article would then read:

> "A foundling shall be presumed to have been born in the territory of the Party in which it is found *and shall acquire the nationality of that country*."

52. Articles 3 and 4 could follow the same model.

53. Mr. LAUTERPACHT thought that that point could appropriately be settled by the Drafting Committee, since it was difficult for the Commission to appreciate forthwith all the possible repercussions of the proposed changes.

54. Mr. CÓRDOVA felt obliged to remind the Commission yet again that the purpose of the draft Convention was the elimination of statelessness. He had included the possibility of contrary proof, but he agreed with Mr. Pal that the purpose of the convention would best be met by applying the criterion that the foundling acquired the nationality of the territory in which it was found.

55. Mr. LIANG (Secretary to the Commission) did not think that the Drafting Committee should assume all the responsibilities with which Mr. Lauterpacht wished to entrust it. So long as article I had not been given its final form, the texts of the succeeding articles must perforce remain provisional.

56. Furthermore, in his experience, the greater the number of questions referred to the Drafting Committee, the greater the likelihood of its proposals giving rise to long and involved discussions in the Commission. He must urge the Commission itself to take decisions on all substantive issues.

57. The CHAIRMAN stated that the Commission naturally must and would decide all matters of substance, leaving questions of form and language to the Drafting Committee.

58. Mr. PAL mentioned in passing that if the Commission felt that the words "For the purpose of article I" should be deleted *passim*, it might be convenient to bring articles I, II and III together in one article. He himself was opposed to the deletion for the reason that article II determined the place of birth; it followed that a foundling would be granted the nationality of the place of birth only in accordance with article I.

59. As for the words: "until the contrary is proved" Faris Bey el-Khouri's suggestion concerning the use of the words "whose place of birth in unknown" would eliminate the difficulties.

60. With the Chairman's permission, he would revert for a moment to article I. If the Special Rapporteur proposed to include comments on that article, some reference should be made therein to article 2 of the Universal Declaration of Human Rights, which laid down that everyone was entitled to all the rights and

freedoms set forth in the Declaration without discrimination of any kind.

61. Mr. SCELLE asked what Mr. Zourek meant by the expression "in infancy".

62. Mr. ZOUREK said that that was a question of appreciation that would have to be settled by the administrations concerned.

63. Mr. CÓRDOVA drew attention to the fact that the French text used the words *enfant trouvé*. Whether a person was or was not a foundling was an issue of fact, and his age was immaterial. National legislation did not normally refer to age in relation to foundlings.

64. The CHAIRMAN invited the Commission to vote on Mr. Zourek's proposal that the words "in infancy" be inserted in the text.

Mr. Zourek's proposal was rejected by 6 votes to 3, with 5 abstentions.

65. Mr. SCELLE asked the Commission to consider the following hypothetical case: A Russian-speaking child of five years of age was found wandering in Paraguay. It was entirely inadmissible that he should be granted Paraguayan nationality. The individual's characteristics must be taken into account.

66. Mr. AMADO, speaking in explanation of his vote, drew attention to the crucial importance of the words "For the purpose of article I", which really governed article II.

67. The CHAIRMAN asked the Commission to vote on Mr. Córdova's proposal that the words "until the contrary is proved" be deleted from article II.

Mr. Córdova's proposal was adopted by 7 votes to 6, with 1 abstention.

68. Mr. SCELLE expressed his whole-hearted disapproval of the Commission's decision. Once it was definitely proved that a foundling did not belong to the country where he was found, it was inconceivable that its nationality should be inflicted upon him.

69. Mr. ZOUREK said that as a result of the second World War thousands of children had had, so to speak, the temporary status of foundlings. In a great many cases, their nationality and parentage had in due course been satisfactorily identified. But under article II all those children would have acquired the nationality of the territory in which they had been found.

70. Mr. KOZHEVNIKOV also held that the Commission had taken a wrong decision.

71. Mr. LAUTERPACHT said that he wished, not to explain his vote, but to raise the question of the way in which the right to explain one's vote should be exercised. In his opinion, explanations of votes should be used not as a means of re-opening the discussion, but only to explain the speaker's attitude, in order to guard against the possibility of its being misunderstood.

72. Mr. KOZHEVNIKOV felt that members of the Commission had full rights to explain their votes, since their reasons for voting for or against any proposal might differ widely.

73. Mr. CÓRDOVA, explaining his vote, said that he had voted as he had because the draft convention under consideration was, by definition, a convention for the elimination of future statelessness.

74. Mr. YEPES said that he had voted against the proposal because he regarded it as quite inadmissible, anti-juridical and inhuman to prevent anyone from proving that he had been born in a particular country, and at the same time to seek to impose on him a nationality he did not want, by a presumption *juris et de jure*.

75. The CHAIRMAN then put to the vote Faris Bey el-Khouri's proposal that the words "whose place of birth is unknown" be inserted after the word "foundling".

Faris Bey el-Khouri's suggestion was adopted by 10 votes to none, with 4 abstentions.

Article II, as amended, was adopted by 9 votes to 3, with 2 abstentions.

The text adopted read as follows:

"For the purpose of article I, a foundling whose place of birth is unknown shall be presumed to have been born in the territory of the Party in which it is found."

Article III

76. The CHAIRMAN then drew attention to article III, dealing with children born to a person enjoying diplomatic immunity.

77. Mr. CÓRDOVA said that article III contained two separate provisions. The first, reading "For the purpose of article I, a child born to a person enjoying diplomatic immunity shall be deemed to have been born in the territory of the State of which his parent is a national", merely reaffirmed an accepted rule of international law. The second, reading "If its parent is stateless, it shall be deemed to have been born in the country wherein he was actually born", had been added by him to cover the case of international officials who were stateless.

78. Mr. LAUTERPACHT said that the proposed text raised a number of questions. In the first place, he wondered what precisely was meant by "a child born to a person enjoying diplomatic immunity"; did that phrase cover a child whose mother enjoyed diplomatic immunity, but not the father? Secondly, it was not clear to what extent the phrase "enjoying diplomatic immunity" covered diplomats' families and staff; moreover, although Mr. Córdova had referred to international officials, the United Nations Charter, unlike the Charter of the League of Nations, did not confer diplomatic immunities on its staff, but only such immunities as they

needed for the fulfilment of their functions. The position was, he thought, the same in the case of the specialized agencies and other international organizations. Thirdly, the phrase "the State of which his parent is a national" was vague, although he presumed that the parent referred to was the one enjoying diplomatic immunity.

79. The whole article dealt with an exceptional case, and he wondered whether it was really necessary to include the second sentence, dealing with an exceptional case within that exceptional case, in the body of the text itself.

80. Mr. PAL asked whether the text which the Special Rapporteur proposed did not rest on the assumption, which was not necessarily correct, that a diplomat could not possess the nationality of a State other than that in whose service he was. He also wondered whether it was legitimate to oblige a State to confer its nationality on a child born to stateless persons in the diplomatic service of another State, even if it was not born on territory over which it exercised jurisdiction but in territory enjoying extra-territorial status. It seemed to him that in both cases the State in whose diplomatic service the person was employed should be responsible for granting its nationality to any children born to him.

81. The CHAIRMAN pointed out that the second sentence was intended to cover international officials, with regard to whom the question of diplomatic service did not arise.

82. Mr. CÓRDOVA said that he had not overlooked the possibility of a person's being employed in the diplomatic service of a State other than that of which he was a national, but that he had felt it preferable to follow the general rule that in the absence of any nationality acquired *jure soli*, the child should acquire the nationality of the father.

83. Mr. ALFARO had grave doubts about the wisdom of the text proposed. Many countries, including his own, had no special provisions under which children born to their diplomats abroad were deemed to have been born in their territory, and, conversely, children born to foreign diplomats accredited to them were deemed to have been born elsewhere. The first sentence would therefore be leading the Commission on to very dangerous ground, and the second was unnecessary, since the question would not arise in the case of *jus soli* countries, and in the case of *jus sanguinis* countries article I would apply regardless of whether or not the parents enjoyed diplomatic immunity.

84. Mr. SPIROPOULOS felt that the first sentence of article III, which laid down what nationality should be acquired in cases where there might be doubt, also had no place in a convention the sole aim of which was the elimination of statelessness. Articles I and II together covered all possible cases of statelessness arising at birth.

85. Mr. SANDSTRÖM and Mr. LAUTERPACHT agreed.

85a. Mr. CÓRDOVA accordingly suggested that article III be deleted.

It was agreed that article III should be deleted.

Article IV [3]

86. The CHAIRMAN drew attention to article IV, dealing with births on vessels or in aircraft.

87. Mr. LAUTERPACHT said that the text proposed by the Special Rapporteur was unnecessarily complicated for what was, after all, an exceptional case. Article IV was not intended to apply to all persons born on vessels or in aircraft, but only to those who would otherwise be stateless. The Special Rapporteur had applied a principle which would not be acceptable to many States, possibly the majority; his proposal was that the nationality of children born on vessels and in aircraft, unless otherwise determined, should be determined by which State exercised jurisdiction over the vessel or aircraft at the time of birth. Theoretically, it might be true that States enjoyed the right of jurisdiction over vessels in their territorial waters or ports and over aircraft flying over their territory, but, as a matter of convenience, most States did not in practice exercise that right. Moreover, in the case of vessels, and even more so in that of aircraft, it would often be difficult to decide with certainty whether or not a birth occurred inside a State's territorial waters or over its territory. The distinction which Mr. Córdova drew between State vessels and aircraft and private vessels and aircraft was also, in his view, an unnecessary refinement. He therefore wished to propose that the article be amended to read as follows:

> "For the purposes of article I, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth in an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered."

88. Mr. AMADO pointed out that Mr. Lauterpacht's proposal would make it possible for people to ensure that their children became nationals of any State they wished merely by arranging to take a trip in a vessel flying the flag of that State at the time of their birth. Its adoption would give rise to serious anomalies in practice.

89. Mr. SANDSTRÖM much preferred the text proposed by Mr. Lauterpacht to that proposed by Mr. Córdova, under which the nationality acquired would depend solely on chance and, as Mr. Lauterpacht had pointed out, might often be open to serious doubt.

90. Mr. HSU also supported Mr. Lauterpacht's proposal, which was simpler than Mr. Córdova's and would serve the same purpose.

91. Mr. CÓRDOVA agreed that, so far as the elimination of statelessness was concerned, there was no difference between the two proposals; in other respects, however, there was an important difference and the Commission must choose between them.

92. In his view, it was necessary to preserve the distinctions he had made. As he had pointed out in the

comment, the only clear precedent on the subject appeared to be point IX of the Bases for Discussion prepared for The Hague Codification Conference of 1930.[3] Point IX referred only to births on board merchant ships, since it was generally agreed that births on State vessels should be considered as births in the territory of the State whose flag the vessel flew. It had been the general opinion of all those countries which had replied to the questionnaire submitted to them on that occasion that births on a merchant vessel on the high seas should be treated in the same way. So far, he and Mr. Lauterpacht were also in agreement.

93. With regard to births on a merchant ship in foreign territorial waters, however, there had been no unanimity. The United States of America, Italy and Japan, for example, had accepted the view that in such cases the child should have the nationality of the State in whose territorial waters it was born. Other countries, however, such as Great Britain and the Dominions, Germany, Belgium and Norway, had argued that all civil acts, including births, occurring on a ship must be controlled by the legislation of the country whose flag the ship flew, even if that ship happened to be navigating in foreign waters. Belgium had appeared to make a distinction between the members of the crew— children born to whom, in its view, should be nationals of the State whose flag the ship flew — and passengers, where the determining factor would be the State in whose territorial waters the birth occurred. The distinctions which he had made, therefore, had been made before, and he still preferred his text to that proposed by Mr. Lauterpacht.

94. Mr. PAL was inclined to favour the simpler text proposed by Mr. Lauterpacht, since the whole article was governed by the words "For the purposes of article I". The article would not apply in cases where a child would acquire nationality under the existing law of one of the States concerned; nor was its purpose to settle cases where there might be doubt as to which of two nationalities it should acquire.

95. Mr. LIANG (Secretary to the Commission) suggested that neither of the two proposals before the Commission could give rise to cases of dual nationality. Cases of dual nationality could, of course, arise from births on vessels or in aircraft, but were invariably due to conflicts between the laws of the various States concerned. As had been pointed out, both proposals began with the words "For the purposes of article I", and article I only applied in cases where no nationality would be otherwise acquired. To take an example, if a Chinese woman travelling in an aircraft registered in Switzerland gave birth to a child while over United States territory, then, provided that the child did not receive either Chinese, Swiss or United States nationality under those countries' existing laws, it would receive Swiss nationality under Mr. Lauterpacht's proposal, or United States nationality under Mr. Córdova's. If it did receive one or more of those nationalities under existing laws, the provisions of the convention would not apply.

The text proposed by Mr. Lauterpacht was adopted by 6 votes to 3, with 5 abstentions.

Article V [5]

96. The CHAIRMAN drew attention to article V, dealing with cases of loss of nationality as a result of change in personal status, renunciation of nationality and application for naturalization in a foreign country.

97. Mr. CÓRDOVA felt that the only paragraph of his draft (A/CN.4/64) which called for any explanation was paragraph 3, the purpose of which was to provide against cases where persons renounced their nationality and proclaimed themselves, for example, citizens of the world.

98. Mr. LAUTERPACHT said that, although the text proposed by the Special Rapporteur covered a number of contingencies which, in the 1930 Hague Convention, had been dealt with in separate articles, it appeared to cover the whole ground very thoroughly, with two possible exceptions, one of them of great importance. Persons often lost their nationality as a result of prolonged residence abroad, particularly if they failed to comply with certain formalities, such as registering with their consular authorities. Such cases would not be covered by the text proposed for article V, and although it might be argued that they were covered by paragraph 2 of article VI, which read, "No State shall deprive any person of its nationality on any other grounds unless such a person, at the time of deprivation, acquires the nationality of another State", deprivation usually implied a deliberate act by the State. To avoid any doubt on the point, which, as he had said, was an important one, he felt that it should be provided for in the text, and he would in due course submit an appropriate amendment.

99. The other type of case which he had in mind was that in which a person lost his nationality as a result of applying for an expatriation permit and then, for some reason or another, failing to move to another country and acquire its nationality. It was possible that such cases would be covered by the text proposed for paragraph 4 of article V, but again he felt that the point should be made clear. It would be remembered that in the 1930 Hague Convention, separate provision had been made for such cases.

100. Mr. CÓRDOVA thought that there could be no doubt that the first type of case referred to by Mr. Lauterpacht was covered by article VI, paragraph 1, which read: "No State shall deprive any person of its nationality by way of penalty", since loss of nationality incurred in that way was certainly a penalty, even if imposed automatically. He also felt that the second type of case referred to by Mr. Lauterpacht was covered by article V, since no one applied for an expatriation permit unless he intended to seek naturalization in a foreign country.

[3] See League of Nations publication, *V.Legal, 1929.V.* (document C.73.M.38.1929.V), p. 75.

101. Both points, however, could, if desired, be made explicit in the comment.

102. Mr. LAUTERPACHT still considered it advisable to make the first point explicit in the text itself, as it was arguable, and had been argued at the previous session, that loss of nationality incurred in that way was not a penalty. Article VI, in its present form, was of such importance, however, that it should stand by itself, and he would therefore submit a proposal for a new article dealing with loss of nationality as a result of prolonged residence abroad.

103. Mr. YEPES said that he had no objections to the text proposed for article V, but merely wished to point out that in the comment, Colombia should be added to the list of countries where marriage or its dissolution had no effect on the nationality of the spouse.

104. Mr. ALFARO said that he would vote for article V, but considered that the Drafting Committee should give particularly careful consideration to it, especially to paragraph 1, where the word "provides" would be more appropriate than the word "recognizes" and where the list of reasons for changes in personal status was incomplete, and should be deleted.

On the understanding that the Drafting Committee would pay particular attention to it and that a reference to the second type of case referred to by Mr. Lauterpacht would be inserted in the comment, article V was adopted by 8 votes to 1 with 5 abstentions.[4]

The meeting rose at 1 p.m.

[4] See *infra* 215th meeting, paras. 42-73.

214th MEETING

Monday, 13 July 1953, at 2.45 p.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article VI [7]

1. The CHAIRMAN invited the Commission to continue its consideration of the draft Convention on the Elimination of Future Statelessness with article VI.

2. Mr. CÓRDOVA (Special Rapporteur) said that he had felt it necessary to distinguish between deprivation of nationality by way of penalty and deprivation on other grounds, as he did not believe that States should be able to apply deprivation of nationality as a sanction, even if the individual concerned acquired another nationality at the same time. The text which he proposed, therefore, stated categorically that no State should deprive any person of his nationality by way of penalty; he was convinced that only by means of such a categorical prohibition could the possibility of statelessness arising in that way be excluded.

3. If the aim was not the elimination, but the reduction of statelessness, the prohibition could, of course, be qualified.

4. Mr. ALFARO pointed out that a person might not be deprived of his nationality until some time after he had acquired the nationality of another State. He suggested, therefore, the addition of the words "or has acquired" after the word "acquires" in paragraph 2.

5. The CHAIRMAN, speaking as a member of the Commission, recalled that Mr. Yepes had rightly said that article VI was one of the most important in the whole draft.[1] Unfortunately, it was also one of those which raised the most serious objections in the minds of members, who, like himself, came from *jus sanguinis* countries, where importance was attached to the link which bound the individual to the State of which he was a national. Depending on the interpretation of the word "penalty", such States might be able to accept paragraph 1, but in that case they would be unable to accept paragraph 2. A person who entered the service, or more especially the armed forces, of another State, particularly if it was an enemy State, proved by his actions that he attached no value to his nationality and that the bond by which he should be linked to the State of which he was a national no longer existed.

6. During the second World War, for example, many thousands of Netherlands subjects had enlisted in the enemy's armed forces. Netherlands law provided for

[1] See *supra*, 211th meeting, para. 30.

deprivation of nationality when a person entered the service of another State without the permission of the Crown, and all those persons had therefore been deprived of their Dutch nationality. After the war, their lack of a nationality had presented a serious problem, and the Netherlands Government had considered the possibility of rescinding the relevant provision with retrospective effect. A proposal in that sense, however, had met serious opposition. The Government had then introduced a bill seeking to re-admit all those persons to Dutch nationality, but, Parliament had been unwilling to accept the proposal. The present position, therefore, was that each case had to be considered under a simplified naturalization procedure.

7. In view of what he had said, it was obviously impracticable to impose on the Netherlands an obligation such as that envisaged in the Special Rapporteur's text.

8. That text was also illogical. It would be much more logical — and just as satisfactory from the point of view of eliminating statelessness — to oblige States which allowed aliens to enter their service or their armed forces in circumstances which would entail loss of nationality, to confer their own nationality upon them.

9. Mr. CÓRDOVA agreed that, from the point of view of eliminating statelessness, a provision on those lines would, in theory, be as satisfactory as that which he had himself proposed. In practice, however, it would give rise to difficulties which led him to prefer his own proposal.

10. Mr. YEPES pointed out that, in the comment, Colombia should be added to the list of countries where statelessness could not occur as a result of withdrawal of nationality.

11. He felt that the point raised by Mr. François need present no difficulty provided a clear distinction were drawn between nationality and citizenship. In Colombia, persons who entered the armed forces of another State were deprived by law of all their political rights, but did not lose Columbian nationality. Similarly, persons who were renaturalized need present no problem, provided the distinction between nationality and citizenship was observed.

12. The CHAIRMAN, speaking as a member of the Commission, feared that if the Commission were to follow Mr. Yepes' line of thought in every case where it might seem to offer a convenient solution, the draft convention would be robbed of all its value. If the Commission recognized a distinction between nationals and citizens, it would logically have to adopt further provisions in which it was clearly laid down what rights could be withheld from the latter and what rights must be accorded to all.

13. Mr. SPIROPOULOS said that it was common practice for States to withhold certain rights from certain categories of their nationals — for example, from persons who had acquired their nationality by naturalization. He agreed that, if States were left entirely free in that respect, a serious danger could ensue. There were, however, internationally accepted standards in such matters, and if a State deprived its nationals of too many of their rights, it would be guilty of transgressing those accepted standards.

14. Mr. CÓRDOVA pointed out that the draft convention under consideration was not concerned with political or civil rights, or with the question of how far a State could deprive its nationals of those rights. States had a clearly recognized responsibility for their nationals towards the international community, and although they had every right to punish them for acts such as those Mr. François had referred to, they had no right to cast them out stateless into the world.

15. Mr. LAUTERPACHT felt that the question that had first been raised by Mr. François was related to the article under discussion, and had, indeed, been bound to arise in connexion with it. Before referring to what Mr. François had said, however, he wished to point out that there was a distinction, even though it might be an elastic one, between deprivation of nationality by way of penalty — and in that category, apparently unlike Mr. François, he would have no hesitation in placing deprivation for service in the armed forces of another State — and deprivation of nationality "on any other ground", for example, because of acquisition of nationality by fraud, or by the operation of the law, in cases, for example, of prolonged residence abroad. It must be borne in mind that the Commission was only concerned with deprivation of nationality resulting in statelessness, and he suggested, therefore, that paragraph 1 be amended to read:

> "The parties shall not deprive any person of his nationality with the result of rendering him stateless."

16. Mr. François had suggested that a person who entered the service or the armed forces of another State thereby showed that he attached no importance whatsoever to the link which was supposed to bind him to the State of which he was a national. The nationals of one State, however, often entered the service of another State, either permanently or for set periods. It was not always necessary for them to swear an oath of allegiance to the second State, but even when it was, he was not convinced that that should necessarily be enough to entail deprivation of their own nationality. He suggested, therefore, that in considering the case of service for another State, the Commission should limit its attention to the case of service in armed forces. That was, indeed, the case which Mr. François had singled out, rather surprisingly omitting any mention of high treason or other forms of disloyalty. He (Mr. Lauterpacht) agreed with Mr. Córdova that the proper penalty in such cases was not deprivation of nationality, but the much more drastic penalties provided by the law. He saw no objection to Mr. Yepes' suggestion that such penalties should in certain cases be accompanied by deprivation of certain political rights. That was the present practice in many countries.

17. Mr. SCELLE said that he could not vote for either paragraph of article VI, which was contrary to certain

essential interests of the State. A State whose very existence might be at stake must be able to protect itself against action jeopardizing its life. From the point of view of the State, the text proposed was quite unacceptable. From the point of view of the individual, it could not be argued that it would afford him protection, for its adoption would actually encourage States to apply more drastic sanctions. Deprivation of nationality was a small matter compared with the deprivation of life.

18. Mr. KOZHEVNIKOV said that, apart from the fact that it was very doubtful whether the text proposed by the Special Rapporteur for article VI would serve the humanitarian purpose it was supposedly designed to serve, that text failed to take into account the fact that nationality was a bond between the individual and the State which carried with it certain mutual rights and obligations. The text was unacceptable because it robbed the State of the right to safeguard itself if the individual severed that bond. Mr. François had said that the Commission could not impose on States an obligation which they would not accept, and he (Mr. Kozhevnikov) entirely agreed, not only in the present instance, but with regard to the entire draft convention.

19. It had been suggested that the Commission should distinguish between nationality and citizenship. So far as Soviet law was concerned, it safeguarded equal rights for all Soviet citizens irrespective of their nationality. All citizens of the Soviet Union enjoyed equal rights.

20. Mr. SANDSTRÖM said that, although the procedure proposed by the Special Rapporteur in his text was not the only way of eliminating statelessness arising as a result of the deprivation of nationality, it seemed to be the simplest. He could vote for it, since the Commission was at present considering a draft designed to eliminate future statelessness, and since it had already agreed to discuss later the other draft, dealing with the reduction of future statelessness.

21. Mr. HSU, too, saw no objection to the inclusion in a convention designed to eliminate future statelessness of the text proposed by the Special Rapporteur. If the Commission adopted a text by virtue of which some State or other would be responsible for the protection of every individual, it could be left to public opinion and diplomatic pressure to ensure that such protection was effective. As Mr. Lauterpacht had said, other penalties, which might even include deprivation of diplomatic protection, were available in cases of disloyalty to the State, and it was true that such penalties could inflict hardships as great as or exceeding those inflicted by statelessness; with the exception of death, however, they were not final and irrevocable, and in that lay the important difference between them and deprivation of nationality.

On the other hand, a State which withdrew its nationality from those of its subjects who engaged in acts of disloyalty towards it, in the way suggested by Mr. François, would automatically cut itself off from all other means of punishing them.

22. Mr. SPIROPOULOS said that if the text proposed by the Special Rapporteur were put to the vote, he would be obliged to abstain. A way out of the difficulty, however, might be to combine the two paragraphs to form a single paragraph, reading as follows:

> "No State shall deprive any person of its nationality on any ground unless such person, at the time of deprivation, has acquired or acquires the nationality of another State".

23. Faris Bey el-KHOURI supported Mr. Spiropoulos' suggestion; if it were not adopted, the text proposed by the Special Rapporteur should be referred to the Drafting Committee, as the words "by way of penalty" were equivocal. He agreed with Mr. Hsu that it was not only wrong, but contrary to the interests of the State concerned, to deprive an individual of what was part of his birthright, even if he committed high treason.

24. Mr. ALFARO also supported the suggestion put forward by Mr. Spiropoulos, since, as Mr. Lauterpacht had said, the borderline between deprivation of nationality by way of penalty and deprivation by operation of the law was far from clear. The Commission was concerned only with cases where deprivation of nationality resulted in statelessness. Paragraph 1, however, would prevent a State from depriving of his nationality a person who entered the service of another State and in time acquired its nationality.

25. He had been impressed by Mr. Yepes' remarks. The difference between nationality and citizenship was clear from the fact that political — and even civil — rights could be withdrawn without causing a disturbance in the international relations of States, whereas nationality could not. To make the point clear, it might be desirable to add a second paragraph after that suggested by Mr. Spiropoulos, reading as follows:

> "The provisions of paragraph 1 do not affect the full rights of a State to deprive any national of his citizenship or political rights or to restrict, to a certain degree, his civic rights by way of penalty or on any other ground".

26. Mr. ZOUREK said that, although he understood the reasons which had prompted the Special Rapporteur to draft article VI as he had, he feared that he had thereby made it unacceptable to governments. The bond of nationality was compacted of reciprocal rights and duties, but the text proposed by the Special Rapporteur gave full freedom of action to the individual and left the State powerless to protect its own vital interests. It prevented the State from formally recognizing a situation which the individual himself had deliberately brought about by severing that bond, usually to escape some obligation inherent in it, particularly that of military service. It was unrealistic to think that statelessness brought about in that way could be eliminated, even if "*involuntary statelessness*", *resulting from conflicting* national laws, could be.

27. It had been suggested that the problem might be solved by distinguishing between nationality and citizen-

ship. Many countries, however, including the People's Democracies, did not recognize that distinction; all Czechoslovak nationals, for example, enjoyed equal rights. It was true that the laws of many countries provided for the deprivation of certain rights as a form of penalty; but what use would such a penalty, or indeed any other penalty than the deprivation of nationality, be against an individual who fled abroad to engage in treasonable activities against his fatherland?

28. The Special Rapporteur was in effect inviting States to renounce certain of their sovereign powers. There might be cases where the conflict of nationality laws made it desirable for them to do so, with regard to those specific cases. The text proposed by Mr. Córdova, however, was not limited to specific cases; it would prevent States from ever depriving anyone of his nationality by way of penalty, without even mentioning his obligations towards the State. It had been claimed that the draft Convention on the Elimination of Future Statelessness could not conflict with the essential interests of any State, since it would be freely entered into; however, it was the substance which counted, not the form.

29. Finally, the text proposed was contrary to the existing practice of a large number of States. The *Study of Statelessness*[2] showed that deprivation of nationality could be incurred in different States for a whole variety of reasons. In some States it could even be incurred by naturalized persons for crimes which carried no such penalty for persons who were nationals by birth — a distinction which was, incidentally, wholly wrong.

30. For all those reasons he would be obliged to vote against the text proposed by the Special Rapporteur.

31. Mr. LAUTERPACHT said that article VI was important partly because the deprivation of nationality was, so far as numbers went, the largest single cause of statelessness, and partly because it gave rise to a number of emotional considerations that had been reflected in the language used by various members of the Commission.

32. If Mr. François's objections were to be met, and the purpose of the draft convention maintained, those objections would have to be dealt with in detail, possibly in a provision reading somewhat as follows:

> "The parties agree to confer their nationality upon aliens who have served in their armed forces and who have been deprived by their own State of their nationality on account of such service."

33. The right of States to punish offenders by due process of law must be preserved. He doubted, however, whether there was any need for distinguishing in the text of the Convention between citizenship and nationality; the point might be better made in the comment.

34. He had not fully understood Mr. Scelle's observations. On the other hand, he thought there was merit in Mr. Spiropoulos's proposal, partly because of the difficulty of deciding what was and what was not a penalty. He wondered, however, whether the expression "No State shall deprive..." covered the normal operation of law as a source of loss of nationality — for example, as a result of continued residence abroad. He also thought that the question of the revocation of naturalization, particularly on the grounds that nationality had been procured by fraud, should be clarified; some might consider that a person naturalized in those circumstances had in fact never acquired the nationality concerned.

35. Mr. AMADO said he had followed the discussion with interest, but it had been mainly confined to the case of persons who acquired their nationality by birth. He wished to address himself rather to the question of naturalized persons. In his view, naturalization was a form of contract between the State and the individual, and one effect of article VI would be to make the contract irrevocable for the State, while leaving the individual free to break the contractual obligation. It would follow, he suggested, that States would tend to make naturalization more difficult.

36. Mr. ALFARO proposed that paragraph 1 of article VI be deleted; that in paragraph 2 the words "by way of penalty" be inserted after the words "its nationality", and the words "or has acquired" after the word "acquires"; and that the following paragraph be added:

> "The foregoing provision does not affect the right of the State to deprive a national of his political or citizenship rights or to restrict his civil rights as a national, by way of penalty or otherwise, for any cause defined in the laws of the State."

37. The first two amendments would have the effect of combining paragraphs 1 and 2, as had been proposed by Mr. Spiropoulos.

38. Mr. CÓRDOVA said that, although it seemed to him technically wrong to combine the two paragraphs, he was prepared to agree to it, since the aim of the draft convention, namely, the elimination of statelessness, would still be served.

39. Taking up Mr. Lauterpacht's point about the automatic loss of nationality as a result of the operation of the law, he suggested that, in order to avoid the confusion that might possibly arise from the unqualified use of the word "deprivation", the second paragraph might read:

> "No State shall deprive any person of its nationality by way of penalty or by operation of the law or on any other ground...".

40. He considered Mr. Alfaro's third amendment unnecessary, since the Commission was not dealing with the deprivation of civil rights. Nationality conferred on the individual the right to his government's protection,

[2] United Nations publication, Sales No.: 1949.XIV.2.

for example, in the shape of the issue of a passport for foreign travel. Moreover, nationality was a link between the individual and the State, which imposed certain responsibilities on the State. However, if the paragraph in question commanded general support, he would accept it, although he would prefer the subject of deprivation of political and civil rights to be relegated to the comment.

41. As to Mr. Lauterpacht's suggestion for meeting Mr. François's objections, he felt that it should not refer to service in the armed forces alone: there were many other ways—perhaps, even, of more importance—in which a national could serve a foreign power to the detriment of his own country. On the other hand, there were many forms of service, even in the military forces of a foreign State, which were not detrimental to the country of nationality of the persons so serving. For example, during the last war the Government of Mexico had permitted Mexicans to serve in the armed forces of any State Member of the United Nations. In general, however, he opposed the inclusion of any such article, since it would make it even more difficult to punish traitorous nationals if they lost their nationality and acquired another. He supposed that in those circumstances such persons would enjoy the protection of the government of the country of their new nationality, and would then not even be subject to extradition procedure.

42. Mr. PAL said that he had benefited immensely from the discussion, and only wished to raise a few points relating to the proposed amendments.

43. He could not see what purpose would be served by adding the paragraph proposed by Mr. Alfaro. There was nothing in article 6 as at present drafted which brought into question the right of States to deprive their nationals of political or civil rights; it was simply intended to ensure that States should not deprive their nationals of nationality. Otherwise, the rights of States remained unaffected. Indeed, he was not even in favour of including the point in the comment, for the Universal Declaration of Human Rights limited the penalties of that sort which States might apply.

44. Assuming that it was decided that paragraphs 1 and 2 should be combined, he thought it quite unnecessary to say: "... by way of penalty or on any other ground...". It would be quite enough to say simply: "... on any ground...".

45. He thought that Mr. Lauterpacht's suggestion was inappropriate, because there were many ways, in addition to military service on behalf of an enemy, in which an individual could act to the detriment of the country of which he was a national. Any such clause should be comprehensive.

46. Mr. YEPES said that, in view of the suggestion that it was inhuman to deprive persons of their citizenship, as was permitted by the laws of many Latin-American countries, he felt he should clarify the distinction between nationality and citizenship as it operated in those countries.

47. Citizenship was an exclusive relationship between an individual and the State to which he belonged: other States did not come into the matter. Nationality, on the other hand, was a relationship between the individual and his State in relation to other States. The rights that a State might confer on its own nationals were no concern of any other State.

48. In his view, the Soviet Union concept of nationality was ethnic rather than civic. The same was true of other countries. Switzerland, for example, which numbered among its peoples several nationalities in the ethnic sense, knew only one nationality as the word was understood in international law. The meaning of nationality, as he saw it, was that a person belonging to the Soviet Union, to Switzerland or to the United States of America was a national of his country; but it did not necessarily follow that any individual national would enjoy all possible rights of citizenship.

49. On that understanding, political rights were the rights proper to citizenship; they were not the rights proper to a national as such. A person, for example a minor, a woman (in some cases) or a criminal, might be a national of a country, but not a full citizen. The difference between nationality and citizenship was precise; and though a State might deprive a person of his citizenship rights as a sanction, for example, by depriving him of the right to vote or to stand for public office, no State had the right to deprive a person of his nationality, which, by definition, was a matter affecting its relations with other States; for deprivation of nationality involved deprivation of protection, with the implication that the individual affected might become a charge on other States. Moreover, the right to a nationality was one of the inalienable rights of the human being, as had been expressly recognized in the Universal Declaration of Human Rights adopted by the United Nations General Assembly.

50. He contested Mr. Amado's contention that naturalization was in the nature of a contract between the individual and the State. On the contrary, naturalization, in the sense they were considering, was an act of authority, a favour which the State could either grant or withhold according to the higher interests of the community.

51. Mr. AMADO agreed that he might more properly have used the term "allegiance" rather than "contract".

52. The CHAIRMAN, speaking as a member of the Commission, wished briefly to reply to Mr. Córdova. It was true that some individuals entered the military service of foreign countries without detriment to their own countries, but the text suggested by Mr. Lauterpacht was intended only to apply to the grave cases of persons who, in the view of their own government, deserved to be deprived of their nationality.

53. As to Mr. Córdova's point that deprivation of nationality in such circumstances involved the drawback that their own governments would be prevented from punishing the individuals concerned, he would only say

that the right to punish individuals for the crime of high treason, or entering the service of the enemy, remained in all circumstances.

54. Mr. KOZHEVNIKOV, referring to Mr. Yepes' statement about the difference between nationality and citizenship, said that he was unable to admit that any distinction existed between them. In his (Mr. Kozhevnikov's) country, all citizens enjoyed equal rights.

55. Mr. SPIROPOULOS agreed with Mr. Pal that the additional paragraph proposed by Mr. Alfaro had nothing to do with the question under discussion, and that there was accordingly no need to include it. On the other hand, he agreed that paragraph 1 of article VI should be deleted, and its contents embodied in paragraph 2. The words "by way of penalty" should be dropped as they added nothing to the text, the words "on any ground" being sufficient in themselves. He therefore suggested the following simpler and more comprehensive text for article VI:

"No person shall lose his nationality on any grounds unless he has acquired a new nationality".

56. Mr. SANDSTRÖM said that Mr. Spiropoulos' suggestion would affect article V; he thought that the Commission ought to adhere to the phrase "deprivation of nationality", used in article VI.

57. Mr. AMADO said that Brazilian law spoke of "loss" rather than of "deprivation" of nationality.

58. Mr. ALFARO agreed that the words "by way of penalty" could be deleted from his amendment, for the reasons given by Mr. Spiropoulos.

59. As to the general undesirability of his third amendment, he felt that some mention of the concepts of citizenship and nationality should be made either in the draft convention or in the comment; the distiction was clear in the Latin-American legal system, but elsewhere there was a general tendency to confuse internal political rights and rights with an international bearing.

60. In reply to the CHAIRMAN's request that he should comment on Mr. Spiropoulos' observations,

61. Mr. CÓRDOVA said that it was obvious that the convention really need consist of only two basic articles: the first providing that every individual should have the right to acquire a nationality, and the second providing that no one should lose his nationality. But such a convention would be so general as to be useless, and would in fact constitute no more than a general statement of aims. A purely general treatment of statelessness was in his view inadequate; any convention should deal with specific cases.

62. Mr. HSU said that he would not go so far as Mr. Pal in suggesting that Mr. Alfaro's third amendment should not be included even in the comment. He asked Mr. Alfaro whether he would agree that it should be placed there.

63. Mr. ALFARO agreed that, since his third amendment dealt with a fact, namely, that no fewer than twenty-five countries made a distinction between citizenship and nationality, it would be better included in the comment.

64. Mr. LAUTERPACHT said that there seemed to be general agreement that Mr. Alfaro's third amendment did not properly belong to article VI, although it might be included in the report.

65. He found Mr. Spiropoulos' proposed text attractive — perhaps too attractive, as it was so short that it failed to deal with the typical and most important cause of statelessness, namely, deprivation of nationality, with which article VI was supposed to deal. He suggested, as an alternative, a summary article which might read as follows:

"No party shall revoke or deprive a person of nationality by way of penalty or for any other reason, by operation of the law or otherwise, unless such person has or acquires another nationality."

66. His sole object in putting forward his suggestion concerning military service on behalf of a foreign power had been to demonstrate the consequences of Mr. François' approach to the problem. Now that it had served its purpose, he would withdraw it.

67. Mr. SPIROPOULOS recalled that when the Commission had been discussing article I, concerning the acquisition of nationality *jure soli,* Mr. Yepes had said that some persons who had acquired nationality through the application of that principle had not *ipso facto* acquired full rights of citizenship. Mr. Alfaro's third amendment seemed to him to make the same point in an inverse sense.

68. His suggested text for article VI had not been intended as a formal amendment. It had, however, appeared to him that, as the three preceding articles referred to the acquisition of nationality, article VI might well refer simply to its loss, and that a general phrase would raise no difficulties.

69. The CHAIRMAN said that, in the light of Mr. Spiropoulos' remarks, the Commission had before it article VI as drafted by the Special Rapporteur, Mr. Alfaro's amendments, and the text suggested by Mr. Lauterpacht.

70. Mr. ALFARO said that he had already agreed to the deletion of the phrase "by way of penalty"; that cause of deprivation of nationality, as well as deprivation of nationality by operation of law would, he felt, be covered by the general phrase "on any ground".

71. Mr. SANDSTRÖM suggested a simpler version for article VI, which might read:

"No State shall deprive a person of nationality on grounds other than those listed in article V."

The meeting rose at 6 p.m.

215th MEETING

Tuesday, 14 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. Gilberto AMADO, *First Vice-Chairman.*
later: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Régime of the high seas (item 2 of the agenda) (A/CN.4/60) (*resumed from the 210th meeting and concluded*)

1. The CHAIRMAN recalled that, after the Commission had decided at its 210th meeting to reconsider the text which it had adopted for article 2 of the draft articles on the continental shelf (Part I),[1] Mr. Sandström had proposed that the first paragraph of article 2 be deleted, and Mr. Spiropoulos had reintroduced the text which he had previously proposed for article 2 but subsequently withdrawn. That text read as follows:

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

2. Since the 210th meeting, Mr. Hsu had submitted the following two alternative proposals for the text of article 2:

> "A
>
> "The coastal State shall have the exclusive right to exploration and exploitation of the natural resources of the continental shelf.
>
> "B
>
> "The continental shelf is subject to the exclusive right of exploration and exploitation of natural resources by the coastal State."

3. Mr. SANDSTRÖM said that in his view existing international law did not give the coastal State rights of sovereignty over the continental shelf. Until President Truman's proclamation, the general concept had certainly been that the coastal State had sovereignty over its territorial sea and the underlying sea-bed and subsoil, but no further. The fact that by that proclamation the United States of America had claimed certain rights — not sovereignty — in respect of the exploration and exploitation of the natural resources of the continental shelf had not created any new rule of law. Nor had the proclamations of certain other governments following President Truman's proclamation, even if some of them had contained the word "sovereignty"; if a State or a group of States could change the law by mere proclamation, that would mean the negation of a law-bound community of States. Nor was the position changed by the fact that, during the past years, there had been no protests against such proclamations. Absense of protest did not, in itself, mean that other States approved the proclamations; for if the proclamations were not accompanied by action which infringed upon the interests of foreign States, there was evidently no need for such States to protest.

4. With regard to the whole problem, he would refer to paragraph 6 of the Commission's comments on article 2 of the draft which it had approved at its third session. That paragraph read as follows:

> "The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established a new customary law. It is sufficient to say that the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community."[2]

5. If the text now proposed for article 2 was intended to confer on the coastal State sovereignty over the continental shelf, it did not lay down a rule of existing law, but a rule proposed as a step in the progressive development of international law. In his opinion, however, the new article 2 as a whole did not in fact give sovereignty to the coastal State. It was clear from paragraph 2 that the coastal State was granted only limited rights and for

[1] See *supra*, 210th meeting, para. 74.

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

a special purpose, namely, the exploration and exploitation of the natural resources of the continental shelf. Such limited powers could not be called sovereignty. The situation with regard to the continental shelf was quite different from that which arose when the sovereign powers over a territory were divided between different States. In the latter case, the words "limited sovereignty" could be used, because the sovereign rights in the territory were envisaged as a whole. He did not understand, however, how it could be said that the continental shelf was subject to the sovereignty of the coastal State.

6. Some members would perhaps like to take the radical step of awarding sovereignty to the coastal State. In his view, that would not be sound legislative practice. The Commission must take into consideration not only the particular sphere of law which was directly concerned in the matter, but also related subjects, such as the territorial sea and the régime of the high seas. There was no doubt that a rule such as that contained in paragraph 1 of article 2 would have immediate repercussions upon those fields of law. Logically, sovereignty over a territory was bound to result in sovereignty over what lay above that territory. Where such important fields of law were concerned, the existing law should not be modified in the indirect way proposed.

7. Some might argue that paragraph 1 of article 2 was necessary in order to provide a basis for the rule stated in paragraph 2. In his opinion, that was not so. As he had already said, paragraph 1 did not state the existing law. What was more important, in the progressive development of law the source or basis of the new law was neither positive law nor a kind of natural law, but a new need of the community. That was precisely what had happened in the present case, and it was to needs of the community that the last sentence of paragraph 6 of the 1951 commentary referred. It was unnecessary, however, for the new rule of law to go further than was required to meet the new need. On that score, too, paragraph 1 was unnecessary, and it would even be wrong to maintain it.

8. It would also be detrimental to the Commission's prestige to reverse the views which it had officially and publicly expressed in the report on its third session. Nothing had occurred to justify such a change of position. Any government which, in its comments on the 1951 draft, had expressed the view that sovereignty ought to be conferred upon the coastal State, had probably already expressed that view before, and in more solemn form, for example, by making a proclamation on the subject.

9. For the reasons he had given, he proposed that paragraph 1 of article 2 be deleted, and that paragraph 2 be amended to read:

> "The coastal State exercises exclusive right of control and jurisdiction for the purpose of exploration and exploitation of the natural resources of the continental shelf."

10. The words "exclusive right of control and jurisdiction" seemed to express exactly the type of powers the Commission had in mind.

11. Mr. HSU said that, although he might be able to accept Mr. Sandström's proposal, depending on the ensuing discussion, he felt it desirable to explain the purpose of his own. That purpose was three-fold: first, to avoid using the terms "sovereignty" or "sovereign rights"; secondly, to avoid using those terms in direct relation to the continental shelf instead of in relation to the exploitation of the natural resources of the continental shelf; thirdly, to avoid using the term "control and jurisdiction". "Control and jurisdiction" used in relation to the exploitation of the natural resources of the continental shelf had scarcely any meaning, whereas "control and jurisdiction" used in relation to the continental shelf itself had too much. For he found it difficult to disagree with the United Kingdom Government that control and jurisdiction over the continental shelf meant the same as sovereignty or the possession of sovereign rights over it.

12. Neither term — "sovereignty" or "sovereign rights" — was necessary in the present instance. It was not the practice to speak of sovereign rights over the high seas for the purpose of naval engagement, visit, search and capture or for the purpose of exercising penal jurisdiction over collisions, exercising control over fishing or suppressing piracy and the slave trade. Nor was it the practice to speak of sovereign rights over the sea-bed of the high seas for the purpose of maintaining sedentary fisheries or cable-laying. Nor was it the practice to speak of sovereign rights over the contiguous zones beyond the territorial sea for the purpose of enforcing customs, fiscal and immigration regulations. Why then should the Commission speak of sovereignty or sovereign rights over the continental shelf for the purpose of exploiting its natural resources. Use of either term was not only unnecessary but also unjustifiable for five main reasons.

13. In the first place, freedom of the high seas could be subject to restrictions without changing its character, just as could sovereignty over territory in a similar situation. If innocent passage through the territorial sea did not assimilate the territorial sea to the high seas, there was no reason why exploitation of natural resources should necessitate the assimilation of the continental shelf to territory. Indeed, the enforcement of customs, fiscal and immigration regulations in the contiguous zones had not converted those zones into territorial sea. What was needed concerning the continental shelf was exclusive right of exploitation, not sovereignty.

14. Secondly, it was not the case that the coastal State's sovereignty over its continental shelf was an existing rule of law. Claims had been made to exercise certain rights over it, but that was all. Not enough time had elapsed since those claims had been made for it to be possible to say that they were generally accepted. The point was pertinent, particularly because what was affected was collective or community interests, not interests of individual States; it usually took more time

for opposition to encroachments on collective interests to become articulate. It could not be argued that a claim which was not immediately contested was accepted, for the fact that no protest had been made against the claims of Chile, Peru and Costa Rica not only to the continental shelf but also to the superjacent waters, surely did not mean that those claims had been accepted. Final proof of the absence of any new rule of international law in the matter was furnished by the very fact that the Commission had been seized of it; if there had been general agreement, that would have been unnecessary. It was worth bearing in mind, moreover, that when the Commission had, in 1951, provisionally approved a text which made it quite clear that it did not recognize sovereignty over the continental shelf, not a single government had protested that it was being deprived of something which it already possessed; the most that any government had been moved to do was to say that, in its view, sovereignty over the continental shelf should be recognized.

15. Thirdly, it was unrealistic to suppose that sovereignty over the continental shelf could be restricted to the sea-bed and subsoil. In his view, those States which, in claiming sovereignty over the continental shelf, had claimed sovereignty over the superjacent waters as well, had been perfectly logical.

16. Fourthly, acceptance by the Commission of the principle of sovereignty over the continental shelf would only encourage a mischievous trend which had begun with the United Kingdom Order in Council of 6 August 1942 concerning the Gulf of Paria, and the proclamation by the President of the United States of America on 28 September 1945,[3] which had been confirmed by the example of many other States and which had found its latest and most extreme expression in the claim of El Salvador. It was noteworthy that since 1951, when the Commission had refused to recognize sovereignty over the continental shelf, no further claims had been made. If the Commission now accepted the principle of sovereignty over the continental shelf, it was not to be doubted that the trend would be resumed, or that it would lead to more sweeping claims than those which had been made in the past, embracing the superjacent waters and air and extending out into the high seas beyond the limits which the Commission had fixed, unless political situations proved to be unfavourable to such developments.

17. Finally, the Commission should realize that, although States were at liberty to parcel out the high seas among themselves, the initiative in acts of that kind should be left to political bodies such as the General Assembly. The Commission, as a legal body, should resist attempts to encroach upon established principles of international law, particularly those favouring the development of the community idea, such as the freedom of the high seas.

18. Mr. SPIROPOULOS agreed with Mr. Hsu that the term "sovereign rights" was not entirely happy, but recalled that it had been used by the Special Rapporteur in the text which he had proposed in his fourth report (A/CN.4/60), and subsequently taken over by him (Mr. Spiropoulos) in an attempt to find a compromise solution. The Commission, which had been unwilling to accept even the term "sovereign rights" in 1951, was now envisaging use of the stronger term "sovereignty". The fact that four or five governments, out of a total of sixty or more, had expressed the view that the coastal State should exercise sovereignty over the continental shelf was not sufficient reason for that change of position.

19. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had already devoted four meetings to the consideration of article 2, and that it had finally been adopted by 8 votes to 4, with 1 abstention, Mr. Scelle being the only absentee at the time of the vote.[4] In those circumstances he hoped that the whole question would not be re-opened, since members had already heard, and had an opportunity of commenting on, all the arguments that could be advanced.

20. The alternative texts proposed by Mr. Hsu were quite inadequate, since they would apply with equal force to any holder of a concession. The rights exercised by States were fundamentally different by nature. On the other hand, he could vote in favour of the text proposed by Mr. Spiropoulos, which, as the latter had said, was based on that contained in his (Mr. François') fourth report (A/CN.4/60). The only difference between it and the text proposed by Mr. Sandström was that the latter referred to the "exclusive" right of control and jurisdiction. He could vote for that text too, though he preferred Mr. Spiropoulos's.

21. Mr. YEPES said that he could vote for either Mr. Spiropoulos's or Mr. Sandström's text; he wished, however, to refer to two points in the latter's statement. Mr. Sandström had rightly warned the Commission against abandoning the position which it had publicly taken as recently as 1951; but the Commission had as radically and with as little reason reversed the position which it had publicly taken in 1951 with regard to the definition of the continental shelf. There was still time for it to revert to its previous position in that matter, as well as in the matter at present under consideration.

22. Mr. Sandström had also said that there was no existing international law with regard to the continental shelf, but he (Mr. Yepes) had already pointed out that a customary law of the continental shelf had developed, even if its development had not followed the usual course.

23. Faris Bey el-KHOURI recalled that he had not opposed Mr. Sandström's motion for the re-consideration of article 2 because he had supposed that new arguments would be advanced. Nothing had been said at the present meeting, however, which had not been said

[3] See texts in *Laws and regulations on the régime of the high seas* (United Nations publication, Sales No.: 1951.V.2), pp. 38 and 44.

[4] See *supra*, 200th meeting, para. 83.

before, and he would therefore vote in the same way as before, namely, in favour of the text provisionally adopted. That text would not encroach on the principle of the freedom of the high seas provided it was clearly stated, as was done in paragraph 2, that sovereignty was limited to the sea-bed and its subsoil and did not extend to the superjacent waters. If the Commission acknowledged the exclusive right of the coastal State to explore and exploit the sea-bed and its subsoil, it would be recognizing its sovereignty over them, for below the surface, and at such a depth, sovereignty could mean no more than exclusive rights of exploration and exploitation.

24. Mr. ALFARO said that, although during the earlier discussion he had strongly supported the wording proposed by the Special Rapporteur, in which the term "sovereign rights" had been used, now that he had before him the text of the other articles the Commission had adopted, he felt that it would be more appropriate to use the wording proposed by Mr. Sandström. The term "sovereignty" was entirely inappropriate. With all the restrictions which were placed on the coastal State's rights in the other provisions of the text, what remained could not possibly be termed "sovereignty", at least, not in any sense in which that term was understood in international law.

25. The second paragraph of article 2 limited the coastal State's exclusive rights to the rights of user, control and jurisdiction for certain specific purposes; if Mr. Sandström's proposal was rejected and that text was retained, he would, incidentally, have certain observations to make about the term "the rights of user". Articles 3 and 4 stated that the coastal State's right did not affect the legal status of the superjacent waters or of the airspace above the superjacent waters. Article 5 stipulated that the measures which could be taken for the purposes laid down in article 2 should be "reasonable". Finally, article 6 provided that the coastal State must not interfere with navigation or fishing, must give due notice of installations constructed on the continental shelf, and refrain from constructing such installations in narrow channels or on recognized sea lanes essential to international navigation. It was therefore abundantly clear that the Commission was not recognizing the coastal State's sovereignty over the continental shelf, but its exclusive, or, if the Commission really saw fit, sovereign right of control and jurisdiction for the purposes of exploring and exploiting its natural resources. A legal text should not contain a conventional lie, and he therefore supported Mr. Sandström's proposal, although he could accept Mr. Spiropoulos's if the latter found favour with the majority of the Commission.

26. Mr. KOZHEVNIKOV recalled that he had voted in favour of the text which the Commission had adopted for article 2. The arguments which he had heard at the present meeting could not shake his agreement with that text. If, however, the Commission wished to reverse its previous decision, as was its right, he would suggest that the term "exclusive right", in Mr. Sandström's proposal, be replaced by the term "sovereign rights".

27. Mr. SANDSTRÖM said that he would prefer not to use the term "sovereign rights", but would be prepared to do so if that would render his proposal acceptable to a majority of the Commission.

28. Mr. PAL said that he had previously voted against the text which the Commission had adopted, but that on reflection he felt obliged to vote for it and against the alternative proposals introduced at the present meeting. Unless the Commission recognized the coastal State's sovereignty over the continental shelf, there would be no legal basis for the exercise of its rights, however they might be termed. It was not the Commission's function merely to give legal sanction to the proclamations of States; it must endeavour to find some legal basis on which their claims might be justified, and if they correspond to a real need, such a basis must necessarily exist. In the present case, he considered that such a basis did exist, in a logical extension of the principle of the coastal State's sovereignty over its territory. As a result of scientific progress, it was now possible for the coastal State to exploit the natural resources of its continental shelf, in the same way as scientific progress had at an earlier date made it possible for it to exploit the natural resources of its river beds and of the sea-bed and subsoil of its territorial sea.

29. Mr. CÓRDOVA recalled that he had not been present during the previous discussions, but could confine himself to saying that he had heard no valid argument against the proposal to give the coastal State sovereignty over the continental shelf. Although he favoured the text previously adopted by the Commission, he could accept that proposed by Mr. Sandström or that proposed by Mr. Spiropoulos; in substance, there was very little difference between them.

30. Mr. SCELLE said that it seemed to be generally recognized that to award the coastal State sovereignty or sovereign rights over the sea-bed and subsoil of an area of the high seas was not in accordance with existing law; it was, in fact, in flagrant violation of it, for it was a cardinal principle of international law that the high seas were *res communis* which could not be subjected to the sovereignty of any one State. The Commission could only justify such a violation of the existing rules of law if that were necessary in the interests of the international community as a whole. The interests of the international community as a whole, however, did not require that exclusive rights of exploration or exploitation be given to the coastal State. There was no reason why the same principle should not be observed as in the case of fisheries, and the right of exploration and exploitation given to whichever State or States were best qualified. From what he had said it was obvious that he could not vote for any of the texts proposed, since not only were they all contrary to existing international law, but they also went beyond what was required by modern developments.

31. Mr. LAUTERPACHT said that, as he had previously stated, he was prepared to vote for any text which would secure a clear majority, since he thought that that was a point of considerable importance. The different proposals had different advantages, and there was no great substantive difference between them. The use of the word "sovereignty" might invite some far-fetched speculations in relation to the superjacent waters. On the other hand it had the merit of giving a definite legal status to the areas in question. With regard to the text proposed originally by the Special Rapporteur and now taken over by Mr. Spiropoulos, the term "sovereign rights" was inappropriate in a legal text. It was in the nature of a descriptive term in political science; the appropriate legal term was "rights of sovereignty". If Mr. Spiropoulos could accept that change, he would support the text which he had proposed.

32. It should be emphasized that the Commission was not by virtue of that text conferring full sovereignty upon the coastal State; it merely said that the coastal State exercised the rights of sovereignty over it, and that for a specific purpose. The legal basis which Mr. Pal had sought to find in the principle of sovereignty would be constituted rather by the fact of the Contracting Parties' acceptance of the convention.

33. Mr. ZOUREK recalled that he had voted in favour of article 2 in the form in which it had been adopted, and said that he had heard nothing during the present discussion to lead him to change his mind. If a substantial majority of the Commission was in favour of reversing its previous decision, however, he could accept the text proposed by Mr. Spiropoulos, preferably with the amendment suggested by Mr. Lauterpacht.

34. He could not agree with Mr. Yepes that a customary law existed in the matter, since by no means all coastal States had laid claims to a continental shelf, and even those which had made such claims were in complete disagreement about the extent and the scope of the rights they claimed.

35. Replying to a question by the CHAIRMAN, Mr. HSU said that he would ask for a vote only on the first of the two texts he had proposed. He recalled that at the beginning of the meeting he had said that he might be able to vote in favour of Mr. Sandström's proposal, but the discussion had convinced him that that proposal suffered from the taint of compromise.

36. Since Mr. Pal had raised the question of the legal basis for the rights to be accorded to the coastal State, he thought he should explain the legal basis on which his own proposal rested. That basis was the principle of the freedom of the high seas. He also realized, however, that, in the interests of the international community as a whole, the exploitation of the natural resources of the continental shelf was economically necessary, and as the Commission appeared to think that such exploitation could most conveniently be carried out by the coastal State, he was prepared to give the coastal State exclusive rights for the purpose. There was a distinction between the exploitation of the natural resources of the continental shelf and the operation of fisheries, which justified the granting of exclusive rights in the one case but not in the other.

37. He had gone as far as he could to meet the views of those who wished the coastal State to exercise sovereignty over the continental shelf, and the text which he proposed went far enough, he believed, to meet the coastal State's legitimate needs. Further he could not go.

38. Mr. SPIROPOULOS regretted that he could not accept Mr. Lauterpacht's suggestion to replace the term "sovereign rights" by the term "rights of sovereignty" which, in French at least, would be open to some misunderstanding.

39. The CHAIRMAN put to the vote the first of the two texts proposed by Mr. Hsu.

That text was rejected by 7 votes to 1, with 5 abstentions.

40. The CHAIRMAN then put to the vote the text proposed by Mr. Spiropoulos.

The text proposed by Mr. Spiropoulos was adopted by 10 votes to 3, with 1 abstention. It read as follows:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources".

41. The CHAIRMAN, speaking in his personal capacity, explained that he had voted for the text just adopted because it best expressed the Commission's views.

Mr. François took the Chair.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 214th meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*resumed from the 214th meeting*)

Article V [5] (*resumed from the 213th meeting*) and *Article VI* [7] (*resumed from the 214th meeting*)

42. The CHAIRMAN requested the Commission to continue its discussion of article VI of the draft Convention on the Elimination of Future Statelessness prepared by the Special Rapporteur (A/CN.4/64). That discussion, which might become very complicated, turned on three major issues.

43. First, there was the distinction between paragraphs 1 and 2 of the text proposed by the Special Rapporteur. Mr. Córdova had thought that there should be absolute prohibition of deprivation of nationality as a penalty, and that there should be only a qualified limitation on deprivation for other reasons. Mr. Alfaro, on the other hand, thought that the two matters could be combined; and, following his line of thought, Mr. Lauterpacht had suggested a new text which read:

"No Party shall revoke, or deprive a person of, nationality, by way of penalty or for any other reason,

by operation of the law or otherwise, unless such person has or acquires another nationality."

44. *Prima facie,* Mr. Lauterpacht's text was not easy to understand, and it might require some redrafting. The French translation too was not happy and needed revision.

45. Secondly, there was Mr. Alfaro's third amendment relating to the distinction made in Latin American countries between citizenship and nationality.[5] That was a separate question and would have to be discussed separately.

46. Thirdly, Mr. Sandström had suggested that the contents of article V were partly covered by article VI. Mr. Sandström had therefore proposed that the last two paagraphs of article V should be deleted and included in a revised version of article VI. In his (the Chairman's) view, that matter should be discussed first, as the question whether or not there was duplication between articles V and VI would arise regardless of the fate of the Special Rapporteur's text.

47. Mr. SANDSTRÖM said that the Chairman had accurately explained his proposal. Article V related not only to the consequences of general changes of personal status, but also to the consequences of specific changes, namely, renunciation of nationality and application for naturalization. He doubted whether it was wise to treat all those matters in one article, particularly because renunciation of nationality and the consequences of application for naturalization had points in common with the matters treated in article VI.

48. He did not like the phrase "by way of penalty" which it had been suggested should be inserted in article VI. On the one hand, he thought that article VI should not concern itself with criminality; on the other hand, there were many legal systems which provided that persons could be deprived of their nationality for acts which were not of themselves necessarily wrong: for example, the continued residence of a naturalized person in the country of his previous nationality. He emphasized that neither nationality nor naturalization was in the nature of a contact: it was a relationship between the subject and the State that created legal obligations.

49. Mr. CÓRDOVA (Special Rapporteur) said that the precise form of the provision adopted was a matter of technique. It was possible to draft an article in the form of a general prohibition of deprivation, renunciation or loss of nationality without the acquisition of another nationality. When, however, he had been confronted with the problem he had thought it advisable to take separately each of the historical sources of statelessness and to provide a remedy for each.

50. There was a distinction between deprivation of nationality as a penalty for, perhaps, a criminal act, and the automatic application of the law depriving a person of nationality for other, non-criminal reasons, which was again different from renunciation of nationality. He felt that it would be more comprehensible, both for the public and for lawyers, to deal with those matters *seriatim,* rather than by a general clause providing simply, for example, that no State should deprive a person of its nationality if that person did not acquire another.

51. He agreed that paragraphs 3 and 4 of article V had in themselves very little relation to the question of change of personal status dealt with in paragraphs 1 and 2. It would be possible to make a new article VI of paragraphs 3 and 4, leaving the present article VI substantially as it was, but renumbering it. If the Commission wished to make no distinction between deprivation of nationality as a penalty and deprivation of nationality by automatic operation of law, then paragraps 1 and 2 of the original article VI could be merged, and he would be able to accept Mr. Lauterpacht's proposed redraft thereof. But he opposed the merging of that subject with loss of nationality resulting from an application for naturalization or from renunciation of nationality.

52. Mr. ALFARO said that he would withdraw his third amendment on condition that the statement contained therein was recorded in the Commission's report on the work of the session. He agreed that that amendment was concerned not with a mandatory provision, but rather with the absolute distinction between citizenship and nationality that obtained in twenty-five States. In so far as there was any misunderstanding about that distinction, he stressed that it should be made clear in the summary record that the prohibition of deprivation of nationality did not limit the right of States to restrict citizenship rights within his meaning of the term. That was important, in order to avert possible misunderstanding of action that Latin American countries might have to take under their existing legislation.

53. As to his other amendments, he maintained that paragraphs 1 and 2 of article VI should be combined in the sense of the suggestions made by Mr. Lauterpacht, Mr. Spiropoulos and himself, but was somewhat disturbed by some of the technical expressions used in Mr. Lauterpacht's draft. He would prefer that paragraph to read:

"No person shall lose or be deprived of his nationality on any ground or for any reason unless that person has or acquires another nationality."

54. That would cover sanctions, deprivation by operation of law and all the other circumstances which the Commission had in mind.

55. Mr. SANDSTRÖM asked whether Mr. Alfaro intended that article V should be kept as it was.

56. Mr. SPIROPOULOS was in favour of dealing with the matter by a general clause laying down that there should be no deprivation of nationality without the acquisition of a new one. Mr. Córdova had said that the article could be cast either in a general or in an enumerative form; the danger of the enumerative

[5] See *supra,* 214th meeting, para. 36.

method was the possibility that one or more instances might unwittingly be omitted. Further, he agreed with Mr. Sandström that paragraphs 3 and 4 of article V should be removed from that article; all duplication between articles V and VI should be eliminated.

57. He would suggest informally that, in order to meet all points of view, article VI should begin by stating a general rule and continue by giving specific examples.

58. Mr. LAUTERPACHT said that he agreed with the Special Rapporteur. In the first place, it might well be better to divide article V into two parts, the first consisting of paragraphs 1 and 2, and the second of paragraphs 3 and 4. In the second place, it was very important that article VI should be particularized, to enable the important historical causes of statelessness to be dealt with; a general clause would not meet practical requirements. He felt, too, that the Commission should be careful to avoid giving the impression that it did not attach due importance to the most conspicuous cause of statelessness, namely, deprivation of nationality by way of penalty. For those reasons, he could not accept Mr. Sandström's amendment. That amendment mixed the various causes of statelessness. Also, it was undesirable that the Commission should rescind an earlier decision. He agreed with the Chairman that his (Mr. Lauterpacht's) text for article VI required drafting changes, but he was convinced that the Commission should maintain the principles of the Special Rapporteur's draft for article VI, and see to it that that article dealt with deprivation of nationality both as a penalty and for analogous reasons: even automatic denaturalization as a result of continued residence abroad had to his mind an element of sanction in it.

59. Mr. AMADO put a number of questions concerning the syntax of Mr. Lauterpacht's proposed text. Concerning deprivation of nationality as a penalty, he said that the Brazilian Constitution laid down three grounds for loss of nationality: first, voluntary acquisition of another nationality; second, acceptance of employment, pension or commission in another State without the permission of the President of Brazil; third, conviction by a court of justice of an offence for which deprivation of nationality was the appropriate sentence.

60. The connexion between the individual and the State was, as he had said before, of the essence of allegiance, and to his mind the concept of sanction did not enter the picture; it should therefore not be mentioned. A prohibition of denationalization in general terms might possibly have some effect; but particularization could only cause difficulties for a number of States.

61. Mr. SANDSTRÖM said that it seemed to him that everyone was in agreement about the purpose of article VI; the differences related solely to the way in which it should be drafted. For his part, he had no objection to the matters treated in articles V and VI being spread over three articles: the first consisting of paragraphs 1 and 2 of article V, the second of paragraphs 3 and 4 of article V, and the third of article VI. The various specific issues cited by various members of the Commission as constituting reasons for deprivation of nationality could be summarized in the phrase:

> "... deprivation of nationality as a penalty or otherwise by reason of a person's conduct."

62. Mr. LIANG (Secretary to the Commission) referring to Mr. Lauterpacht's proposed text for article VI, said, first, that Mr. Lauterpacht had emphasized a distinct concept, namely, the deprivation of nationality by way of penalty; that was otherwise known as denationalization. Secondly, it seemed to him to be confusing, when referring to loss of nationality by operation of law, to call that loss deprivation, which was a word more properly associated with the concept of denationalization. Thirdly, as Mr. Alfaro had said, the word "revoke" was obscure in the context of the other concepts contained in Mr. Lauterpacht's text. Revocation applied to nationality acquired by naturalization: one could hardly speak of revocation of nationality acquired by birth.

63. As regards the drafting of articles V and VI, there were three distinct subjects which should be treated in three separate articles: first, deprivation of nationality; secondly, loss of nationality by operation of law; thirdly, revocation of nationality. Mr. Lauterpacht's suggested draft for article VI had the merit of comprehensiveness, but he thought it was necessary to emphasize the political and juridical consequences of denationalization by dealing with that issue separately.

64. Mr. YEPES agreed that the subject-matter of paragraphs 1 and 2 of paragraph V differed in nature from that of paragraphs 3 and 4; the Commission was, however, discussing paragraph VI. He pointed out a number of discrepancies between the English and French texts of Mr. Lauterpacht's proposal, and asked which version the Commission was meant to be discussing; they would only get confused if they discussed both. Mr. Lauterpacht's English text mentioned revocation of nationality; but it was evident to him that nationality as such was not revocable, though naturalization might be. Was there any distinction in English? Furthermore, Mr. Lauterpacht's English text prohibited the deprivation of nationality "unless such person has or acquires another nationality." He asked at what date the person concerned was to acquire the other nationality; was it to be on the date on which he was deprived of his first nationality or later? For his part, he would prefer a text reading "... unless such person has or acquires *ipso facto* another nationality".

65. Mr. LAUTERPACHT agreed that his text should be amended; it should state at what date the new nationality was to be acquired, and it should be modified inasmuch as revocation was the term used in English law in respect of a certificate of naturalization.

66. He urged the Commission to adopt the Secretary's suggestion that the three main causes of loss of nationality, which were independent and different, should be treated separately, to make them more easily understandable. He hoped to be able to submit a revised text at the next meeting.

67. Mr. ALFARO was in favour of the retention of the expression, "by way of penalty", for deprivation of nationality on that ground was the main source of statelessness; but he still opposed the use of the expression "by operation of law", for all deprivations of nationality were to his mind the result of the operation of some law. Mr. Lauterpacht was probably thinking of loss of nationality caused by lapse of time, as well as of such cases as that of a person born of foreign parents in a given country who would lose the nationality of that country unless he made a declaration when he came of age that he intended to retain it. If the Commission wished to cover cases of loss of nationality by the automatic operation of law in that manner, it should draft a special provision according to which the high contracting parties would agree that no one should lose his nationality in that way unless he acquired another.

68. Mr. CÓRDOVA asked Mr. Lauterpacht, on the assumption that deprivation of nationality by way of penalty should be treated in one paragraph, what was to be treated in the other paragraphs.

69. Mr. LAUTERPACHT said that the remaining paragraphs should deal with loss of nationality by operation of law — due to residence abroad and so forth — and with revocation of nationality acquired by naturalization — naturalization acquired by fraud, for example — in that order.

70. The CHAIRMAN shared the opinion of those members who thought that Mr. Córdova's proposal was preferable to the perhaps more scientific view expressed by Mr. Sandström; Mr. Spiropoulos' suggestion should also be studied attentively.

71. He noted that Mr. Lauterpacht had said that it might be possible for him to present a revised text the following day; he himself thought that the Drafting Committee, which might co-opt Mr. Sandström for the purpose, should be asked to present a new text for both article V and article VI in the light of the foregoing discussion.

72. Mr. YEPES wondered whether the Special Rapporteur's text for article VI was not after all the best. The Commission had so far been unable to do better, though it might be preferable to make paragraph 1 of article VI a separate article.

73. Mr. SCELLE said that, from the point of view of juridical technique, when fraud entered into an apparent naturalization the act of naturalization was void; hence the person concerned was not naturalized, and it was not possible to speak of the revocation of such non-existent naturalization. The article should take account of that consideration, though it was evident that it would not always be possible to avoid statelessness in such cases. There were, however, many difficulties, for a void act could have no legal effect, and in that event the change of nationality, and *a fortiori* the deprivation of the acquired nationality, could not have taken place.

The Chairman's proposal that articles V and VI be referred to the Drafting Committee was adopted.

Nationality of married women

74. The CHAIRMAN said that the next day, before taking up article VII, the Commission would have to take up the question of the nationality of married women.

75. Mr. CÓRDOVA said that the Commission on the Status of Women had reached the conclusion that no woman should lose her nationality as the result of her marriage; it wished women to be in the same position as men as regards nationality. The Economic and Social Council had endorsed the Commission's recommendation and had requested the International Law Commission to study the problem, and draft an appropriate convention. The International Law Commission had taken the view that it should deal with the matter within the general framework of nationality including statelessness.[6]

76. He had now received a communication from the Chairman of the Commission on the Status of Women drawing attention to article V of the draft Convention on the Elimination of Future Stateslessness and to article VI of the draft Convention on Reduction of Future Statelessness. She had suggested that the International Law Commission might see its way to drafting the articles in such a way as to give the present drafts temporary effect only, pending agreement between all States on the principle that no woman should lose her nationality as a consequence of her marriage.

77. The International Law Commission had to decide between two principles. The first was the principle of family unity, according to which a wife and the children of a marriage should in general acquire the nationality of the husband and father. The second was the principle that the position of women with regard to nationality should be the same as that of men.

78. The CHAIRMAN said that the matter should be taken up the following day when members had had time to study the letter from the Chairman of the Commission on the Status of Women.

79. Mr. LIANG (Secretary to the Commission) said that he had been advised that the Social Committee of the Economic and Social Council, which was at present meeting in the Palais des Nations, was considering the matter raised in the letter from the Chairman of the Commission on the Status of Women, and would in due course report to the Economic and Social Council. He was concerned about the possible overlapping of competence, and suggested that more time should be allowed for study of the letter in question.

80. Mr. CÓRDOVA then referred to the draft article VII which was concerned with the question of the inadequacy of treaties on territorial settlements. As a matter of general principle, the inhabitants of a territory should acquire the nationality of the State to

[6] See "Report of the International Law Commission covering the work of its fourth session", *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), para. 30.

which the territory was transferred, and it was also a principle of existing international law that the State to which the territory was transferred should allow the right of option to persons who wished to retain their own nationality. There were, of course, cases in which it was impossible to apply the second principle, for example, when a whole territory was absorbed by the elimination of a State. In those circumstances, all the inhabitants of the territory had to acquire the nationality of the State into which the territory was incorporated. Article VII as drafted would make it a rule that the State to which the territory was transferred should confer its nationality on the inhabitants of the territory, subject to the right of option, but would at the same time ensure that the State from which the territory had been transferred did not deprive the inhabitants of their old nationality until they had acquired the new one.

81. There was, however, one point which was not covered by the article, namely, the case of a person who had previously inhabited the transferred territory but who had left it. It was open to question whether he should retain his original nationality or acquire the nationality of the State to which the territory was transferred. He (Mr. Córdova) thought that such a person should have the right of option, and that there should be a third paragraph in the article to deal with that.

82. He realized that States tended to conclude treaties as they pleased, and that transfers of territory were a constant cause of statelessness; article VII would attempt to limit the right of States so to act. He was opposed to the view that because States were sovereign they should not be asked to surrender the right to act in all circumstances as they chose; in his view, international law should have precedence over the unfettered will of States, and States should comply with it.

The meeting rose at 1 p.m.

216th MEETING

Wednesday, 15 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

* The number within brackets corresponds to the article number in the Commission's report.

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article VII [9]

1. The CHAIRMAN invited the Commission to take up article VII of the draft Convention on the Elimination of Future Statelessness (A/CN.4/64, Part I).

2. Mr. LAUTERPACHT said that article VII raised a number of questions. In paragraph 1, reference should be made not only to existing States to which territory might be transferred, but also to new States created on the territory of one or more States. In the latter case one could hardly speak of the transfer of territory.

3. Again, the phrase "persons inhabiting the said territory" would not, if interpreted literally, cover persons who, though they might have had the nationality of the State from which the territory was transferred, did not habitually reside in the transferred territory. Such persons might in some cases become stateless unless specific provision were made for their case.

4. Moreover, some persons might have grounds for not wishing to acquire the nationality of the State to which the territory was transferred; that nationality might be hateful to them. The possibility of option was therefore necessary.

5. On the other hand, it should be made clear that when the text referred to the possibility of option, only an effective or an exercised option was meant.

6. He therefore proposed the following text for article VII:

> "Existing States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality on persons possessing the nationality attaching to such territory unless such persons effectively opt for the retention of that nationality, or unless they have or acquire another nationality."

7. Mr. SCELLE said that he agreed in part with Mr. Lauterpacht. It seemed to him, however, that article VII as drafted provided yet another example of the tendency, which he remarked throughout the convention, to lay down unrealistic rules. The draft failed to take into account territorial changes other than those brought about by the cession of territory; but there was

also, for example, the succession of a number of States to one previous State, as had occurred on the division of British India. Nor did article VII distinguish between peaceful cession and cession resulting from war; the latter, if due to aggression, might be void of legal effect, but it could not be ignored. For those reasons he had come to the conclusion that the reference to transfer of territory was inadequate.

8. The phrase "The State... shall *confer* its nationality..." was also inadequate. In his view, the State should be compelled to *recognize* the persons concerned as its nationals.

9. His third objection was that article VII made it appear possible for persons opting to retain the nationality of the transferring State to remain in the transferred territory. But it would have been absurd had the inhabitants of Alsace-Lorraine had the possibility of remaining French in 1871 or of remaining German in 1919. It was obviously necessary, as international law had already recognized, that persons who retained their former nationality should leave the transferred territory.

10. Accordingly, he concluded that article VII was useless in its existing form, and should be thoroughly revised. Mr. Lauterpacht's suggestion was interesting, but was incomplete and too long.

11. Mr. SPIROPOULOS agreed with Mr. Scelle, and asked whether it was possible to legislate at all in the matter. Each case of transfer of territory was a special case, and he doubted whether it was either desirable to make general rules in advance, or possible to devise an acceptable formula. The issue was one on which many governments felt strongly, and the Commission must be careful in dealing with it if acceptance of the convention as a whole was not to be compromised. The Commission must see to it that the convention was acceptable at any rate to some governments, and was not rejected by all.

12. Mr. PAL, referring to paragraph 1 only of article VII, said that he shared Mr. Scelle's and Mr. Spiropoulos' difficulties. He, too, was concerned about the phrase "effectively opt" in Mr. Lauterpacht's amendment. The exercise of the option and the conferring of nationality were two different acts performed by two different entities — the individual and the State. When was the option to be regarded as becoming effective, and how much delay was to be allowed. Further, the possibility of option might frequently be unreal, particularly in the case of property owners; for if they retained the nationality of the transferring State but remained where they were they would become aliens, and their interests might be jeopardized by the property laws of the successor State. He asked therefore whether effective option implied effective remedies against loss of property. Care must be taken to ensure that any general rule did not harm the inhabitants of the transferred territory.

13. Faris Bey el-KHOURI agreed with Mr. Pal that it was difficult to establish a general rule. The problem with which the Commission was faced should normally be solved by means of treaties in which the detailed procedures necessary would be laid down; he thought therefore that the opening phrase of article VII should read somewhat as follows: "In the absence of conventional agreement...". The Treaty of Lausanne, which was concerned with the effects of the disintegration of the Ottoman Empire, was an example of such a treaty. Nevertheless, though the principles contained in that treaty were identical with the principles followed in paragraph 1 of article VII, in the result many persons had become stateless. Many subjects of the Ottoman Empire living abroad had not exercised their right of option; they had either remained Turkish subjects, a status which in general they did not acknowledge, or they had become stateless. Furthermore, a special arrangement had been necessary to take care of the tens of thousands of persons living in the Arab countries who had wished to retain their Turkish nationality.

14. Mr. HSU said that objections to the phrase which referred to the possibility of option for the retention of nationality could be met by modifying the latter part of Mr. Lauterpacht's amendment to read:

> "... shall confer their nationality on persons possessing the nationality attaching to such territory and choosing to remain in it, unless their nationality is otherwise provided for and accepted by those persons".

15. People could leave the transferred territory if they did not wish to become nationals of the new State.

16. Mr. PAL doubted whether article VII was a necessary part of the draft convention. Transfers of territory had been a source of statelessness in the past, but would probably not continue to be so. To his mind, article VII constituted an attempt to settle a conflict of nationalities rather than to eliminate a source of statelessness.

17. Mr. YEPES shared the doubts of other members about the scope of article VII as submitted by the Special Rapporteur; it should be redrafted. Article VII did not take all experience into account; in particular, it failed to provide for the case of States that were split up to form several new States. Cases of the kind had occurred in American history, as for instance in 1830, when Grand Colombia had split into three different States, Ecuador, Venezuela and present-day Colombia. A rule should be established which would cover situations of that kind.

18. Mr. KOZHEVNIKOV said that his first impressions made him, too, very doubtful about the need for article VII, and suggested that the solution provided did not correspond to the problem facing the Commission. He was sceptical of the value of the article because abstract and general provisions which failed to take into account the variety of practical situations could only lead to confusion. Experience showed that the problems raised by transfer of territories had been and could continue to be dealt with by treaties.

19. Mr. LAUTERPACHT said that, notwithstanding the attitude of previous speakers, he considered that the

draft convention ought to deal with the problem in as much detail as might be necessary. Although there were admittedly difficulties, it should not be beyond the Commission's capacity to solve the problem.

20. Existing international law provided no solution. He agreed that the matter should be dealt with primarily by treaty, as indeed it had been hitherto; the Minority Treaties of 1919, for example, had been concerned with conferring the nationality of the successor States on persons who would otherwise have been stateless.[1]

21. Mr. Scelle had objected to article VII on the ground that it might result in the removal from the transferred territory of persons opting to retain the nationality of the transferring State. However, it was a rule of international law that such optants would be required to leave the territory.

22. He reverted to the difficulty which he had described earlier. Article VII was concerned with what should happen to persons living in the territory ceded, or having a connexion with it. The former were adequately described by the word "inhabitants"; the latter were not. There were persons who would lose their nationality but who, for various reasons, would not acquire a new one.

23. The Commission had undertaken to draft a convention eliminating all sources of future statelessness. He urged members not to take the view that, because the subject matter of article VII was particularly difficult, it should be left on one side.

24. The CHAIRMAN, speaking as a member of the Commission, suggested that article VII, as drafted by the Special Rapporteur, be replaced by the following article:

> "Treaties governing territorial changes must include the provisions necessary to ensure that inhabitants of the territories affected do not become stateless."

25. Mr. SANDSTRÖM agreed with the Chairman that the Commission should formulate a general clause for article VII which would make it incumbent on States, in any treaties relating to territorial changes that they might conclude, to prevent statelessness arising. Additional rules might, however, be necessary, and a number of suggestions had been made in the Commission which would provide a useful basis for future discussions.

26. Mr. ALFARO said that there seemed to be general agreement on the substance of paragraph 1 of article VII as drafted by the Special Rapporteur. Some members of the Commission, however, were of the opinion that the draft convention should not concern itself with the problems of nationality in connexion with transfers of territory.

27. Mr. Scelle had opposed article VII on the ground that it would permit persons to retain their nationality and yet continue to live as aliens in the transferred territory, a procedure which would give rise to danger and difficulty. There were, however, cases in which States had in such circumstances recognized the right of persons to retain their former nationality, An example was provided by the arrangements made for the independence of Panama, according to which persons who had wished to retain Colombian nationality, had been free to do so. National criteria in the matter differed, and he thought that it would be more prudent for the Commission to avoid controversy. Its aim was to prevent statelessness, and the first paragraph might therefore be confined to a statement of the duty of the successor State to confer its nationality on the inhabitants of the transferred territory. For example, the article might read somewhat as follows:

> "The State to which territory is transferred or a new State formed on territory previously belonging to another State shall receive as nationals all persons who were nationals of the State which transferred the territory."

28. In his view, however, the Commission would be wise to follow the Chairman's advice and adopt a general article stipulating that States which were concluding treaties should settle the matter of nationality in any way that would prevent persons being rendered stateless.

29. Mr. SCELLE agreed with Mr. Lauterpacht that an article governing the nationality of persons in territories transferred from one State to another was necessary. He repeated, however, that in his view article VII was inadequate in its existing form. All eventualities should be covered: cession by treaty as well as formation of new States following the expressed will of the inhabitants. The Chairman's proposal was too vague. He (Mr. Scelle) felt that the Commission could not rely exclusively on treaties; there must be a definite rule, imposed on all governments. The convention should state that governments were obliged to take specific measures, and it should further specify exactly what measures were to be taken. It was not enough to allow governments to take what treaty action they liked.

30. Faris Bey el-KHOURI suggested that the first clause of article VII should read:

> "In the absence of a conventional agreement determining the nationality of the inhabitants of a territory to be transferred to another State or forming a new State..."

31. Mr. HSU agreed with Mr. Scelle that it was not safe to depend merely on treaties. The Commission should ensure that human beings were not treated as chattels, and that the inhabitants of transferred territories had the right to choose their future nationality.

32. Mr. CÓRDOVA (Special Rapporteur) said that the object was to abolish future statelessness entirely, or to the greatest possible extent. In his draft of article VII, he had followed the sense of the Montevideo Convention on Nationality of 26 December 1933 and of other treaties. He had intended the word "transfer" to

[1] See *Laws concerning nationality* (United Nations publication, Sales No. 1954.V.1), pp. 586-587.

include the absorption of an entire State in another State, the transfer of part of a State, the formation of a new State from several States, and the creation of a number of States from a single State. Perhaps the word "transfer" did not, in fact, cover all those meanings, but his object had been to make it clear that, whatever territorial change took place, a State should confer its nationality on the inhabitants of the territory attributed to it as a result of the change, and that the inhabitants should enjoy the possibility of option, as well as the possibility of physical removal to the territory of the State of which they had previously been nationals. To his mind, the mention of the possibility of option in article VII should not be construed as meaning that States were thereby relieved of their obligation to provide for requirements additional to the mere option itself: for example, for emigration and physical transfer.

33. Article VII, as drafted, did not refer to treaties because changes of sovereignty might result from other events — for example, rebellions — as well. States should not be at liberty to act as they pleased, causing statelessness and anarchy; the Commission's object must be to ensure that the freedom of action of the new government of the transferred territory was appropriately limited in that respect.

34. The two major causes of statelessness were persecution on grounds of race, religion or political opinion, and treaties drawn up in such a way that some persons were rendered stateless. He could not agree with Mr. Spiropoulos that the relevent international law was already adequate, and it was the Commission's function to develop international law where it was inadequate.

35. Mr. Scelle had objected to the use of the phrase "shall confer their nationality", but "confer" was the word customarily used.

36. What was to be understood by "effective option" in Mr. Lauterpacht's amendment? If the word "option" was used at all, its efficacy was necessarily implied, though the Commission could not prescribe in detail the procedure for making it so; that must remain the responsibility of the State concerned.

37. As Mr. Scelle had pointed out, the Chairman's amendment did not cover cession other than cession by treaty. Of course, a general rule that States should not take any action that might render persons stateless would cover the whole issue; nothing more would be required than a simple article such as:

> "No State shall legislate or make treaties in such a way as to cause statelessless."

But that would hardly be a convention: the Commission should suggest precise remedies for precise causes. In short, the object of article VII was to ensure that States conferred their nationality on the inhabitants of territories transferred to them; that those persons should have the right of option; and that the State from which the territory was transferred should provide that the inhabitants of the transferred territory would not lose its nationality unless and until they acquired the nationality of the State to which the territory was transferred, should they so opt.

38. Mr. SPIROPOULOS said that he had been charged with adopting a negative attitude to article VII; but it seemed to him that his attitude was no more negative than that of many of his colleagues. In any event, it was positive so far as the problem with which the Commission was faced was concerned.

39. The point at issue was not transfers of territory alone but all changes of territorial status. The financial consequences of such changes were provided for in international law, but there were no established rules relating to nationality in such cases. There was no customary international law on the matter, and article VII as drafted was derived from conventional law. In the field of debts, States were still free to take what decisions they deemed appropriate; but the convention would limit their freedom in respect of nationality, for States would be deprived of the possibility of making rules contrary to its provisions.

40. Referring to Mr. Hsu's plea that particular account should be taken of the interests of the human beings involved, he pointed out that the object of the convention was to eliminate future statelessness rather than to take into account purely humanitarian considerations. He agreed with Faris Bey el-Khouri, Mr. Alfaro, Mr. Sandström and others that the convention should provide for contingencies which were not otherwise covered by existing practice. In general, he was in favour, providing statelessness was in fact eradicated, of allowing States to choose whatever method of elimination they might deem appropriate. However, he might modify that view in the light of the way in which the discussion evolved.

41. Mr. ZOUREK said that article VII was intended to cover many different circumstances, such as the cession of territory, the division of territory, the absorption of a State within another State and so forth. It should not, however, cover cases in which transfer of territory was the result of aggression contrary to the Charter of the United Nations; and in that context he thought that the last phrase of paragraph 1 of article VII, "if the latter continues to exist", had many dangerous potentialities. In fact, it seemed to him that the great variety of international practice demonstrated the necessity for taking into account specific circumstances as they arose. He wondered, therefore, whether the Commission could commit States to adherence to detailed provisions. He felt that it could hardly do more than lay down in the draft convention certain guiding principles likely to induce States to take appropriate measures to eliminate or to avoid statelessness in the future.

42. Mr. LAUTERPACHT said that if Faris Bey el-Khouri intended the phrase "In the absence of a conventional agreement..." to mean "In the absence of treaty provisions sufficient for the purpose...", then he had no objection to it. States were always at liberty to find a better method than any suggested by the Commission if they could do so, and that also applied to

[2] *Ibid.*, p. 585.

the Chairman's suggestion that States be placed under an obligation to make effective provision in treaties to prevent statelessness arising. Nevertheless, the Commission was still bound to provide in the convention complementary rules to meet the possible inadequacy of treaties.

43. A formula derived from the final remarks of the Special Rapporteur would provide for all contingencies; article VII might then read:

> "Existing States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise, or unless they have or acquire another nationality."

44. There was still a doubt in his mind about the use of the word "inhabitants". Did the word refer to persons who were domiciled in the territory, or to persons who were resident in it? That was a matter which could, however, be clarified in the comment or in the Commission's report; it was not necessary to deal with it in article VII.

45. Faris Bey el-KHOURI then proposed that paragraph 1 of article VII be replaced by the following two paragraphs:

> "1. The nationality of the inhabitants of a detached territory to be transferred to another existing or newly created State shall be determined by treaty among the parties concerned. The principle of avoiding giving rise to statelessness shall be respected in the conclusion of such treaties."
>
> "2. In the absence of such treaties as are mentioned in the previous paragraph, the State to which a territory is transferred shall... [here follows the rest of the first paragraph of Article VII]

46. Mr. AMADO said that the crux of the whole question lay in the right of option. Under article 4 of the Montevideo Convention on Nationality of 26 December 1933 the inhabitants of a transferred territory could "expressly opt" to change their original nationality. Article 18 of the Harvard Draft of a Convention on Nationality, on the other hand, provided that they should become nationals of the successor State "unless in accordance with the law of the successor State they decline the nationality thereof".[3]

47. The Commission could not hope to foresee all the possibilities which might arise in practice. The considerations by which States might be affected in cases of transfers of territory were infinite in their variety and complexity. He was therefore in favour of a general provision such as that proposed by the Chairman, clearly stating that provision should be made to ensure that inhabitants of transferred territories did not become stateless, but leaving States free to arrange the matter in the way best suited to the circumstances of the particular case.

48. Mr. ALFARO felt that there was general agreement that the text must contain an article dealing with statelessness arising as a result of transfers of territory. There was also agreement that, as a general rule, the State to which any territory was transferred should confer its nationality on the territory's inhabitants. He was not so sure that there was general agreement on the principle that the inhabitants, individually or collectively, should have the right to opt to retain their former nationality, still less on the question whether that principle should be recognized in the text. With regard to the principle, he personally believed that each inhabitant should have the right of option.

49. The text proposed by the Chairman and supported by himself did not constitute a recommendation, as had been suggested, but a rule. If that rule was not complied with, the various measures provided for in the Charter of the United Nations would come into effect. Faris Bey el-Khouri's proposal was similar in purpose to the Chairman's, and he could accept it if it was generally preferred.

50. With regard to what would now be the second paragraph, he supported the first part of the amendment proposed by Mr. Lauterpacht, but preferred the wording used by Mr. Córdova in connexion with the right of option.

51. Mr. SCELLE felt that the question was becoming clearer. He agreed with Mr. Lauterpacht and Mr. Spiropoulos that the text proposed by the Special Rapporteur was, in the present instance as in many others, far too categorical and sweeping. A general statement such as that proposed by the Chairman, however, unexceptionable though it might be, would solve none of the problems which at present arose, and he could not vote for a draft which purported to settle the problem of statelessness arising as a result of transfers of territory in that way. The result would be anarchy, for whatever their desires in the matter, governments were subject to too many kinds of pressure before which they were powerless to take decisions freely. It was idle to argue that the Commission should leave governments free to make the necessary arrangements, for they were not free. Unless it wished to make quite clear that the Convention represented an ideal, at present impossible of fulfilment, the Commission could best help governments by stating precisely what should be done, thus not leaving them at the mercy of the pressures to which they were subject.

52. For that purpose, however, the text proposed by the Special Rapporteur was, as he had said, too categorical. Application, in every case, of the principle that the successor State should confer its nationality on the inhabitants of a transferred territory would sometimes work against the interests not only of the inhabitants in question but also of the successor State. If a colony, for example, were, on emancipation, under an obligation to confer its nationality on settlers who had until then

[3] Harvard Law School, *Research in International Law*, Special Supplement to the *American Journal of International Law*, vol. 23 (1929), p. 60.

possessed the nationality of the metropolitan State, it might jeopardize not only their interests but also its own existence as an independent nation. The question of the distinction between nationality and citizenship again arose in that connexion. It had previously been suggested that in certain circumstances States might confer nationality on certain persons without giving them full citizen rights; but cases might arise, and had arisen in the past, where a State found it convenient to confer citizen rights on all persons who inhabited its territory, without necessarily conferring its nationality on them all.

53. Mr. HSU felt that it was necessary to lay down some rules in the matter. The Commission could not leave everything to chance. It was seeking to eliminate statelessness because it was an evil, and it would be illogical to replace it by another evil. Statelessness arising as a result of transfers of territory could not be compared with statelessness arising at birth, for, although it was of little importance what nationality a child possessed provided that he possessed one, adults had an acquired outlook, an acquired tongue and acquired loyalties, all factors which could not be ignored.

54. Mr. YEPES agreed that there could be no doubt that a convention for the elimination of statelessness must contain an article dealing with cases of statelessness resulting from transfers of territory. He had also no doubt about the fact that in such an article the individual's right of option should be recognized. He did not agree, however, with those members of the Commission who had said that no customary law existed in that respect; for all treaties governing transfers of territory recognized, explicitly or implicitly, that in such circumstances no one should be forced to change his nationality against his will.

55. He agreed with those members who had stressed the fact that the Commission could not hope to cover all eventualities. The most that it could do was to lay down a general rule along the lines proposed by the Chairman or Faris Bey el-Khouri; he agreed with the latter that his second paragraph was also needed to cover cases where there were no treaties.

56. With reference to the example chosen by Mr. Scelle, he did not wish to enter into a discussion of the pros and cons of the colonial system, but would merely point out that the Commission should not approach an urgent problem of the present day with outmoded nineteenth-century concepts.

57. The CHAIRMAN said that it seemed that the majority of the Commission accepted the principle which underlay his proposal, as it also underlay the first paragraph of Faris Bey el-Khouri's. The question remained whether such a provision was sufficient, or whether, as Faris Bey el-Khouri proposed, it should be supplemented by a provision such as that contained in the text proposed by Mr. Córdova or in the amendment proposed by Mr. Lauterpacht.

58. If the Commission accepted the principle contained in his proposal and agreed that it should be supplemented by a second paragraph, he would suggest that the Drafting Committee be instructed to submit a text on which the Commission could vote.

59. Mr. SANDSTRÖM said that he had no objections to the procedure suggested by the Chairman, but would only call the Drafting Committee's attention to the fact that territorial changes need not necessarily occur as a result of treaty settlements.

60. Mr. CÓRDOVA pointed out that neither the text proposed by the Chairman nor that proposed by Faris Bey el-Khouri made it clear that the right of inhabitants of a transferred territory to opt to retain their previous nationality should be safeguarded in any treaties governing the transfer of the territory as well as in cases where there was no treaty. He hoped that the Drafting Committee would bear in mind the desirability of making that point quite clear.

61. Mr. HSU expressed his entire agreement with what Mr. Córdova had just said.

62. The CHAIRMAN said that the Drafting Committee might, of course, find it necessary to submit alternative texts, but it was always preferable to vote on definite texts rather than on questions of principle, which might be interpreted differently.

63. Mr. LAUTERPACHT said that, although he agreed that the inhabitants of a transferred territory should have the right to opt to retain their previous nationality, the convention which the Commission was drafting was concerned solely with the elimination of statelessness. The Commission was not entitled to introduce the right of option through the back door.

64. Mr. SCELLE agreed.

65. The Chairman appeared to equate his own proposal and the first paragraph of Faris Bey el-Khouri's, but the two were quite distinct. He (Mr. Scelle) could accept the latter, but could not accept the former, which seemed to disregard cases where no treaties were concluded.

66. Mr. YEPES said that, on reflection, he agreed with Mr. Scelle that the Chairman's proposal differed substantially from the first paragraph of Faris Bey el-Khouri's, but that he could agree to the procedure which the Chairman had suggested.

67. Mr. AMADO also agreed with the views expressed by Mr. Lauterpacht. It would be unfortunate if the Commission were diverted from its main aim, the elimination of statelessness, by disagreement as to whether or not to give recognition in the text to the right of option. The difficulty was one which could easily be solved by voting — for example, on the addition to the text proposed by the Chairman of the words "taking into account such inhabitants' right to opt to retain their previous nationality".

After further discussion the Chairman's suggestion was adopted that the Drafting Committee be instructed to submit a text or texts embodying, first, the principle contained in his proposal and the first paragraph of Faris

Bey el-Khouri's and secondly, the principle contained in the text proposed by Mr. Córdova and the amendment proposed by Mr. Lauterpacht.

Nationality of married women
(resumed from the 215th meeting)

68. The CHAIRMAN recalled that at the previous meeting the Commission had agreed to defer decision on the letter which the Chairman of the Commission on the Status of Women had sent to the Special Rapporteur. He felt it was useful that the Commission's attention should have been drawn to an alternative method of eliminating statelessness arising as a consequence of change in marital status, but considered that adoption of that method would entail a highly unusual and unacceptable procedure. It was proposed that reference should be made in the draft conventions on the elimination and reduction of future statelessness to another convention which had not yet been signed, and to achieve the purpose which the Commission on the Status of Women had in mind it would be necessary that that latter convention be ratified by *all* States. An additional article would therefore have to be inserted in the draft conventions on the elimination and reduction of future statelessness, regulating the position during the transitional period. He submitted that it was impossible to legislate in that way, but suggested that the wishes of the Commission on the Status of Women could be met to some extent by referring, in the comment, to the efforts which were at present being made by that Commission to eliminate statelessness as a consequence of change in marital status by means other than those which the International Law Commission envisaged, and by pointing out that, if those efforts were successful, two alternative ways of eliminating such statelessness would exist.

The Chairman's suggestion was adopted.

Preamble

69. The CHAIRMAN invited the Commission to consider the preamble to the draft convention on the elimination of future statelessness, recalling that it had previously decided to defer consideration of it until it had completed consideration of the various articles.

70. Mr. CÓRDOVA said that he wished to withdraw the text proposed for the preamble in document A/CN.4/64 in favour of the following, which was based mainly on suggestions by Mr. Lauterpacht:

"*Whereas* the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality";

"*Whereas* the Economic and Social Council has recognized that the problem of stateless persons demands 'the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality';

"*Whereas* statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man;

"*Whereas* statelessness is frequently productive of friction between States;

"*Whereas* statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law;

"*Whereas* the practice of many States has increasingly tended to the progressive elimination of statelessness;

"*Whereas* no vital interests of States are opposed to the total elimination of statelessness;

"*Whereas* it is desirable, by international agreement, to render legally impossible situations which give rise to statelessness;

"*The Contracting Parties*

"*Hereby agree as follows*:"

71. Mr. AMADO and Mr. KOZHEVNIKOV requested that consideration of the preamble be deferred to enable members of the Commission to consider the new text presented by the Special Rapporteur.

72. Mr. SANDSTRÖM proposed that consideration of the preamble be deferred until the Commission had considered the draft Convention on the Reduction of Future Statelessness, since he could not vote for the draft Convention on the Elimination of Future Statelessness except on the understanding that it represented an ideal.

73. Mr. LAUTERPACHT and Mr. CÓRDOVA saw no need for deferring consideration of the preamble to the first draft convention until the Commission had considered the second, since the same considerations did not all apply to the preambles to the two conventions.

Mr. Sandström's proposal was rejected by 6 votes to 5, with 3 abstentions.

The meeting rose at 1 p.m.

217th MEETING

Thursday, 16 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

* The number within brackets corresponds to the article number in the Commission's report.

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

1. The CHAIRMAN announced that the Drafting Committee had prepared revised texts of articles V, VI, VII, VIII and IX of the draft Convention on the Elimination of Future Statelessness. Since those texts had only just been received, he suggested that consideration of them should be deferred till the following day, together with further consideration of the preamble to the Convention, which, he recalled, it had been agreed to postpone until consideration of the articles had been completed.

It was so agreed.

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS

Article I [1]

2. The CHAIRMAN drew attention to the draft Convention on the Reduction of Future Statelessness, article I of which read as follows:

> "If a person does not acquire any nationality at birth, either *jure soli* or *jure sanquinis,* he shall subsequently acquire the nationality of the State in whose territory he was born, provided that:
>
> "(*a*) He continues to reside in such State until the time when he reaches military age; or
>
> "(*b*) He opts for the nationality of the State where he was born on reaching military age; or
>
> "(*c*) He serves in the armed forces of the State in whose territory he was born."

That text did not appear to be applicable to women, who could fulfil none of the conditions which had to be fulfilled before the grant of nationality.

3. Mr. CÓRDOVA (Special Rapporteur) agreed that the text would have to be modified to cover women.

4. He recalled that he had been instructed by the Commission to examine the various criteria which might be required to establish the necessary link between the child who acquired no nationality at birth and the State whose nationality it was proposed it should receive. As he pointed out in his comment, the number of such criteria was infinite. Since the aim of the convention was the reduction of statelessness, he had selected only three criteria, one of which would be sufficient in each individual case. All three were based on the principle that the determining factor in such cases should be the individual's will, and in particular his will as regards one of the most important forms of service which could be rendered to the State, namely military service. If, on reaching military age, a stateless person opted for the nationality of the State where he was born, he was thereby expressly declaring his willingness to perform military service for that State, and it seemed perfectly reasonable that he should receive its nationality. Similarly, a person born stateless who continued to reside in the State where he was born during the most formative years of his life until the time when he reached military age could also be regarded as having a sufficiently strong link with it. Finally, service in the armed forces of a State was generally recognized to constitute a link of the same type; thus, during the second World War, the United States of America had enacted legislation under which all stateless persons serving in the United States armed forces could claim United States nationality.

5. The CHAIRMAN pointed out that it would be simple to cover the case of women by replacing the words "until the time when he reaches military age" by some such words as "for as long as the laws of such State shall require".

6. Mr. YEPES suggested that the same idea could be conveyed more simply by saying "until he reaches majority". He asked, however, what was meant by the word "reside", which in Colombia at any rate would require personal and continuous presence.

7. Mr. CÓRDOVA said that it was certainly not his intention to refuse nationality to stateless persons who had travelled abroad, provided they continued to be domiciled in the State where they were born.

8. Mr. ALFARO said that the text proposed by the Special Rapporteur invaded the province of municipal legislation and might not be applicable to individual States. Some States, for example, had no armed forces. He proposed, first, that the word "subsequently" should be deleted, and, secondly, that the three provisos proposed by the Special Rapporteur should be replaced by a more general clause, reading as follows:

> "On attaining majority he complies or has complied with any such conditions as are required to retain nationality by the law of the State in whose territory the birth took place."

9. Mr. SANDSTRÖM asked whether the Special Rapporteur did not agree that a stateless person should have the right to refuse the nationality of the State where he was born even if he continued to reside there until he had reached a certain age or even if he served in its armed forces. He also wondered whether the Special Rapporteur was not attaching excessive importance to the factor of the individual's will in placing an obligation on the State to grant its nationality to a stateless person born on its territory when he reached military age, subject only to his opting for that nationality. He did

not think it was legitimate to place that obligation on the State with regard, for example, to persons who went abroad.

10. Mr. CÓRDOVA said that in his view it was undesirable to give people a nationality and then to deprive them of it if certain conditions were not fulfilled; that would be creating statelessness, not reducing it. It was infinitely preferable to wait until such time as there was a definite link between such persons and the State and then to give them nationality unconditionally.

11. He did not agree with Mr. Sandström that there was any need to provide for the right of option in cases where a person resided in the State where he was born until he reached a certain age or where he served in its armed forces. With regard to the former case, he need only point out that an individual who acquired his nationality *jure soli* had no such right of option. With regard to the latter, he thought that the fact that a person enlisted in a State's armed forces was sufficient proof in itself that he chose to assert or confirm the link between that State and himself. Conversely, a person who, on reaching military age, opted for the nationality of the State where he had been born, thereby expressly declared his willingness to serve in its armed forces and should receive its nationality, even if he was no longer living in its territory.

12. Mr. LAUTERPACHT agreed that the text proposed by the Special Rapporteur placed undue emphasis on military age and military service. All reference to military age, and possibly to military service, should be omitted, and the Chairman's point that the present text did not cover women would then be met. Mr. Yepes' objection to the word "reside" could be met by referring to "habitual residence". It would also be necessary to make clear that the article did not apply in cases where another nationality had been acquired since birth. He also suggested that it was not asking too much of any person who desired to acquire a certain nationality that he should perform the formality of making a declaration to that effect. He agreed with Mr. Sandström that sub-paragraph (*b*), as proposed by the Special Rapporteur, placed an unreasonable obligation on States. He agreed with Mr. Alfaro that the whole article "invaded the province of municipal legislation". He did not, however, regard that objection as decisive. The Commission was at present engaged not in a task of codifying the municipal law of States, but of formulating a rule of international law. That, if it meant anything at all, would require, in many cases, changes in the municipal law of States.

13. Mr. LIANG (Secretary to the Commission) pointed out that the Commission must decide whether, for the purposes of article I, nationality should be acquired at birth subject to the fulfilment of certain subsequent conditions, or whether it should not be acquired until those conditions had been fulfilled.

14. He noted that the three conditions mentioned by the Special Rapporteur had been taken from the resolutions adopted by the Institute of International Law at Venice in 1896 and the report adopted by the International Law Association in 1924. Although those texts had been intended to resolve cases of dual nationality, they were relevant to the question of what constituted a sufficient link between the individual and the State whose nationality he was to receive, and the Special Rapporteur's proposals in that respect seemed perfectly acceptable, except insofar as they seemed to confer undue importance on the question of military age. There might, however, be other conditions which should be fulfilled before the grant of nationality; Mr. Lauterpacht had already pointed out that the person concerned should not have acquired another nationality, nor, it might be thought, should he have held public office in another State.

15. Mr. SCELLE said he could not accept Mr. Córdova's view that a convention designed to reduce statelessness should keep people without the protection of a nationality during the very years when they might stand most in need of it. In his view it was essential that nationality should be granted from birth.

16. He agreed that the Special Rapporteur had placed undue emphasis on military age and military service.

17. Mr. CÓRDOVA said that, speaking personally, he was in complete agreement with Mr. Scelle. If, however, article I were recast along the lines favoured by Mr. Scelle it would be indistinguishable from article I of the draft Convention on the Elimination of Future Statelessness. As Special Rapporteur he had been instructed to prepare, in addition to that convention, a convention designed to reduce statelessness without necessarily eliminating it altogether. For that purpose he considered it preferable to provide that nationality should not be acquired until the link between the State and the individual was evident, instead of conferring it at birth with the possibility of its being forfeited later. The text which he proposed would represent a considerable improvement on the present situation. It would certainly never result in creating statelessness, as would a text prepared on the alternative lines proposed.

18. Mr. SCELLE said that he did not see how a text which provided for the acquisition of nationality at birth but made its retention, once majority was attained, subject to certain conditions could "create" cases of statelessness; surely, no one would reject the nationality of the State where he was born if he had no prospect of acquiring another. He had opposed the draft Convention on the Elimination of Future Statelessness because it was too categorical and too sweeping. The text proposed by the Special Rapporteur for article I of the convention at present under consideration, however, was even worse; it would, in effect, increase the number of stateless.

19. Mr. ALFARO said he had gladly subscribed to the principles underlying the draft Convention on the Elimination of Future Statelessness but realized that many States would be unable to accept so radical a text. It was for that reason that the Commission was also drafting a convention which would be acceptable to a

larger number of States but would have the effect of reducing statelessness as much as possible. He agreed with Mr. Scelle that it was preferable to allow an individual to repudiate, by the act of his own free will, the nationality he had acquired under the convention rather than keep him without nationality during the years when he needed its protection most. Persons who did not acquire any nationality at birth, either *jure soli* or *jure sanguinis*, should automatically acquire the nationality of the State where they were born and should retain such nationality until they came of age; then, depending on whether they had identified themselves with the State whose nationality they possessed or with another, they should be free to confirm or renounce that nationality under the same conditions as the other nationals of that State. The Commission was primarily concerned with statelessness resulting not from the free choice of individuals, but from conflicting nationality laws.

20. Mr. SANDSTRÖM pointed out that the aim of the convention — and, in his view, the only realistic aim — was to reduce statelessness as much as possible. Its provisions might well be based on those of recent laws enacted by States which were making a serious attempt to achieve the same aim. For example, in 1950 the Scandinavian countries had enacted a new law on nationality,[1] and he wished to propose that article I be replaced by the following text, which was based on that new law:

> "If a person does not acquire any nationality at birth, he shall, when attaining the age of majority, have the right to acquire, by option, the nationality of the State in whose territory he was born, provided that since his birth he has had his habitual residence in that State."

21. Mr. YEPES said that the purpose of the article under discussion must be to achieve the greatest possible reduction in the number of cases of statelessness arising as a result of failure to acquire nationality at birth, either *jure soli* or *jure sanguinis*. The text proposed by the Special Rapporteur went too far in one respect and not far enough in another. He therefore proposed, first, the deletion of the word "subsequently", and secondly, the replacement of sub-paragraphs (*a*), (*b*) and (*c*) by the following text:

> "1. He has resided in the country for a continuous period of at least five years before attaining his majority; or
>
> "2. His parents were domiciled in the country at the time of his birth; or
>
> "3. On attaining his majority under the law of the country of birth, he opts for the nationality of that State in accordance with its legislation."

His proposal would make the residence qualifications for stateless persons the same as those normally required of persons seeking naturalization and not more severe, as would be the case with the text proposed by the Special Rapporteur. The provision that nationality should be granted to a stateless person whose parents had been domiciled in the country at the time of his birth was taken from Colombian law.

22. Mr. PAL appreciated the merits of the Special Rapporteur's text, which appeared to be based on the principle that a child, which was dependent on its parents, should share their condition. He was, however, inclined to agree with Mr. Alfaro that it would be preferable to delete the word "subsequently" and thus give the child a nationality from birth, while leaving him free to renounce that nationality, if he wished, on attaining majority.

23. His only comment on the text proposed by Mr. Alfaro was that it seemed desirable to distinguish between cases where the parents were habitual residents and cases where they were only casual visitors.

24. Mr. HSU did not think there was any fundamental disagreement within the Commission. The text proposed by the Special Rapporteur might not necessarily lead to an increase in statelessness, but it would not substantially reduce it; even the Special Rapporteur himself, however, did not favour that text, but preferred article I of the draft Convention on the Elimination of Future Statelessness. Mr. Alfaro's proposal was also a proposal for the "elimination" of statelessness, provided that word was not interpreted too strictly; and in his (Mr. Hsu's) view, it should not be interpreted too strictly, if the purpose of eliminating statelessness was borne in mind, for there was no need for the Commission to concern itself with cases where an individual who was entitled to a nationality refused or renounced it. Along the same lines Faris Bey el-Khouri had pointed out at the previous meeting that it was a much more serious matter to impose a nationality on an adult than on a child. If that view were adopted, Mr. Alfaro's proposal was all that was required, and the Commission could consider submitting a single convention instead of two.

25. Mr. LAUTERPACHT proposed that article I be worded as follows:

> "Whenever a person does not acquire any nationality at birth he shall, on attaining majority, acquire on application the nationality of the State in whose territory he is born provided that he has no other nationality and he has resided habitually in that State since birth or has resided permanently in that State for seven years immediately preceding his application."

He was aware that that text would leave such a person stateless until he attained his majority. It was designed, however, to meet the needs of those States which felt they could not accept the draft Convention on the Elimination of Future Statelessness; if any of them was prepared to confer nationality on such a person at birth, there was no reason why it should not accept the more radical convention.

[1] See *Laws concerning nationality* (United Nations publication, Sales No.: 1954.V.1), pp. 121, 352 and 439.

26. Mr. Sandström had referred to the efforts which were being made by a number of States to reduce statelessness arising at birth; those efforts related particularly to cases such as were dealt with in the Special Rapporteur's article V. Mr. Córdova, however, had not dealt with the case of children born of stateless parents who had been born in the State where he was born — in that connexion he had in mind legislation enacted by the Netherlands — or had resided there for a considerable period. He therefore proposed that an additional article be inserted after article I, reading as follows:

"If a person born of stateless parents does not acquire any nationality at birth he shall acquire the nationality of the State where he is born if:

"(*a*) His stateless father or mother was born in that State, or

"(*b*) His stateless father or mother has resided in that State for ten years."

27. Mr. YEPES remarked that the latter point was covered by sub-paragraph 2 of his amendment, although he made the criterion domicile instead of ten years' residence.

28. Mr. LAUTERPACHT said that he would have no objection to domicile being taken as the criterion.

29. Mr. CÓRDOVA said the Commission had reached the point at which, in its desire to retain the right of option, it seemed willing to sanction statelessness. The Commission's point of view at the previous session had been perfectly clear, that "if a child acquires no nationality at birth, it shall subsequently acquire the nationality of the State to which it is specifically identified by criteria to be defined and dealt with by the Special Rapporteur in his next report."[2] If the aim was the reduction, and not the elimination of statelessness, that approach seemed perfectly sound, whereas that proposed by Mr. Alfaro would actually lead to an increase in the numbers of stateless.

30. Mr. ALFARO observed that, not only in the text which he proposed but also in that proposed by the Special Rapporteur, the individual could, on attaining majority, refuse the nationality of the State where he was born; in that respect, therefore, the one was not more likely to give rise to statelessness than the other. The difference between them was that Mr. Córdova's proposal would keep large numbers of people stateless for twenty-one years.

31. Mr. SANDSTRÖM pointed out that the right of option was, properly speaking, a concession granted to individuals born in *jus sanguinis* countries. In *jus soli* countries the question did not arise.

32. The text proposed by Mr. Lauterpacht for article I was unnecessarily complicated; on the other hand, his proposal for an additional article was of great interest, although that article, and the Special Rapporteur's article V, should logically precede article I since they dealt with the acquisition of a nationality at birth.

33. The CHAIRMAN said that the Convention on the Elimination of Future Statelessness would impose heavy obligations on the parties to it and might therefore be unacceptable to many States. The Special Rapporteur had accordingly been asked to prepare a second convention, to be entitled "Convention on Reduction of Future Statelessness", acceptance of which would involve States in less onerous obligations. The Commission was now discussing the second convention; yet in the course of their discussion members of the Commission were tending to make the provisions of the second convention such that in the result the two conventions would be substantially alike.

34. The object of article I was to reduce the likelihood of a child being stateless. Countries applying the principle of *jus sanguinis* were unlikely to accept a convention which applied the *jus soli* in the case of otherwise stateless children. Article I had been proposed in an effort to overcome that difficulty, but the amendments put forward were such that few countries applying *jus sanguinis* would be willing to accept a convention containing them; indeed, there was no reason to suppose that a State which found unacceptable the principles applied in article I of the first convention would take any different view of article I of the second if those amendments were adopted. The purpose of the second convention was, surely, to take the matter of nationality law a step forward while keeping within the limits of likely acceptability. If that were so, the Commission should not seek to insert in the second convention obligations which many States would find it difficult to accept; in particular, a rigid article ensuring children the certainty of nationality at birth would be firmly opposed.

35. Mr. SCELLE said the Convention on Elimination of Future Statelessness was one in which concessions to expediency were not in point. It was, as it were, an expression of revealed truth and reminded him of the Ten Commandments. To that extent it was illusory and unreal because States would be unwilling to adopt it. It was for that reason that the Commission had embarked on the drafting of the Convention on Reduction of Future Statelessness.

36. In article I, it had been felt necessary to ensure the existence of a link between the individual and the State; that link in the case of States applying *jus sanquinis* was primarily long residence. The Special Rapporteur's presentation of the matter was, however, somewhat unreal. The time object was not so much to prevent statelessness as to ensure that statelessness would not have consequences detrimental to the interests of the individual concerned; if an individual wished to remain stateless there was no reason to prevent him from doing so. Yet article I as drafted envisaged the withdrawal or the non-acquisition of nationality as a consequence of acts of the individual rather than of the State.

37. The requirement in article I that a stateless person

[2] *Yearbook of the International Law Commission, 1952*, vol. I, 162nd meeting, para. 34.

might acquire the nationality of the State in whose territory he was born provided he served in its armed forces should not be worded as if it were a condition precedent to the acquisition of such nationality. On the contrary, military service was a normal obligation on the nationals of any State; that an ex-stateless person should perform military service meant only that he was in the same situation of conformity to the law as all other nationals.

38. Mr. YEPES said that the Chairman's remarks concerning the possible uselessness of the Convention on Elimination of Future Statelessness were a grave warning on which the Commission should reflect; for if that convention were useless it should not be submitted for consideration by the General Assembly. The Commission was likely to be severely criticized if it submitted such a convention against the weighty advice to which its members had just listened.

39. Mr. SPIROPOULOS said that, to the best of his recollection, the request for the preparation of a Convention on the Elimination of Statelessness had come from the Economic and Social Council. He supposed therefore that the Commission would submit the text to the Economic and Social Council; it would be unwise to present the text to a body which had not asked for it.

40. The CHAIRMAN said he thought that the text would be submitted direct to the General Assembly.

41. Mr. LIANG (Secretary to the Commission) said it was clear from the Commission's terms of reference that the final draft of the convention would be submitted to the General Assembly; the Commission was not, according to its constitution, merely a body of advisers to the Economic and Social Council.

42. Mr. SPIROPOULOS said that, if the final text was to be submitted to the General Assembly, then a preliminary text ought to be submitted previously to governments. That would, however, be a lengthy procedure. In any event, he disagreed with Mr. Yepes that the Commission should not submit a draft convention to the General Assembly merely because it was thought that it might be useless. The Economic and Social Council had asked for a draft convention designed to eliminate statelessness; the consideration that some or even a number of governments might be expected not to accept the convention was irrelevant.

43. The CHAIRMAN said that further discussion of the procedural point should be deferred. He would ask the Secretariat to study the matter.

44. Mr. KOZHEVNIKOV said that, throughout the discussion on article I of the Convention on the Reduction of Future Statelessness, the Commission had been faced with the relationship between that convention and the Convention on the Elimination of Future Statelessness. He wondered whether the Commission was acting correctly in discussing the Convention on the Reduction of Future Statelessness before putting the first convention in final form. He suggested that it would be clearer, quicker and more logical to dispose of the Convention on Elimination of Future Statelessness first. Once that was done, the Commission might be able to decide whether there was any need for a second convention; or it might come to the conclusion that it would be possible to combine the two conventions. At first sight, therefore, it would seem that discussion on the draft Convention on Reduction of Future Statelessness should be postponed.

45. The CHAIRMAN said that Mr. Kozhevnikov was logically correct. But at the opening of the meeting, the Commission had not yet received the text of the articles of the draft Convention on Elimination of Future Statelessness prepared by the Drafting Committee. He had thought, therefore, that it would save time if they began by discussing the draft Convention on Reduction of Future Statelessness. He hoped that Mr. Kozhevnikov would be satisfied if the Commission reverted to the draft Convention on Elimination of Future Statelessness the following day, but continued its discussion of article I of the Draft Convention on Reduction of Future Statelessness for the remainder of the present meeting.

46. Faris Bey el-KHOURI said that the effect of Mr. Sandström's amendment would be that a person born stateless would remain stateless until he achieved his majority. It was therefore very similar to the amendment proposed by Mr. Lauterpacht. He (Faris Bey el-Khouri) accordingly proposed a further text to read:

> "If a person does not acquire any nationality at birth he shall acquire at birth the nationality of the State in whose territory he was born and he remains a national of that State unless he opts, within one year after attaining majority, for another nationality which he may have acquired, or unless he is revoked by the government of the State on the grounds of failing to comply with/fulfil the requirements of/its municipal laws for retaining nationality."

47. The CHAIRMAN, speaking in his personal capacity, said that it seemed to him that Faris Bey el-Khouri was proceeding on a false assumption. The object of the convention under discussion was not the elimination but the reduction of future statelessness.

48. Mr. SANDSTRÖM said that there was only a slight difference of drafting between his amendment and Mr. Lauterpacht's. In the event of a vote being taken, he would withdraw his amendment.

49. Mr. ALFARO was prepared to withdraw his amendment in favour of Mr. Yepes'.

50. Mr. AMADO's first impression of the amendments under consideration was that he approved the omission of the word "subsequently"; a stateless person should acquire immediately on birth the nationality of the State in whose territory he was born. For that reason he favoured the amendments proposed by Mr. Alfaro, Mr. Lauterpacht and Mr. Sandström. Indeed, they were conceived along the same lines as existing Brazilian law. He pointed out further that there was no substantial difference between Mr. Lauterpacht's and Mr. Sand-

ström's amendment. He disagreed with Mr. Yepes' amendment.

51. Mr. LAUTERPACHT said there was only one small difference of substance between his amendment and that proposed by Mr. Sandström: his (Mr. Lauterpacht's) amendment contained the phrase "provided that he has no other nationality". It seemed to him more convenient therefore to treat Mr. Sandström's amendment as the only one before the Commission.

52. Mr. CÓRDOVA said that the amendments proposed by Mr. Lauterpacht and Mr. Sandström included only one condition, habitual residence, compliance with which would ensure that a stateless person could acquire the nationality of the State in whose territory he was born. He wondered whether additional conditions might not be inserted.

53. Mr. LAUTERPACHT said that the condition mentioned in his amendment was intended to be a minimum. The fact that other conditions were not specifically mentioned was not intended to imply that States might not establish any other conditions they considered desirable; such a condition might for example be military service.

54. Mr. YEPES said the proposal in his amendment to omit the word "subsequently" from article I, ensuring thereby the immediate acquisition of a nationality on birth, was supported by Mr. Alfaro, Mr. Amado, Mr. Scelle and others. He suggested that the Commission should first agree on the deletion of that word from article I and discuss the remainder of the article later.

55. Mr. KOZHEVNIKOV, referring to the texts proposed by Mr. Lauterpacht and Mr. Sandström, asked whether it was their intention that the State should be compelled, on the conditions mentioned therein, to confer its nationality on stateless persons, or only to give stateless persons the right of application.

56. He also asked what sort of residence was in the minds of Mr. Lauterpacht and Mr. Sandström when they referred to "habitual residence". Did they mean domicile or something less?; was it to be permanent and constant residence or not?

57. Mr. SANDSTRÖM said that his amendment was intended to confer on a stateless person the right to become a national of the State in whose territory he was born. The State would be under an obligation to confer its nationality on him at his request. The difference in Anglo-Saxon law between domicile and residence had been much discussed. He hoped that the use of the phrase "habitual residence" in his amendment would not provide an occasion for further discussion and that the Commission would neglect such fine points of interpretation for the time being.

58. Mr. AMADO agreed with those members who felt that the words "subsequently" should be omitted. He was in favour of an amendment along the lines of those submitted by Mr. Lauterpacht and Mr. Sandström.

59. Mr. LAUTERPACHT said he put the same interpretation as Mr. Sandström on his amendment.

60. Mr. YEPES again suggested that the Commission should vote for the deletion or retention of the word "subsequently" in article I.

61. The matter of "habitual residence" should be handled cautiously, for if the phrase implied domicile there would be difficulty in the case of minors who lived in a country other than that in which their parents lived. Furthermore, there was a distinction, normally made in Colombian law, between material or *de facto* residence and legal residence.

62. Mr. ZOUREK contrasted Mr. Yepes' amendment on the one hand with the amendments of Mr. Lauterpacht and Mr. Sandström on the other. The former was inspired by the concept that the nationality of the State in whose territory a child was born should be conferred on the child if he did not acquire another nationality; it might be conferred at birth or later on specific conditions. Mr. Yepes' amendment was thus prompted by the *jus soli*.

63. But the difficulties with which the Commission was faced arose primarily in States applying the *jus sanguinis*, and it was evident therefore that in drafting the text care must be taken to see that it would be acceptable to those States. The amendments of Mr. Lauterpacht and Mr. Sandström were inspired by principles that appeared to be fair and consequently acceptable. They laboured, however, under the disadvantage that they left the initiative in the hands of the individual and did not require him to prove the solidity of his link with the State, which was, however, as it were, the trustee of the interests of the national collectivity. Comparing that procedure with procedures leading to naturalization, he pointed out that when States naturalized individual applicants they demanded compliance with certain conditions which would ensure that a successful applicant was likely to become a good citizen, whereas in the amendments it was proposed that States should depend on a mere formality — the place of birth and the fact of residence. He felt bound to draw attention to that difficulty, as it was likely to make an otherwise just article unacceptable to many States.

64. Mr. KOZHEVNIKOV again drew attention to the mandatory nature of the amendments proposed by Mr. Lauterpacht and Mr. Sandström. In the latter it was stated that a person should "have the right to acquire, by option, ...", while the former said that a person should "acquire on application ...". It seemed therefore that in substance both texts had an imperative sense, namely, first, that option was a right of the individual, and secondly, that the individual's wishes should be automatically accepted. He asked whether the Commission was expected to vote on a text bearing that imperative sense or whether the text, particularly of Mr. Lauterpacht's amendment, meant that the only right conferred on a stateless person was that of making application.

65. Mr. LIANG (Secretary to the Commission) read out a further amendment which resulted from an agreed combination of the amendments proposed by Mr. Lauterpacht and Mr. Sandström:

> "If a person has not acquired any nationality at birth or subsequently, he shall, after having attained the age of majority, have the right to acquire, by option, the nationality of the State in whose territory he was born, provided that since his birth he has had his habitual residence in that State."

66. Mr. YEPES had serious objections to that combined text. Referring to the clause reading "... he shall, after having attained the age of majority...", he observed that the exact time when the person would be able to exercise the right of option was left unspecified. Further, the age of majority was itself variable and therefore an unsatisfactory criterion.

67. Mr. KOZHEVNIKOV repeated that it was still not clear to him whether persons were to have the right to acquire a nationality by option or whether they were merely to have the right to apply.

68. Mr. LAUTERPACHT said that according to the combined amendment the individual would have the right to demand nationality and the State would be under the obligation to grant it.

69. It would be difficult to give a precise definition of the term "habitual residence" to which objections had been raised. It was however a customary term in various legal systems and had been interpreted by international tribunals. He supposed that the courts of the different States applying the convention would interpret the term "habitual residence" in accordance with their national law.

70. The combined amendment required a person to have had his habitual residence, between his birth and his attainment of the age of majority, in a particular State if he were to acquire the nationality of that State. That went further than the terms of Mr. Yepes' amendment, according to which a person would be entitled to take the nationality of the country in which he had been born after five years' residence in it. He felt that five years' residence was too short for the purpose which the Commission had in mind; but if Mr. Yepes were prepared, supposing the Commission had adopted the combined amendment, then to propose that ten years' residence should be regarded as evidence of habitual residence for the purposes of article I, he (Mr. Lauterpacht) would be prepared to support that proposal.

71. Mr. YEPES said he accepted ten years rather than five years as the period of required residence before a person born in a country might acquire its nationality. His previous objection to the combined draft however still stood. At what time "after having attained the age of majority" would a person be entitled to acquire the nationality of his country of birth?

72. Mr. LAUTERPACHT replied that he would be entitled to acquire that nationality at any time after attaining the age of majority.

73. Mr. SANDSTRÖM agreed with Mr. Lauterpacht. He only wished to add that, in his view, an individual who had resided for thirty years in his country of birth had an even greater right to acquire its nationality than a person who had resided for a shorter period.

74. Mr. YEPES could accept the joint amendment of Mr. Lauterpacht and Mr. Sandström only if his proposal for the deletion of the word "subsequently" from article I were adopted. He urged that the Commission should immediately take a vote on the deletion or retention of that word; that was a basic issue. He did not accept the joint amendment *in toto* as it left vague the time at which a person would have the right to acquire the nationality of the State in whose territory he was born. To leave that point uncertain was incorrect from every point of view.

75. Mr. CÓRDOVA pointed out that it was not the sense of the joint amendment that nationality should be acquired by a stateless person at birth, coupled with conditions for its subsequent retention. The amendment in fact provided for an actual residence of perhaps twenty or twenty-five years — the period between birth and the age of majority — before the right to nationality was acquired. That was in contrast to Mr. Yepes' amendment according to which residence for five years — subsequently altered in the course of the discussion to ten years — would be long enough to confer a right to the nationality of the State concerned. The requirement of naturalization laws was normally only five years' residence. There was now a suggestion that ten years' residence would be required of stateless persons before they could acquire such nationality; and Mr. Lauterpacht and Mr. Sandström went even further in their amendment. In his view, however, the Commission should treat the stateless persons more generously than normal aliens applying for naturalization.

76. Mr. LAUTERPACHT said that the difference between stateless persons and normal aliens was that the convention proposed to give stateless persons the right to acquire nationality, not merely the right to apply for it.

77. Mr. SCELLE said that the Commission appeared to be playing a complicated game of hide and seek. Mr. Alfaro and Mr. Yepes had suggested, with some support, the deletion of the word "subsequently" in article I in order that a stateless person might have at any rate a temporary nationality from birth. The discussion had taken the form of a conjuring trick and something quite different had now appeared, namely, support for a proposal that stateless persons could only acquire the nationality of the State in which they were born, after varying periods of residence.

78. Mr. YEPES pointed out that he had not withdrawn his amendment providing for the acquisition of nationality at birth, and said that if the purpose was to achieve a real decrease in the number of stateless persons, the Commission should be willing to omit the word "subsequently".

79. Mr. LAUTERPACHT said that if Mr. Scelle and Mr. Yepes really wished to suggest that stateless persons should acquire immediately at birth the nationality of the State in whose territory they were born, then they should make a positive proposal in that sense.

80. Mr. SCELLE said that it was not correct that the sense of Mr. Yepes' amendment was that a stateless person would acquire immediately on birth the nationality of the State in whose territory he was born; other conditions had to be fulfilled in addition. The effect of Mr. Yepes' amendment would be that nationality would be granted provisionally; in that way statelessness would be avoided for a very large number of persons.

81. Mr. AMADO said that Faris Bey el-Khouri's amendment would, if adopted, raise no difficulties in Brazil.

The meeting rose at 1.5 p.m.

218th MEETING

Friday, 17 July 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

** The number within brackets corresponds to the article number in the Special Rapporteur's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Article I [1] (continued)

1. The CHAIRMAN said that before he opened the morning's discussion Mr. Yepes had a statement to make.

2. Mr. YEPES stated that he intended to circulate a revised version to be substituted for the amendment he had proposed the previous day to article I of the draft Convention on the Reduction of Future Statelessness. The text of his revised version for the complete article read as follows:

> "If, for any reason whatsoever, a person does not acquire any nationality at birth, he shall acquire at birth the nationality of the State in whose territory he was born, provided that, in addition:
>
> "(1) He has resided in the country for a continuous period of at least five years immediately before attaining his majority; or
>
> "(2) Both parents, or the one exercising parental authority, were domiciled in the country at the time of his birth; or
>
> "(3) During the year in which he attains his majority under the law of the country of birth, he opts for the nationality of that State in accordance with its legislation."

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*resumed from the 216th meeting*)

Articles 5, 6, 7, 8 and 9

3. The CHAIRMAN said that the Commission would proceed to discuss the text proposed by the Drafting Committee for articles 5, 6, 7, 8 and 9 of the draft Convention on the Elimination of Future Statelessness.

4. Articles 5, 6, 7 and 8 contained all the material that had previously been contained in articles V and VI of the draft prepared by the Special Rapporteur (A/CN.4/64, part I). The Commission had been in general agreement on the substance of the articles but had requested the Drafting Committee to revise the text before it took a final decision on them.

5. There had not, however, been similar agreement on the substance of article VII as drafted by the Special Rapporteur. That article was concerned with the effects of transfer of territories between States. In order to allow the discussion in the Commission to continue, the Drafting Committee had been asked to draw up a revised text of the original article VII to take into

account various points raised by the Commission. That revised draft was the new article 9.

6. The text of articles 5, 6, 7 and 8 proposed by the Drafting Committee was as follows:

"Article 5

"1. If according to the law of a contracting Party a person loses his or her nationality as a consequence of a change in the personal status of that person on account of marriage, termination of marriage, legitimation or adoption, such loss shall be conditional upon acquisition of another nationality.

"2. The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

"Article 6

"1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

"2. Persons who seek naturalization in a foreign country or who obtain an expatriation permit for that purpose shall not lose their nationality unless they acquire the nationality of that foreign country.

"3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or any similar reason.

"Article 7

"The Parties shall not deprive their nationals of nationality by way of penalty so as to render them stateless.

"Article 8

"The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious, or political grounds, so as to render them stateless."

7. Thus the new article 5 was very similar to paragraphs 1 and 2 of the old article V. The new article 6 was similar to paragraphs 3 and 4 of the old article V, but contained a new third paragraph, it being considered that a person's absence from his country of nationality was a frequent cause of statelessness which had, however, not been expressly mentioned in the text suggested by the Special Rapporteur. The new article 7 was similar to paragraph 1 of the old article VI. In that case there was a difference of opinion between the Special Rapporteur and other members of the Commission, in that the Special Rapporteur considered that there should be in the convention an absolute prohibition of deprivation of nationality by way of penalty, whereas other members felt that there should only be prohibition of such deprivation as would render the individual stateless. The new article 8 resulted from a suggestion of Mr. Spiropoulos, the deprivation of nationality on racial, ethnical, religious or political grounds being regarded by the Drafting Commitee as an important point.

8. He invited general statements on articles 5 to 8 inclusive.

Article 5 [V, paras. 1-2]

9. Mr. YEPES said that the text of article 5 did not correspond to the Colombian Constitution or the 1933 Montevideo Convention on Nationality.

10. Mr. ALFARO said that the text as contained in document A/CN.4/64 included the word "recognition" in the paragraph which corresponded to paragraph 1 of the new article 5. Since, for example, the recognition of an illegitimate child might affect its nationality status, the word should also appear in the enumeration in that paragraph.

11. Mr. LAUTERPACHT thought that the omission was merely a clerical error as the Drafting Committee had intended "recognition" to be included.

12. The CHAIRMAN said that the word "recognition" would be inserted in the text.

13. Mr. ALFARO mentioned the "emancipation" of minor children as an additional cause of change in their personal status in countries whose law was based on the *Code Napoléon*. Accordingly, either the word "emancipation" should be inserted in paragraph 1 of article 5 after the word "adoption" or alternatively, as had been suggested by the Chairman, a general phrase such as "or any other causes", should be introduced.

14. Mr. CÓRDOVA (Special Rapporteur) agreed that the emancipation of a minor could indirectly affect his nationality status.

15. After a short discussion in which the CHAIRMAN, Mr. CÓRDOVA, Faris Bey el-KHOURI, Mr. LAUTERPACHT and Mr. SANDSTRÖM took part on the exact phraseology to be used in paragraph 1 of article 5 to cover the possibility of changes in personal status for causes additional to those enumerated in the draft, it was proposed that paragraph 1 of article 5 should be amended to read:

"... as a consequence of any change in the personal status of that person such as..."

The amendment was approved by 11 votes to none, with 2 abstentions.

16. Mr. KOZHEVNIKOV said that it should not necessarily be assumed that because nobody spoke on an article there was therefore no opposition to it. He had no objection to the substance of some of the individual articles under discussion, but they were all based on the concept that international law took precedence of municipal law. He thought that the subject of the articles under consideration was essentially a matter that fell within the domestic jurisdiction of States. The articles should therefore be voted on separately.

Paragraph 1 of article 5 as amended was approved by 11 votes to 1, with 1 abstention.

Paragraph 2 of article 5 was approved by 11 votes to 1, with 1 abstention.

17. Mr. YEPES suggested that it should be specified that the word "children" in paragraph 2 referred only to children under age.

18. Mr. SANDSTRÖM explained that the Drafting Committee had not wished to use the word "minors" instead of the word "children" in paragraph 2 of article 5 because it was feared that it might be taken to imply that children of full age might be deprived of their nationality.

19. Mr. YEPES formally proposed the inclusion in paragraph 2 of article 5 of the words "under age" after the word "children".

20. The CHAIRMAN said that the paragraph had already been approved by the Commission and that no amendment was therefore possible. The matter would however be mentioned in the Commission's report. He then put article 5 as a whole to the vote.

Article 5 as a whole was approved by 11 votes to 1, with 1 abstention.

The article as adopted therefore reads as follows:

"Article 5

"1. If according to the law of a contracting Party a person loses his or her nationality as a consequence of any change in the personal status of that person such as on account of marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon acquisition of another nationality.

"2. The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality."

Article 6 [V, paras. 3-4]

21. The CHAIRMAN invited comment on article 6.

22. Mr. YEPES recalled article 13 of the Universal Declaration of Human Rights, paragraph 2 of which read:

"Everyone has the right to leave any country, including his own, and to return to his country."

It seemed to him that the wording of paragraph 2 of article 6 implied the approval of the Commission for the control of expatriation by permit. He therefore proposed the deletion of the phrase "or who obtain an expatriation permit for that purpose".

23. In the next place, he observed that naturalization was a serious matter, imposing, in many countries, considerable responsibilities on the individual naturalized. There were, however, very many people who in fact became naturalized merely in order to obtain the protection of a particular government, and remained consistently outside the territory of the State whose nationality they had acquired. That practice should not be encouraged, and he therefore proposed the inclusion of an additional phrase at the end of paragraph 2 of article 6, to read "and establish their domicile there".

24. Mr. CÓRDOVA said that, whether or not the Commission approved of them, the existence of expatriation permits was a fact and there was no rule of international law against them. He felt that the clause in paragraph 2 of article 6 concerning expatriation permits should not be omitted merely because of article 13 of the Universal Declaration of Human Rights.

25. He felt that Mr. Yepes' second suggestion, if adopted, would mean that the convention would make an established domicile a necessary condition of effective naturalization. That seemed to him to be entirely a matter for the naturalization regulations of the different countries; the Commission had no need to take that point into account and Mr. Yepes' suggestion should therefore not be accepted.

26. Mr. YEPES replied that he had understood that the Convention on the Elimination of Future Statelessness was being drafted in a spirit of perfectionism. It was wrong, even by implication, to legalize the practice of subordinating individuals to the requirements of States in the matter of expatriation permits. Similarly, as regards the requirements of domicile for effective naturalization, the Commission should not appear to approve of the many fictitious naturalizations that were obtained, particularly in Latin America.

27. Mr. LAUTERPACHT agreed with Mr. Córdova as regards both expatriation permits and the requirement of domicile for effective naturalization. On the latter point, he reminded Mr. Yepes that the Commission was dealing with the elimination of statelessness, not with the abuse of naturalization. He hoped that Mr. Yepes would not insist on his amendment. As regards expatriation permits, he recalled that the United States had not ratified the 1930 Hague Convention on certain questions relating to the conflict of nationality laws, because it included a chapter regarding expatriation permits. Nevertheless, expatriation was a fact and the Commission should do its best in the convention to correct any anomalies resulting from it. He hoped, therefore, that in that case also Mr. Yepes would not insist on his amendment.

28. Mr. ALFARO said he had some sympathy with Mr. Yepes as regards expatriation permits. The Commission was, however, dealing with facts, recognition of which did not imply approval. Indeed statelessness itself was a fact which the Commission recognized insofar as it was drafting a convention for its elimination. In his view, therefore, paragraph 2 of article 6 should be left as it had been drafted.

29. Mr. YEPES said he would not insist on his first amendment that the reference to expatriation permits should be omitted. He maintained, however, his second amendment.

Paragraph 1 of article 6 was approved by 11 votes to 1, with 1 abstention.

30. The CHAIRMAN then asked for a vote on Mr. Yepes' remaining amendment, to add at the end of paragraph 2 of article VI the phrase "and establish their domicile there".

The amendment was rejected by 5 votes to 2, with 6 abstentions.

Paragraph 2 of article 6 was approved by 8 votes to 3, with 2 abstentions.

31. The CHAIRMAN asked for comments on paragraph 3 of article 6.

32. Mr. LIANG (Secretary to the Commission) thought that the last four words in the English text reading "or any similar reason" should be changed to "or on any similar ground". No change was needed in the French text.

33. The CHAIRMAN asked whether the phrase "or on any similar ground" included, for example, military service.

34. Mr. CÓRDOVA suggested that paragraph 3 might be worded in such a way that the circumstances enumerated were examples rather than a comprehensive list. A similar change had been made in the drafting of paragraph 1 of article 5.

35. Mr. SANDSTRÖM objected to the phrase "or on any similar ground" because the grounds enumerated were mutually dissimilar. He suggested paragraph 3 might read:

> "Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or fulfil any similar formality."

36. Mr. ALFARO agreed that there was no similarity between the circumstances enumerated, and that the idea of similarity should be eliminated. He thought that the last phrase of paragraph 3 should read "... failure to register or on any other ground".

37. The CHAIRMAN said that Mr. Alfaro's suggestion, if adopted, would be an absolute prohibition of loss of nationality in any circumstances and for any reason; it would include and go beyond the aims of the article.

38. Mr. AMADO suggested accordingly that the last phrase of paragraph 3 might read "... failure to register or to fulfil any other formality".

39. Mr. LIANG (Secretary to the Commission) agreed with the Chairman that if in the last phrase of paragraph 3 the word "similar" were omitted, the article would become too wide in scope. He recalled the Commission's attention to Mr. Córdova's suggestion that the wording of the paragraph might be similar to the wording adopted in paragraph 1 of article 5.

40. Mr. LAUTERPACHT, referring to the final phrase of paragraph 3, agreed with the text as it stood. He felt that the phrase "similar ground" was intended to include anything similar to the other enumerated circumstances: departure, stay abroad, and failure to register.

41. He would, however, like to put the following further point, viz. — that the subject of paragraph 3 was somewhat different from those dealt with in paragraphs 1 and 2 of article 6 and that paragraph 3 might, therefore, better become a new article.

42. Mr. CÓRDOVA, referring to the previous discussion on the effect of an individual's service in a foreign army, said that such service was entirely permissible unless it were to the detriment of the State of which the individual was a national. In his view, the point should be covered by the insertion of an additional phrase in paragraph 3 of article 6.

43. Mr. KOZHEVNIKOV said that paragraph 3 was incomprehensible to him, at any rate in the Russian text. A simple departure or stay abroad was raised as a problem requiring the Commission's formal attention. Yet it had, to his mind, nothing to do with denationalization.

44. Mr. YEPES entirely agreed with Mr. Kozhevnikov. It could not be imagined that the mere leaving of one's home country might be cause for the deprivation of nationality; perhaps the Drafting Committee had intended to refer to permanent residence abroad; but as it stood the paragraph was drafted in too general terms.

45. He asked whether the phrase "or on any similar ground" was intended to cover the case of a national entering the service of a foreign State. For his part, he felt that such a meaning would be stretching the words too far; there was no similarly between that circumstance and, for example, failure to register.

46. Mr. SCELLE agreed with Mr. Lauterpacht that paragraph 3 of article 6 should become a separate article.

47. As to departure and absence abroad, there was the concept in French law of departure without intention to return. He thought that that might be appropriate.

48. Mr. CÓRDOVA agreed that, according to some legal systems, persons leaving their countries without the intention to return might be deprived of nationality, but in others the possibility of deprivation for absence from the home country was worded more widely. The precise grounds for deprivation of nationality were not the Commission's concern. If absence by itself could be a ground for deprivation, that was sufficient.

49. He suggested that the convention should make specific mention of the effect of service for a foreign government, which he felt was a circumstance that could not be included in the general phrase "or on any similar ground".

50. Mr. SANDSTRÖM said that the subject of paragraph 3 of article 6 was a particular case of an individual's breaking the bonds of nationality. It was therefore not something different in kind from the other matters treated in article 6, and the paragraph should therefore not be made into a separate article.

51. Mr. KOZHEVNIKOV still thought that paragraph 3 was badly framed. If he called attention to its lack of clarity, it was because he feared it might lead to misunderstanding.

52. Mr. LAUTERPACHT said that departure or absence abroad was a frequent cause of statelessness. The article should not deal with the details of such departure or absence, and was adequate as it stood. Deprivation of nationality on the grounds of military or other service for a foreign State seemed to him to be akin to a penalty and, as such, more relevant to article 7 than to article 6.

53. Mr. LIANG (Secretary to the Commission) said that the grounds for loss of nationality enumerated in paragraph 3 of article 6 were all based on some national legislation or other. The article merely took account of the existence of certain causes of loss of nationality, and he could see no objection to their enumeration. But the act of departure with the *animus revertendi* was not a cause of deprivation of nationality. Therefore, the use of the word "departure" without qualification seemed unjustified. He suggested that the phrase "on the ground of departure, stay abroad,..." should be amended to read: "on the ground of permanent or prolonged stay abroad...".

54. Mr. ZOUREK considered paragraph 3 of article 6 quite unrealistic. It was necessary for every State to impose some duties on its nationals living abroad, partly in order to be able to ascertain whether, in fact, they wished to remain citizens of the State concerned; rules were made to fit that situation. A person living abroad might break the link of nationality; and in that case if he had no wish to return and fulfilled none of his duties to his home country, the latter would have no further interest in him. If, on the other hand, a person living abroad received all the benefits of nationality and fulfilled no duties towards his home State, the only sanction possible in many cases was deprivation of nationality. Paragraph 3 of article 6, if adopted, would remove the possibility of applying that sanction. The article, to his mind, was totally unbalanced in that its tenor was exclusively in the interests of the individual and disregarded the interests of the national collectivity.

55. As to the details of paragraph 3, he agreed that the text as it stood was lacking in precision. It should certainly refer not simply to departure but rather to departure without authorization, or without the intention to return. He would vote against it.

56. Faris Bey el-KHOURI said that emigration, a very normal occurrence, had not been mentioned. He was referring not so much to permanent emigration but to emigration with the intention to live and work abroad for perhaps a decade or two. Such emigration had never been taken by any State as a ground for depriving any citizen of nationality.

57. In the next place, it seemed to him that article 6 as it stood might be a source of dual nationality. He was sure that he would be told that the Commission was not concerned with dual nationality but only with the elimination of statelessness; but it seemed to him that the Commission should be careful when eliminating one evil not to create another. He would therefore abstain in the vote on article 6.

58. Mr. SANDSTRÖM advised the Commission not to elaborate the conditions under which loss of nationality, on the ground of departure or absence abroad, might take place.

59. Mr. AMADO said the clause was drafted in wide terms, and was perhaps dangerous; it imposed considerable burdens on States and would not be easy for any State to accept. The aims of the article should be borne in mind.

60. He referred to the very large number of immigrants in Brazil who had acquired Brazilian nationality. At one time the Brazilian Government and administration had consisted largely of persons with Portuguese names; now, one found many persons with Polish and other names, indicating a very different origin. Immigrants who had come to Brazil in the past had had the intention of and had succeeded in establishing themselves there, whereas Europeans who migrated to other European countries went purely in order to meet a temporary need for man-power. At the present time, on the other hand, immigrants were coming to Brazil who lacked the spirit of adventure and demanded a standard of life that it was impossible for them to find immediately on arrival. There was, therefore, a tendency for such persons to return to their home countries, and the nationality law had to take account of that situation.

61. Mr. YEPES thought the Commission would be interested to know that Latin American international law had provided for the situation mentioned by Mr. Amado. A conference held in 1906 in Rio de Janeiro had approved a convention establishing the conditions under which persons might lose the nationality they had acquired in their country of immigration. The principle followed was that a permanent loss of connexion with the country of immigration would result in loss of its nationality. Two years' residence in the home country without the *animus revertendi* was regarded as evidence of such a loss of connexions.

62. Mr. ALFARO said he had come to the conclusion that paragraph 3 of article 6 was too vague and went beyond the Commission's intentions. He was sure that there would normally be no loss of nationality on account of temporary absence abroad, but the paragraph as drafted drew no distinction between long and short absences. He suggested that in that respect the article might be redrafted so as to provide that persons should not lose their nationality for failure to comply with formalities in connexion with their temporary residence abroad.

63. Mr. LAUTERPACHT asked Mr. Alfaro if he wanted all permanent residents abroad to lose their nationality and become stateless.

64. Mr. CÓRDOVA said that the Commission's intention was to prevent all deprivation of nationality

due to residence abroad. He agreed with Mr. Lauterpacht that military service in a foreign State, although it usually involved foreign residence, should be considered in article 7, because deprivation of nationality due to it was in the nature of a penalty. He felt that paragraph 3 of article 6 should be left as it was. As drafted, it would, if accepted, be a contribution to international law; any changes would raise difficulties.

65. Mr. LIANG (Secretary to the Commission) said that any detailed description of the means of deprivation of nationality on grounds of residence abroad would make paragraph 3 of article 6 unnecessarily complicated and, in consequence, incomprehensible. The United Nations Secretariat's "Study of Statelessness" (E/1112)[1] had referred to instances of deprivation of nationality on departure abroad without authorization. Similarly, Dr. Kerno's memorandum entitled "National Legislation concerning Grounds for Deprivation of Nationality" (A/CN.4/66) gave instances in which clandestine frontier crossing was a reason for deprivation of nationality, and in which Bolivia, Bulgaria and Haiti were cited as countries which deprived emigrants of their respective nationalities. He could find in the documents no example of deprivation of nationality for simple departure abroad.

66. Mr. CÓRDOVA said that although no case had been quoted of denationalization resulting from simple departure abroad, yet such cases might exist. There was no reason for the Commission to restrict the scope of paragraph 3 of article 6.

67. Mr. LIANG (Secretary to the Commission) said that paragraph 3 as it stood might give the false impression that simple departure and stay abroad were existing causes of statelessness.

68. The CHAIRMAN, closing the discussion, said that there were no formal amendments to article 6 before the Commission, and he would proceed to put the Drafting Committee's text to the vote.

Paragraph 3 of article 6, the last phrase reading "or on any other similar ground", was approved by 7 votes to 2, with 3 abstentions.

Article 6 as a whole was approved by 8 votes to 2, with 2 abstentions.

The text approved therefore read as follows:

"1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

"2. Persons who seek naturalization in a foreign country or who obtain an expatriation permit for that purpose shall not lose their nationality unless they acquire the nationality of that foreign country.

"3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground."

[1] United Nations publication, Sales No. 1949.XIV.2.

Article 7 [VI, para. 1]

69. The CHAIRMAN invited comments on the text proposed for article 7.

70. Mr. KOZHEVNIKOV pointed out that the words "so as to render them stateless", in the English text, seemed to imply that States were in the habit of depriving their nationals of nationality in order to render them stateless.

71. Mr. LAUTERPACHT said that the words to which Mr. Kozhevnikov had referred meant "with the result of rendering them stateless" and that he did not think they were open to any other interpretation.

72. The words "by way of penalty", on the other hand, were open to several interpretations. He could accept the text proposed by the Drafting Committee on the understanding that those words covered cases where persons were deprived of their nationality as a result of entering the service or the armed forces of another State, and cases where a nationality acquired by naturalization was withdrawn on the ground that it had been acquired by fraud or that relevant data had been concealed. The point should, however, be made clear in the general report.

73. Mr. SPIROPOULOS suggested that any ambiguity in the English text could be removed by bringing it into line with the French and saying "if such deprivation renders them stateless".

74. Mr. CÓRDOVA agreed. With regard to the term "penalty" it was certain that unless the precise sense in which that term was being used was clearly stated in the accompanying comment, article 7, which was one of the most important in the whole draft, would be open to widely divergent interpretations. In that connexion, he pointed out that the term "penalty" usually meant a sanction imposed by the law of a country for offences defined as such in the law of the country. The Commission was proposing that the term should be used in a broader sense, to cover action taken by the State with regard to acts which were not crimes, as defined in its law, but which it regarded as being directed against it.

75. Addition of the words "so as to render them stateless" or "if such deprivation renders them stateless" would therefore give rise to the situation that in respect of one and the same act, which was not defined by law as an offence, the State would be able to impose the "penalty" of deprivation of nationality in one case, where the author of the act would acquire another nationality, but not in another, where he would be left stateless. The text proposed was therefore contrary to the fundamental principle of equality before the law.

76. Mr. SANDSTRÖM pointed out that the words "so as to render them stateless" also occurred in the English text of article 8. In his view, the English wording was preferable to the French, where the use of a conditional clause gave the impression that if that condition were not fulfilled no objection would arise, an impression which was particularly unfortunate in the case of article 8. He accordingly suggested that the words "*si*

cette privation de nationalité a pour effet de rendre apatride cette personne ou ce groupe de personnes", in that article and "*si cette déchéance le rend apatride*" in article 7 should be brought into line with the English text by saying, for example, "*afin de la (le) rendre apatride*".

77. Mr. SCELLE did not agree that the French text of articles 7 and 8 necessarily gave rise to the impression which Mr. Sandström suggested.

78. He wished to repeat that he could not agree, and he was sure that Kelsen and Oppenheim would not have agreed, that the fact of declaring the acquisition of nationality null and void on the ground that it had been acquired by fraud constituted a penalty; in such a case nationality had never really been acquired at all, any more than a marriage ceremony performed by an unauthorized person could be regarded as valid.

79. In other respects the text proposed by the Drafting Committee was an improvement on that proposed by the Special Rapporteur, which had read simply "no State shall deprive any person of its nationality by way of penalty". The Commission should, however, bear in mind that it would have the following effect: the national of any State who was deprived by it of its nationality without acquiring another would be regarded by the other contracting States as still possessing that nationality. It seemed obvious that in such cases there would be a need for recourse to compulsory arbitration, if the individual's position was to be clarified.

80. Mr. LIANG (Secretary to the Commission) pointed out that it might be difficult to explain precisely what was meant by the term "penalty" in article 7 since the grounds which were referred to in article 6, paragraph 3, as grounds for the deprivation of nationality could be regarded, and in some cases were regarded, as grounds for the deprivation of nationality as a penalty. Rightly or wrongly, the "Study of Statelessness" stated that the following had been ascertained to be grounds for deprivation of nationality as a penalty:

"(*a*) Entry into the service of a foreign government, more particularly enrolment in the armed forces of a foreign country;

"(*b*) Departure abroad without authorization;

"(*c*) Expatriation to evade military obligations;

"(*d*) Disloyal attitude or activities;

"(*e*) Aid furnished to Axis powers during the Second World War;

"(*f*) Naturalization obtained by fraud;

"(*g*) Penal offences committed by a naturalized citizen".[2]

81. With regard to naturalization obtained by fraud, he agreed with Mr. Scelle that the question of deprivation of nationality did not arise in such a case, since the acquisition of the nationality was null and void. He agreed, however, with Mr. Lauterpacht that in other respects the administrative action which a State took consequent upon acts by its nationals which it regarded as directed against its interests should be considered as "penalties"; but the task of defining what was meant by "penalty" in article 7 was complicated by the fact that in that article the word did not mean only legal penalties, yet did not include the "penalties" imposed "by operation of the law", which — in his view rightly — were dealt with separately in article 6, paragraph 3.

82. Mr. SANDSTRÖM recalled that he had previously indicated his opposition to the term "by way of penalty". He would, however, accept it provided it was made clear in the comment that it meant no more than action taken by the State in consequence of an act by an individual which it considered contrary to its interests. He did not think there would be any difficulty in that respect, provided the Commission did not agree with Mr. Scelle that a nationality acquired by fraud was null and void (*nulle de plein droit*). The parallel which Mr. Scelle had drawn was false; if a marriage ceremony was celebrated by an unauthorized person, there was no doubt that it was null and void; a marriage ceremony performed by an authorized person, but on the basis of fraudulent statements by the parties, however, was not null and void but voidable (*annulable*).

83. The CHAIRMAN declared the discussion of article 7 closed and recalled Mr. Spiropoulos' suggestion with regard to the English text. Since that suggestion concerned a point of translation rather than one of drafting, there was no need to vote on it. He therefore put the text proposed by the Drafting Committee for article 7 to the vote.

That text was adopted by 8 votes to 2, with 2 abstentions.

84. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained because, although he could accept the article, he felt it unlikely that he would be able to accept the accompanying comment.

Article 8

85. The Chairman drew attention to the text proposed by the Drafting Committee[3] for article 8.

The text was adopted by 9 votes to 2, with 1 abstention.

86. Mr. KOZHEVNIKOV said he had voted against the text proposed for article 8, despite the fact that some of the provisions were in their general form unexceptionable. He had done so because of the context in which it was placed, that of a convention based on a principle which he found unacceptable.

87. Mr. ZOUREK said he had voted against the text proposed for article 8 not because he was opposed to the idea which it expressed, but because, like article 6,

[2] *Ibid.*, pp. 140-141.

[3] See *supra*, para. 7.

paragraph 3, and article 7, it derived from a one-sided view of nationality which he could not accept.

Article 9 [VII]

88. The CHAIRMAN drew attention to the text which the Drafting Committee proposed for article 9, reading as follows:

"1. Treaties whereby territories are transferred must include the provisions necessary to ensure that inhabitants of the territories affected do not become stateless, while respecting their right of option.

"2. In the absence of such provisions, existing States to which territory is transferred or new States formed on territory previously belonging to another State or States shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality."

89. Those two paragraphs expressed the two principles which the Commission had agreed should be contained in the article dealing with transfers of territory. The Drafting Committee had also agreed that the question of the right of option should be mentioned in both paragraphs.

90. Mr. LAUTERPACHT pointed out that the other articles which the Commission had adopted were in the form of articles of a convention. He assumed that in its final revision of the text the Drafting Committee would bring article 9 into line with them.

91. The CHAIRMAN, in the absence of further comment, put paragraph 1 to the vote.

Paragraph 1 was adopted by 10 votes to 1, with 1 abstention.

92. Mr. SANDSTRÖM felt that in paragraph 2 some other word should be used than "transferred", which was the term normally used in cases where territories were ceded. Such cases, however, would be less important, for the purpose of paragraph 2, than other cases.

93. Mr. SCELLE agreed. The whole wording of paragraph 2 could be much improved; he saw no reason to refer to "existing" States and would prefer the sentence to be turned round, so as to emphasize the rights of the individual rather than the duties of the State.

94. The CHAIRMAN ascertained that there were no further comments on article 9 and suggested that it might be referred back to the Drafting Committee, which would doubtless take account of Mr. Sandström's observation and of any suggestions it received from Mr. Scelle.

The Chairman's suggestion was adopted.

On the above understanding, article 9 as a whole was adopted by 11 votes to 2.

95. Mr. KOZHEVNIKOV, explaining his vote, said that he fully recognized the value of treaties as a means of regulating relations between States. He had, however, voted against article 9 because it was worded in such a way as to prescribe to States rules on matters falling within their domestic jurisdiction, and was therefore incompatible with the principle of their sovereignty.

Arbitration clause [Article 10]

96. Mr. CÓRDOVA said that, now that the Commission had completed its consideration of the articles of the draft Convention on the Elimination of Future Statelessness, he wished to remind it that at the previous session it had considered the possibility of devising a system of arbitration for the settlement of differences arising out of the convention and had asked him, as Special Rapporteur, to prepare extracts from Mr. Kaeckenbeeck's book, "The International Experiment in Upper Silesia".[4] As he had previously explained, that had been done by Mr. I. Kerno, whose memorandum appeared as document A/CN.4/65. He personally was convinced that unless some means were provided of settling the disputes that were bound to arise, not only with regard to the interpretation of the convention but also with regard to the question whether a given individual was the national of a State or not, the Commission's endeavours in that field would bear little real fruit. Mr. Kaeckenbeeck went so far as to suggest that a special arbitral tribunal should be established for such a purpose and that individuals should have the right of access to it. In his own words, "Neither the individual's right to a nationality nor the rule of law can be assured, in the face of conflicting State policies, without a judicial organ of the kind of the Arbitral Tribunal. ... I am convinced that the experiment of letting individuals take the initiative of claiming and defending their right to a nationality is invaluable." He (Mr. Córdova) believed that the Commission should at least give careful consideration to the valuable experience which had been acquired in Upper Silesia and that it must take the responsibility of accepting or rejecting the idea of setting up a similar tribunal to deal with disputes arising out of the convention. He had made no suggestions in that respect, because he had not felt entitled to do so, having been instructed only to prepare extracts from Mr. Kaeckenbeeck's book.

97. Mr. LAUTERPACHT said that the question which the Special Rapporteur had raised had been bound to arise and that it was as well that it should have arisen before the Commission proceeded further with its work. Disputes were likely to arise out of any convention, particularly out of a convention dealing with questions of nationality. It was normal for the question of the settlement of such disputes to be dealt with in the final articles, along with questions of ratification, revision, entry into force, etc. He understood that it was not the intention that the Commission should draft final clauses for the Convention on the Elimination of Future Statelessness. It might therefore be considered unnecessary for the Commission to deal with the question of arbi-

[4] See *Yearbook of the International Law Commission, 1952*, vol. I, 161st meeting, paras. 11-36.

tration, although he suggested that it would be advisable to insert a sentence in the general report to the effect that the Commission regarded it as of the greatest importance, and indeed as axiomatic, that the convention, like all conventions concluded under United Nations auspices, should contain a provision for the settlement by arbitration of any disputes arising out of it. It was true that the Commission had itself prepared such a clause in the case of the draft articles on the continental shelf, but that was because there was a possibility that those articles would remain articles, and would not be given the form of a convention.

98. The CHAIRMAN, speaking as a member of the Commission, recalled that he and other members of the Commission had been opposed to the inclusion of an article dealing with the settlement of disputes in the draft articles on the continental shelf, on the ground that if the Commission included such an article once, it would have to do so in every case. Their fears were now revealed as justified. He was opposed to the suggestion that the Commission should attempt to draft an article dealing with the settlement of disputes arising out of the Convention on the Elimination of Future Statelessness; he was also opposed, though less strongly, to Mr. Lauterpacht's suggestion.

99. Mr. SCELLE said that Mr. Lauterpacht's suggestion would be of some value, but that he would like the Commission to go further. Mr. Córdova's suggestion was not that the Commission should draft the ordinary arbitration article, but that it should provide for a special international judicial body to settle cases where the Convention gave rise to disputes. The ordinary arbitral procedure was long drawn-out, and he appreciated the misgivings of those who doubted whether the Commission should lay an obligation on States to have recourse to it in the thousands of cases which might arise out of the convention. The same objections did not apply to a special judicial body, and he would therefore be in favour of the Commission's providing accordingly.

100. Mr. YEPES agreed that the Commission should draft provisions for a special tribunal to arbitrate in cases of disputes arising from the convention. Such disputes were bound to arise in a field so controversial as that of nationality. He recalled that he had abstained from voting on the proposal to insert a similar article in the draft articles on the continental shelf, but no parallel existed between the two cases. Public opinion would find it very strange if a convention prepared by international lawyers contained no final clauses, or at the very least no provision for the settlement of disputes.

101. Mr. HSU felt that if a substantial measure of agreement could be reached on special arbitration provisions, they should be inserted in the text; if such agreement could not be achieved but the Commission nevertheless agreed that disputes should be settled by arbitration, the necessary provisions could be drafted at the same time as the other final clauses.

102. Mr. LAUTERPACHT pointed out that it might take considerable time to discuss provisions for a special jurisdictional agency such as that proposed. If the Commission wished to devote time to that matter, however, he would support any text which the Special Rapporteur could submit along the lines he had indicated.

103. Mr. CÓRDOVA said that with the help of Mr. Scelle he would prepare such a text.

104. Mr. KOZHEVNIKOV said he fully subscribed to the principle that States should take steps to settle disputes arising between them by peaceful means. He was, however, utterly opposed to the idea of compulsory arbitration which had raised its head again, despite the fact that it was completely contrary to the basic principles of international law. He could support no text which contained that idea, nor could he support the suggestion that the Commission should advocate it in the report.

105. Mr. ZOUREK felt that the time had not yet come to discuss the final clauses of the convention, among which any article on the settlement of disputes would naturally be placed. As the suggestion had been raised, however, he would merely point out that the United Nations Charter laid an obligation on its Member States to settle their disputes by peaceful means; there were other peaceful ways of settling disputes besides arbitration, and he did not understand why a reference to arbitration should be inserted in all conventions concluded under United Nations auspices, to the exclusion of all other ways of peaceful settlement. In that way recourse to arbitration was made compulsory for the contracting States, and the inclusion of such a provision in the convention at present under consideration would make it unacceptable to very many States. The still more radical proposal for a special international tribunal was also unacceptable; there was no parallel between the present situation and that which had obtained in Upper Silesia, where the whole question had arisen out of a particular treaty settlement.

106. Faris Bey el-KHOURI recalled that the Commission was attempting to eliminate statelessness. For that purpose it was obviously vital that as many States as possible should adhere to the Convention. He feared that if provision were made for compulsory arbitration, many would be deterred. The question of statelessness was of concern only to the individual, and he could not see how thousands of disputes between States could arise from a convention dealing with it.

107. Mr. SCELLE said that Mr. Kaeckenbeeck was well known not only as the former President of the Arbitral Tribunal in Upper Silesia, but also as a great humanitarian and jurist, who was in principle opposed to any further step to "institutionalize" the law which did not correspond to the real interests of States. The step which was proposed was not a radical one, but a modest one; unless it was taken, however, there was no doubt, with all due respect to Faris Bey el-Khouri, that the Convention would give rise to thousands of disputes between States.

108. The CHAIRMAN put to the vote the suggestion that the Special Rapporteur should be asked to prepare a text, with a view to its insertion in the Convention, dealing with the settlement of disputes by arbitration.

The suggestion was adopted by 6 votes to 5, with 2 abstentions.[5]

The meeting rose at 1.5 p.m.

[5] See *infra* 219th meeting, para. 45.

219th MEETING

Monday, 20 July 1953, at 2.45 p.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Preamble (resumed from the 216th meeting)

1. The CHAIRMAN said that two matters remained to be dealt with before the Commission completed its work on the draft Convention on the Elimination of Future Statelessness. One was a proposal for an additional article, made jointly by the Special Rapporteur and Mr. Scelle. Since however, the English text had not yet been distributed, he therefore proposed to open the discussion with the other matter, namely, the preamble to the convention. The Special Rapporteur having withdrawn his original text,[1] the Commission had before it only the text prepared jointly by the Special and General Rapporteurs, which read as follows:

"1. *Whereas* the Universal Declaration of Human Rights proclaims that 'everyone has the right to a nationality';

"2. *Whereas* the Economic and Social Council has recognized that the problem of stateless persons demands 'the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality';

"3. *Whereas* statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man;

"4. *Whereas* statelessness is frequently productive of friction between States;

"5. *Whereas* statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law;

"6. *Whereas* the practice of many States has increasingly tended to the progressive elimination of statelessness;

"7. *Whereas* no vital interests of States are opposed to the total elimination of statelessness;

"8. *Whereas* it is desirable, by international agreement, to render legally impossible situations which give rise to statelessness;

"The Contracting Parties

"Hereby agree as follows:"

2. Mr. ALFARO approved the new text in general, but suggested the deletion of the seventh clause, which could be construed in such a manner as to provoke opposition to the convention.

3. Mr. SANDSTRÖM agreed that it might be preferable to drop the seventh clause, though the difficulties might be overcome by redrafting it to read somewhat as follows:

"No vital interests of States requires the upholding of legislation concerning nationality so as to create statelessness."

4. He further suggested that continuity of thought might be better served by re-arranging the clauses in the order: 1, 5, 3, 4, 6, 2, 7.

5. He agreed with a suggestion by Mr. LAUTERPACHT that the order of the clauses might be left to the Drafting Committee.

6. Mr. LAUTERPACHT hoped that clause 7 would stand, its final version to be decided by the Drafting Committee. There was a clear distinction between the vital interests and the important interests of States, and

[1] See *supra*, 216th meeting, para. 70.

the clause in question was concerned with the former. Ratification of the Convention would undoubtedly entail changes in the domestic legislation of the ratifying States, but that did not mean that the vital interests of States were in conflict with the proposed convention.

7. Further, the view had been expressed even in the Commission that the convention involved some fundamental issues of national jurisprudence. That, again, was inaccurate. The principles embodied in the convention had already been incorporated in the legislation of some States. He considered it entirely proper for the Commission to express a view on what was or was not a vital interest of States.

8. Mr. SANDSTRÖM said that, whereas no State could object to statelessness being abolished, the means by which that was to be done might well be questioned.

9. Mr. ALFARO did not oppose the substance of clause 7, but considered that the contents of the preamble should be so self-evident that there could be no reasonable opposition to them. He believed that there was a feeling in some quarters that some interests of States were involved. That clause would inevitably cause confusion between the vital interests of States, which he agreed were not opposed to the elimination of statelessness, and the measures for the elimination of statelessness recommended in the convention. He suggested therefore that the clause might be redrafted to read somewhat as follows:

> "Whereas it is in the interests of States to devise means for the elimination of statelessness."

10. Mr. SCELLE agreed with Mr. Alfaro, and welcomed his efforts and those of Mr. Sandström to draft a more acceptable text. He had some sympathy with Mr. Lauterpacht in his distinction between the vital and the important interests of States, but felt that the draft would provoke an instinctive revulsion on the part of some States, who would consider that it was their own responsibility to decide what was and what was not in their interests.

11. Mr. KOZHEVNIKOV said that his first impression was that the new text of the preamble was to some extent better than the original, for it did not purport directly to impose on parties to the convention acceptance of the principle that international law was superior to municipal law. In particular, he noted the elimination of the sentence suggesting that all nations should "abide by the principle of the priority of international law over national legislation". Nevertheless, Mr. Córdova had said that substantively the new draft was identical with the original, and he (Mr. Kozhevnikov) agreed that that was the case. The concept to which he objected still remained, and his attitude towards the preamble was therefore negative.

12. He would support the deletion of clause 7, for he felt that it would be presumptuous of the Commission to attempt to evaluate the vital interests of States; governments themselves were alone competent to do that. Further, he considered clause 8 to be unrealistic; he doubted whether any or a majority of governments would agree that it was desirable by international agreement to render legally impossible situations which gave rise to statelessness.

13. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Lauterpacht. It was logical to include clause 7. Indeed, it went without saying that any State which adopted the convention would agree with that clause. Thus it would make evident the division between the States which supported the convention and those who did not; for some States would consider, as he himself did, that their vital interests were in fact affected by the measures proposed in the draft convention.

14. Mr. AMADO said that the Commission's discussions on the elimination of statelessness always came back to Mr. François' point. In his (Mr. Amado's) view, the adoption of clause 7 would not help to solve the problem before the Commission, for States opposed to the convention would be forewarned by the clause of the trend of the whole text. Talleyrand had said that everything that was exaggerated was insignificant; and he (Mr. Amado) felt that the convention was weakened by the number of exaggerations. Clause 7 of the preamble should be replaced by an appropriate formula; he would vote against it as it stood.

15. Faris Bey el-KHOURI said that the convention and its acceptance were not postulated merely on the assumption that statelessness was an evil to be eliminated; the convention specified a particular method, with which he could not agree as it would involve the compulsory grant of nationality to very large numbers of stateless persons. In his view, the convention ought to meet not only the difficulties of the large numbers of refugees who were at present stateless, but also those of the small States who would be expected to confer their nationality on them. He felt compelled to vote both against the preamble and against the draft convention.

16. Mr. HSU was substantially in agreement with Mr. Lauterpacht that the draft convention would not affect the vital interests of the majority of states. He suggested, however, that that point should be made in the Commission's report rather than in the text of the convention.

17. Mr. YEPES said that the preamble should be recast in more sober terms. Clause 7 would surely be considered superfluous by those who approved of the convention, and might therefore be deleted whether or not it were true.

18. As to clause 8, he suggested the deletion of the phrase "by international agreement". Further, as there were political, economic and social causes of statelessness as well as legal ones, he would prefer the clause to read;

> "Whereas it is desirable to eliminate all causes of statelessness;".

19. Mr. ZOUREK felt that the preamble was similar to the rest of the convention in that it overstressed the

rights of individuals and understressed the rights of the States of which they were nationals. To him, clause 5, in emphasizing that certain rights of individuals "were recognized by international law", failed to take due account of the consequence of municipal law on stateless persons; he therefore suggested the deletion of that phrase. As to clause 7, the Commission should not in his view judge the interests of States; the clause should therefore be deleted. To his mind, there was a conflict between clause 8, which emphasized the desirability of international agreement for the elimination of statelessness, and the recognition quoted in the second clause that the problem of stateless persons demanded "...joint and separate action by Member nations in co-operation with the United Nations...". Clause 8 was therefore clearly incomplete; it should either be completed or dropped.

20. Mr. LAUTERPACHT said that, as clause 7 clearly had not found favour with the Commission, he would withdraw it. As for Mr. Yepes' objection to the phrase in the eighth clause "...to render legally impossible situations which give rise to statelessness;", he pointed out that statelessness was a creature of law rather than of nature, and that legal remedies for it must therefore be provided.

21. The CHAIRMAN then put the several clauses of the preamble to the vote.

Clause 1 was adopted by 10 votes to none, with 3 abstentions.

Clause 2 was adopted by 10 votes to none, with 3 abstentions.

Clause 3 was adopted by 11 votes to none, with 2 abstentions.

Clause 4 was adopted by 7 votes to 2, with 4 abstentions.

Mr. Zourek's amendment for the deletion of the words "recognized by international law" from clause 5 was rejected by 6 votes to 2 with 5 abstentions.

Clause 5 was adopted by 8 votes to 2, with 3 abstentions.

22. Mr. YEPES asked whether clause 6 really corresponded with the facts — in other words, had the practice of many States increasingly tended to the progressive elimination of statelessness — or was that merely an expression of the Commission's hopes and wishes?

23. Mr. LAUTERPACHT, referring to the Secretariat study entitled "The Problem of Statelessness" (E/1112),[2] pointed out that the policy and recent legislative practice of many States were directed to the elimination of statelessness; the clause was therefore conservative and moderate.

24. Mr. SCELLE felt that the insertion of the clause was a matter of international courtesy.

[2] United Nations publication, Sales No.: 1949.XIV.2.

Clause 6 was adopted by 10 votes to none, with 3 abstentions.

25. Mr. CÓRDOVA (Special Rapporteur) hoped that clause 7 might be preserved in some form. It should, perhaps be cast positively rather than negatively, as the Commission's work had been based on the general desirability, from the point of view of international law, of eliminating statelessness. He suggested therefore that the clause might read:

"Whereas it is in the interest of States to favour the total elimination of statelessness".

26. Mr. SANDSTRÖM drew attention to the curious situation which had arisen, in that Mr. Córdova's draft for clause 7 was almost identical in substance with Mr. Yepes' previous suggestion for clause 8.

27. Mr. LIANG (Secretary to the Commission) said that the first six clauses of the preamble were couched in emphatic language; he warned the Commission against perpetrating an anticlimax. Mr. Yepes' draft was too mild for rounding off the preamble. If the words "by international agreement" and the word "legally" were omitted, then the clause would convey very little but generalities which were already implicit in the previous clauses.

28. Mr. LAUTERPACHT, referring to Mr. Yepes' objection to the phrase "by international agreement", pointed out that the Commission was preparing a convention, so that it was entirely proper to refer to the desirability of international agreement. It would be another matter if the Commission were preparing amendments to municipal law.

29. Mr. CÓRDOVA withdrew his proposal for reviving clause 7.

30. Mr. YEPES withdrew his suggestion that the phrase "by international agreement" should be deleted. His proposed text for clause 7 (formerly clause 8) would therefore become:

"Whereas it is desirable by international agreement to eliminate the causes of statelessness;".

31. Mr. ALFARO drew attention to a discrepancy between the French and English texts of original clause 8; the former mentioned the legal causes of statelessness ("*les causes juridiques d'apatridie*") whereas the latter did not.

32. Mr. CÓRDOVA said that statelessness, with which the convention dealt, was a juridical problem and had no causes other than legal ones.

33. Mr. LIANG (Secretary to the Commission) said that the Drafting Committee might reconsider clause 7. The English version referred to "situations which give rise to statelessness"; but there were many such situations, of which the second World War was one, to which the Commission had no wish to refer.

34. Mr. CÓRDOVA suggested that clause 7 (originally clause 8) should follow the French text, and read:

"Whereas it is desirable, by international agreement, to render impossible legal situations which give rise to statelessness".

35. Mr. SCELLE agreed that the Commission was not called upon to legislate for all situations — including, for example, deportation — from which statelessness might arise.

36. Mr. AMADO said that Mr. Yepes' proposal was virtually identical with Mr. Córdova's.

37. Mr. LAUTERPACHT said that the Commission seemed to be in substantial agreement on the contents of the eighth clause.

Clause 7 (originally clause 8) was then adopted in the form suggested by Mr. Córdova by 10 votes to 2 with 1 abstention.

38. Mr. SANDSTRÖM raised a legal point concerning the vote on clause 7 and the preamble as a whole. Should a vote in favour of clause 7 be taken as indicating full approval of the objects of the Convention for the Elimination of Future Statelessness?

39. Mr. LAUTERPACHT thanked Mr. Sandström for raising the point. He (Mr. Lauterpacht) hoped that the Commission would adopt both the conventions under consideration. He assumed that the Commission would take care to see that the second convention — that on the reduction of future statelessness — was not indistinguishable from the first. The Commission would then, as he saw it, forward not one convention to the General Assembly, but both conventions. The Commission would not recommend the exclusive adoption of one or the other convention. It would not express a preference, but it would recommend that either the one or the other be adopted. The Commission's attitude, in his view, was that, whereas some members considered that only the total elimination of statelessness was a worth while object, others felt that total elimination was impossible of achievement, although the deleterious effects of statelessness could be minimized; at the same time, the Commission thought in general that the adoption of one or other convention was desirable. Indeed, it might have been possible, given the necessary time and skill, for the Commission to have devised a single convention containing two chapters either one of which might have been acceded to by a State accepting the convention. Such a procedure had been followed in the case of the General Act of 1928 for the Pacific Settlement of International Disputes.

40. Mr. CÓRDOVA said that the Commission's general understanding was that both conventions would be presented on an equal footing to the General Assembly and to governments Members of the United Nations. Given that the Commission was preparing a convention on the elimination of future statelessness on the conditions outlined by Mr. Lauterpacht, a vote in favour of clause 7 and the preamble as a whole would not indicate more than that the clause as drafted was appropriate for insertion in the preamble to the draft Convention on the Elimination of Future Statelessness. Such a vote would have no bearing on the Convention on the Reduction of Future Statelessness, which would contain no corresponding clause.

41. Mr. SANDSTRÖM said that he entirely accepted the position as just explained, and that his vote should therefore not be interpreted as implying that he personally approved of one convention rather than the other.

The preamble to the draft Convention on the Elimination of Future Statelessness was adopted by 10 votes to 2, with 1 abstention.

42. Mr. YEPES felt that members of the Commission should give some thought to the title to be given to the draft convention under consideration. Its present provisional title "Draft Convention on the Elimination of Future Statelessness" was inappropriate, since its adoption would not eliminate all future cases of statelessness.

43. After some discussion, the CHAIRMAN suggested that further consideration of the matter be deferred until the draft Convention on the Reduction of Future Statelessness had been examined.

44. Mr. YEPES said that he had no objection to the Chairman's suggestion. His only purpose in raising the question had been to ensure that members of the Commission should give some thought to it.

The Chairman's suggestion was adopted.

Arbitration clause [Article 10]

(resumed from the 218th meeting)

45. Mr. CÓRDOVA said that, acting on the Commission's instructions to draft an article which would provide for recourse to arbitration in the event of disputes arising out of the convention,[3] he and Mr. Scelle had prepared the following text:

"1. With a view to determining the nationality of persons who are stateless or likely to become so, the Parties signatory to this Convention shall each nominate a legal expert on nationality questions. The names of those experts shall be entered on a single list of candidates from which any conciliation commissions that may be required can be formed.

"2. In every disputes case, the Conciliation Commission shall comprise an expert from each of the countries concerned. It may be seized of the case either by one of the governments concerned, or by any person who is stateless or in danger of becoming so, or by his legal heirs and assigns.

"3. Should the Conciliation Commission fail to reach agreement on a settlement of the dispute, the High Contracting Parties undertake to submit it to arbitration [in accordance with the procedure adopted by the International Law Commission in the draft prepared by it at its fifth session].

[3] See *supra*, 218th meeting, para. 108.

"4. They shall also submit to arbitration all disputes regarding the interpretation or the application of this Convention."

46. He and Mr. Scelle had felt that it was absolutely necessary that an individual who was stateless or in danger of becoming stateless should be able to seize the conciliation commission of his case, since it might well happen that it would not be seized of it by any of the governments concerned. It also seemed obvious that in the event of the conciliation commission's failing to reach agreement, the parties to the dispute should be under an obligation to submit it to arbitration and that, in order that the arbitration might not be frustrated by failure of the parties to agree on an arbitrator or by obstructive action on the part of one of them, the procedure followed should be that approved by the Commission.

47. Mr. LAUTERPACHT felt that it might, after all, be impossible for the Commission to insert in the text of the Convention any provision relating to the settlement of disputes, and that it might have to content itself with making a reference to that subject in its general report. The subject was an extremely difficult one, for the disputes which arose out of the convention would be not only disputes between the parties to it but also, and to a greater degree, disputes between one of the parties to it and an individual whom no State recognized as being its national. Paragraph 2 of the text proposed by Mr. Córdova and Mr. Scelle, however, stated that "the Conciliation Commission shall comprise an expert from each of the countries concerned". The proposed procedure would therefore be inapplicable in the majority of cases.

48. The same point appeared to have been overlooked in paragraph 3. The rules of arbitration which the Commission had prepared referred to arbitration between States, and would not be applicable in cases where the dispute was between a State and an individual who was not recognized by any State as its national.

49. Mr. ALFARO asked the Special Rapporteur and Mr. Scelle how they considered that the conciliation commissions referred to in their proposal should be set up.

50. Mr. SANDSTRÖM said that he agreed in principle that an article on the settlement of disputes must be included in the convention if it was not to remain a dead letter. Such an article was particularly necessary in the case of a convention like the one under consideration, where the disputes that arose would be mainly between individuals and States, since no recognized procedure for the settlement of such disputes existed. It was because the disputes that arose out of the convention would be mainly of that type that he had been about to make the same point as had been made by Mr. Lauterpacht.

51. Mr. YEPES said that he regarded conciliation as the best possible means of settling international disputes in all cases where it was applicable. It was, however, a political means of settling disputes, particularly disputes about questions of fact. In the present case, as had been previously stressed by other members of the Commission, the Commission was dealing with questions of law, and disputes relating to questions of law could only be settled by arbitration.

52. Mr. KOZHEVNIKOV recalled that he had already had a number of opportunities of stressing the fact that he was flatly opposed to the idea of compulsory arbitration. Leaving that question aside for the present, however, he wished to point out that the joint proposal by the Special Rapporteur and Mr. Scelle entailed a radical change in the nature of international law. As was recognized by jurists, and as could be seen from history, international law regulated the relations between States. In international law, the individual had no place; he was represented by his State. Under the joint proposal, however, individuals would no longer necessarily be represented by a State; they would themselves be able to bring cases before an international tribunal, without the intermediary of any State. Such a provision appeared to be contrary to the general principles of international law, and also to the wording which the Commission had just adopted for the preamble to the convention; for the preamble referred to "the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law".

53. He also noted that the joint proposal provided that, in the event of the conciliation commission's failing to reach agreement, the parties should submit the dispute to arbitration "in accordance with the procedure adopted by the International Law Commission in the draft prepared by it at its fifth session". He did not understand what was meant. No such draft had yet been adopted, and it seemed premature to refer to it.

54. Mr. HSU said that it seemed clear that the joint proposal did not fulfil the purpose which the Commission had in mind. It might prove satisfactory so far as disputes between governments were concerned, although he did not see why it should be necessary to prepare a new list of candidates from which members of conciliation commissions could be drawn, when a suitable list already existed such as the United Nations Panel for Inquiries and Conciliation. Nor did he see, indeed why the Commission should be at pains to draft a special article dealing with disputes between States. The only purpose of the proposal was to provide for cases where one of the parties to the dispute was an individual who had no government to represent him, and, as had been pointed out, such cases were not covered by the text proposed. It was doubtful, indeed, whether such cases could be covered by any form of conciliation or arbitration as those terms were usually understood, and the Commission might well have to consider establishing for the purpose some type of independent tribunal placed under United Nations auspices.

55. Mr. SCELLE, replying, said that, in considering the proposal which he and Mr. Córdova had submitted, it must be borne in mind that the convention in which it

was to be placed was a convention designed to have the effect of completely eliminating statelessness. It was true that the proposed text did not cover disputes in which only one State was concerned, but in the majority of cases he thought that two or more States would be involved. It would have been possible to give more details of the way in which conciliation commissions should be constituted, but he and Mr. Córdova had not thought that necessary. He and Mr. Córdova had been unable to agree, however, whether it was desirable to include the words "in accordance with the procedure adopted by the International Law Commission in the draft prepared by it at its fifth session", and it was for that reason that they had been placed in square brackets. Whatever procedure was followed, however, arbitration could only take place between States, and he did not think it possible to envisage arbitration between a State and an individual. Mr. Yepes' point he did not understand, since the draft on arbitral procedure itself recognized that recourse should be had to arbitration only after conciliation had failed. Finally, he would point out to Mr. Kozhevnikov that the whole convention was designed to give certain rights in international law to the individual who had no State to represent him.

56. Mr. LAUTERPACHT agreed with Mr. Sandström that a special provision was necessary because the majority of disputes which arose from the convention would be disputes between the State and the individual. Cases of disputes solely between States could be dealt with in a more orthodox way. The only point of the proposed article was to give the individual an internationally recognized right of action before an international tribunal. Mr. Kozhevnikov had argued that that would be contrary to the existing situation as it was defined in the preamble, but the whole purpose of the convention was none other than to change the existing situation.

57. The joint proposal could probably be amended to meet the various points which had been raised. If the Commission were to attempt to adopt such a text, however, it should at least be aware of the fact that in doing so it would be undertaking a task similar to that which the Commission on Human Rights had considered for six years but upon which it had finally been unable to agree. The draft international covenants on human rights did not give the individual the right of petition.

58. It should also be borne in mind that the International Law Commission could not afford to devote more than another week to the question of statelessness. It must make up its mind between attempting to establish detailed machinery for the implementation of the convention — for that was what it amounted to — and confining itself to stating in its general report that it had not the time to devote to the whole complicated question of implementation, which must therefore be dealt with separately. In the circumstances, the latter course might appear the only practicable one.

59. Mr. SCELLE agreed that the thorny question which was dealt with in the text which the Commission had invited him and the Special Rapporteur to prepare was not yet ripe for discussion. He would have no objection to its being simply mentioned in the report.

60. Mr. SANDSTRÖM said that he shared the same views, particularly in view of what had happened with regard to a similar matter in the Commission on Human Rights.

61. Mr. YEPES said that although he was in favour of inclusion in the Convention of an article dealing with the settlement of disputes, he wished to reiterate his view that the only method of peaceful settlement which was appropriate in cases relating to questions of law was the method of arbitration, first defined in the General Act of 1928 and subsequently endorsed by the United Nations.

62. It was claimed that individuals could never be the subjects of international law. Several precedents to the contrary existed, however. To mention only one, the Central American Court of International Justice, which had functioned from 1907-1917, had permitted individuals to submit to it cases similar to those which the Commission was at present considering.

63. Mr. CÓRDOVA thought that all members of the Commission agreed that the question at issue was an important and difficult one requiring full consideration. The Commission had to choose, however, between doing nothing about it, and having the courage to try to solve one element, and one only, of a problem which was exercising legal minds throughout the world. There were twenty-nine different ways in which a State could violate the draft conventions on human rights, but it was with only one of those ways that the Commission was concerned. Unless the individual had the right to defend his interests before an international jurisdictional tribunal in cases where there was no one else to defend them, the convention would largely remain a dead letter, and the Commission would be disregarding the Economic and Social Council's appeal that it conclude a convention for the *effective* elimination of statelessness.

64. Mr. SPIROPOULOS recalled that he had abstained from voting on the suggestion that the Special Rapporteur should be asked to prepare a text dealing with the settlement of disputes, since he had foreseen the difficulties that would arise. He agreed with Mr. Scelle and Mr. Córdova, however, that unless the convention contained provisions for its implementation it would prove of little value. The greatest difficulty, perhaps, related to disputes between a State and an individual, and he agreed with Mr. Lauterpacht that such would form the majority. As Mr. Yepes had pointed out, however, precedents existed for recourse by an individual to an international tribunal; in addition to that referred to by Mr. Yepes, he could mention the European Court of Human Rights and the draft Convention on Settlement in Europe which was being prepared under the auspices of the Council of Europe. It was true that in those cases an international body had been established to settle disputes submitted to it, but there were precedents, too, for the procedure which Mr. Lauterpacht had suggested, under which the individual and the State

could each choose its own representative in order to form an arbitral tribunal. The difficulties were not therefore insoluble, but it would certainly take much longer to solve them than the Commission had still to sit. He agreed therefore that it could do no more, at the very most, than make a general suggestion in its report.[4]

The meeting rose at 6 p.m.

[4] Discussion of the question of inserting an arbitration clause was reopened at the 223rd meeting. See *infra* 223rd meeting, paras. 4-79.

220th MEETING

Tuesday, 21 July 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Arbitration clause [Article 10] (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the article on implementation that had been proposed at the previous meeting by the Special Rapporteur and Mr. Scelle as an addition to the draft Convention on the Elimination of Future Statelessness.[1]

2. Mr. KOZHEVNIKOV wondered whether there was any point in his speaking, as on the previous day the authors of the article had appeared no longer to be insisting on its addition to the draft convention.

3. The proposed additional article again raised the question of the legal status of the individual in international law. In his view, the Commission's task was to confirm the basis of international law: to develop and perfect existing law, rather than to change its substance. The Commission should eschew anything that might imperil or violate the structure of international law as it existed. He emphasized yet once more that, in his view, international law concerned exclusively relations between States. The proposal under consideration, on the contrary, would allow individual physical persons to take part in the processes of international law. He was glad that Mr. Lauterpacht had admitted that there was a contradiction between that proposed additional article and other articles in the draft convention.

4. If the individual physical person were accepted as a subject of international law, additional opportunities of interfering in the domestic affairs of States would inevitably result. For there were forces at work that were bent on destroying, first the doctrine of sovereignty, and then sovereignty itself. If they succeeded, international law would be directed not towards democracy, peace and progress, but towards other and reprehensible ends.

5. The text of the proposed additional article was in any event vague and indefinite. How was the conciliation commission to be established? Which were the "governments concerned" mentioned in paragraph 2? The article related not only to persons who were stateless, but also to "persons... likely to become so"; but who was to determine that a person was likely to become stateless?

6. Apart from his anxiety about the whole idea, which he regarded as wrong, of compulsory arbitration between individuals and States, he felt that the text itself was bewildering. He thought the Commission would be wise not to accept the article, and he was therefore glad that the authors appeared to be willing to withdraw it.

7. Mr. ZOUREK said that other members of the Commission had already emphasized that the machinery proposed in the additional article left much to be desired. He expected that in the majority of cases only one State would be concerned; it was therefore likely that it would be difficult to set the machinery in motion.

8. In his view, the greatest disadvantage of the proposed additional article was that it would enable an individual physical person to engage in litigation on a basis of equality with States. Such a possibility was incompatible with the relationship between an individual and the State of which he was a national. For, according to the additional article, an individual would be entitled to

[1] See *supra*, 219th meeting, para. 45.

take action even if he had not yet become stateless. Such a procedure was inimical to the very foundations of international law, since it would destroy the existing conception of the sovereignty of States.

9. A number of considerations had been adduced in support of the article. The 1922 Geneva Convention between Germany and Poland concerning Upper Silesia,[2] had, for example, been cited as a precedent. That example, however, seemed to him irrelevant, since the Convention in question had been concerned with bilateral arrangements governing a transfer of territory, and had certainly not permitted nationals to bring proceedings against their own government. It had also been suggested, in his view erroneously, that the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, under the auspices of the Council of Europe, gave individuals the possibility of appeal to a European court; but the only right that the individual enjoyed under that Convention was that of seizing the European Commission on Human Rights of the case. Not even the covenants on human rights that were being drafted by the Commission on Human Rights provided for direct complaint by an individual against a State; under the terms of those instruments, only a State could raise the question of an alleged breach of human rights.

10. There seemed thus to be no adequate precedents, and the proposed additional article should not be included in the draft Convention on the Elimination of Future Statelessness.

11. Mr. LAUTERPACHT said that he had been thinking about the subject matter of the discussion, particularly in the light of the considerations raised by the Special Rapporteur at the 219th meeting.[3] Although his (Mr. Lauterpacht's) previous remarks,[4] to the effect that the Commission could hardly hope to solve the problem that had been baffling the Commission on Human Rights for years, seemed to have impressed other members, he now considered that the problems facing the two Commissions were different. The Commission on Human Rights was faced with the problem of giving the individual physical person a procedural right of action in respect of a large number of comprehensive rights: the right of freedom of association, political rights, economic and social rights, and so forth. It was therefore not surprising that it should have encountered difficulties in dealing with the right of petition of the individual. The International Law Commission, on the other hand, was now concerned with only one right, which was being defined in a carefully framed convention.

12. It was evident that the Commission would in part be failing in its duty if it did not provide means whereby the individual might assert his right to a nationality under the terms of the draft Convention on the Elimination of Future Statelessness. The matter was one which concerned both that instrument and the draft Convention on the Reduction of Future Statelessness; and though the Commission ought to consider it exhaustively, he believed that that should be done only when the drafting of both conventions had been completed.

13. He agreed that the text before the Commission was in some respects defective. For example, who precisely would be the experts mentioned in paragraph 1, and were they necessary? Was conciliation really important? Would not an inquiry be preferable? Would arbitration be practicable in cases where one litigant was an indigent person unable to pursue the costly road of international arbitration proceedings to its end?

14. But when, if his suggestion were adopted, the Commission came to go into the matter thoroughly, it might be necessary to consider the theoretical issues that had been, or might be, raised by Mr. Kozhevnikov, Mr. Zourek and other members of the Commission, who considered that States alone could be subjects of international law. In his view, the existing position was not so rigid as some of his colleagues appeared to think. The International Court of Justice had, for example, recently delivered an advisory opinion,[5] in which the Soviet Union member of the Court had concurred, concerning reparation for injuries suffered in the service of the United Nations; the United Nations, as such, had been regarded as having a right of action. Again, there was the advisory opinion of the International Court of Justice concerning the international status of South-West Africa,[6] in which it had been decided, also with the concurrence of the Soviet Union member of the Court, that the inhabitants and peoples of South-West Africa had rights under international law deriving both from the terms of the Mandate and from resolutions of the Council of the League of Nations. He came to the conclusion, therefore, that the precedents were not all in the direction that Mr. Zourek had suggested.

15. Further, he pointed out that the Convention on the Elimination of Future Statelessness would not be imposed on States; any State acceding to it would do so freely and voluntarily. Such a procedure could hardly be described as an encroachment upon the sovereignty of States.

16. Finally, he urged the Commission not to shrink from thorough consideration of the matter merely because of its controversial nature. Individuals were the ultimate subjects of all law, whether municipal or international. He hoped that Mr. Kozhevnikov and others would be willing to reconsider their position.

17. Mr. CÓRDOVA said that Mr. Lauterpacht had in effect made a procedural proposal, namely, that discussion of the additional article be deferred until after the Commission had completed its work on both draft

[2] Signed at Geneva on 15 March 1922. See de Martens, *Nouveau Recueil Général*, 3e série, vol. XVI, p. 645.

[3] See *supra*, 219th meeting, paras. 45-46 and 62.

[4] *Ibid.*, paras. 47-48, and 56-57.

[5] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 199*, p. 174.

[6] *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128.

conventions on statelessness. As the issue was a most important one, he supported Mr. Lauterpacht's suggestion.

18. Mr. SANDSTRÖM agreed with Mr. Córdova.

19. Mr. HSU said that, before a decision was taken on the procedural issue, he would like to explain his proposal, then being circulated, which was complementary to those of the Special Rapporteur and Mr. Scelle, and was that a further additional article be added, reading:

"A commission under the auspices of the United Nations shall be established to act on behalf of stateless persons in cases of dispute contemplated in the previous article."

The additional article submitted by the Special Rapporteur and Mr. Scelle would require consequential amendment.

20. He made that suggestion partly to meet the objection that individuals were being raised to a level of equality with States in the matter of litigation; an international commission acting on behalf of individuals would, he hoped, serve the required purpose without offending any susceptibilities.

21. His second purpose was to make the machinery of appeal more efficient; for the function of a commission was not only to help in the administration of justice, but also to assist persons in need who might well be indigent and unable to help themselves.

22. His third purpose was to complete the draft Convention on the Elimination of Future Statelessness. It would obviously be defective if it failed to provide means for its implementation; and it seemed to him that any State approving the terms of the other articles of the convention would be unlikely to refuse to agree to appropriate methods for ensuring its immediate effectiveness.

A motion proposed by Mr. Córdova and seconded by Mr. Sandström, that discussion of the issues raised by the additional article proposed by the Special Rapporteur and Mr. Scelle be deferred until after the Commission had finished its work on both the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness, was adopted by 10 votes to none, with 3 abstentions.

Draft Convention on the Reduction of Future Statelessness (*resumed from the 218th meeting*)

Article I [1] (resumed from the 218th meeting)

23. The CHAIRMAN invited the Commission to take up again the draft Convention on the Reduction of Future Statelessness. Speaking as Chairman, he summarized the positions so far taken by the various members of the Commission on article I of that convention; speaking as a member of the Commission, he explained the amendment he proposed to it, which read:

"1. If no nationality is acquired at birth, either *jure sanguinis* or *jure soli*, every person shall acquire at birth the nationality of the Party in whose territory he is born.

"2. The national law of the Party may make preservation of such nationality conditional on the person's being normally resident in its territory until the age of eighteen."

24. States applying the principle of *jus sanguinis* did not consider that the fact of a person being born on their territory provided an adequate basis for the acquisition of their nationality; and that view was based on considerations that transcended purely legal principles. Other States, of course, in different circumstances, maintained that birth in their territory was a reasonable basis for conferment of their nationality. For instance the States of the New World considered that immigrants should regard their new countries as new homes, and should have the intention of residing there permanently. But in the Old World the position was different. There, immigrants were of all kinds: persons seeking work temporarily, refugees from persecution, and many others who had not necessarily any intention of making their permanent home in the country they entered. The child of such an immigrant, born in the country of immigration, had no special connexion with it, and it was clearly inappropriate that the mere fact of birth should determine its nationality. It was for that reason that the Special Rapporteur had suggested a text for article I, according to which the child of a stateless person would only acquire the nationality of the State in whose territory it was born on the fulfilment of certain conditions which would ensure that there was more than the link of fortuity between the individual and the State. In the Special Rapporteur's draft, the strongest evidence for a closer link was provided by military service, for his text ran as follows:

"If a person does not acquire any nationality at birth, either *jure soli* or *jure sanguinis*, he shall subsequently acquire the nationality of the State in whose territory he was born, provided that:

"(*a*) He continues to reside in such State until the time when he reaches military age; or

"(*b*) He opts for the nationality of the State where he was born on reaching military age; or

"(*c*) He serves in the armed forces of the State in whose territory he was born."

25. Some members of the Commission thought that the conditions demanded by that text were not satisfactory; for example, the condition of doing military service was inappropriate for women. Furthermore, under it the child would remain stateless until it reached military age. The amendments submitted by Mr. Lauterpacht and Mr. Sandström went, perhaps, even further in the same direction, in that by them stateless persons might only acquire the nationality of the State in whose territory they were born after attaining their majority. Mr. Lauterpacht's amendment read:

"Whenever a person does not acquire any nationality at birth he shall, on attaining majority,

acquire on application the nationality of the State in whose territory he was born provided that he has no other nationality and he has resided habitually in that State since birth ".

26. Mr. Sandström's amendment read:

" If a person does not acquire any nationality at birth, he shall, when attaining the age of majority, have the right to acquire, by option, the nationality of the State in whose territory he was born, provided that since his birth he has had his habitual residence in that State."

27. Mr. Scelle had objected that it was not in keeping with the Commission's aims for children to be left stateless, if that could be avoided; and Faris Bey el-Khouri and Mr. Yepes had proposed amendments according to which nationality would be acquired at birth, though certain conditions would have to be fulfilled if that nationality were to be retained. Faris Bey el-Khouri's amendment read:

" If a person does not acquire any nationality at birth he shall acquire at birth the nationality of the State in whose territory he was born, and he remains a national of that State unless he opts, within one year after attaining majority, for another nationality which he may have acquired, or unless he is revoked by the government of the State on the grounds of failing to comply with [fulfil the requirements of] its municipal laws for retaining nationality."

28. Mr. Yepes' proposed text read:

" If, for any reason whatsoever, a person does not acquire any nationality at birth, he shall acquire at birth the nationality of the State in whose territory he was born, provided that, in addition:

" (1) he has resided in the country for a continuous period of at least five years immediately before attaining his majority; or

" (2) both parents, or the one exercising parental authority, were domiciled in the country at the time of his birth, or

" (3) during the year in which he attains his majority under the law of the country of birth, he opts for the nationality of that State in accordance with its legislation."

29. He found Faris Bey el-Khouri's amendment somewhat obscure; for under it a government would be able to impose any conditions it chose, additional to those mentioned in the convention. Thus it seemed that a reduction in statelessness would not necessarily result. Mr. Yepes' proposal was not clear either. Its intention was that a child should acquire at birth a temporary nationality which might be confirmed later on the fulfilment of certain conditions, of which the chief was that the child should have resided in the country concerned for a continuous period of at least five years immediately before the attainment of its majority. To him (Mr. François) that did not seem to be an adequate condition, and he would prefer as a criterion the child's habitual residence from the time of its birth until its eighteenth birthday in the country concerned. He gave as an example the hypothetical case of a child born in France of stateless persons who subsequently established their home in Germany, where the child was educated; if that child were to return to France at the age of sixteen — the age mentioned in Mr. Yepes' proposal — it would be regarded there as a German, and the French authorities would not consider that it could automatically acquire French nationally after five years' residence, as could a stateless person according to Mr. Yepes' proposal. If, on the other hand, it had remained from birth in France, it would have had its education in that country, learnt French as its mother tongue, and might well be regarded as a French child when it reached the age of eighteen.

30. For those reasons, he proposed that article I be replaced by the text proposed by himself.

31. It seemed to him to be reasonable to permit a child, provided it had been normally resident in the country concerned, to go abroad after the age of eighteen, whether for study or any other purpose; for that reason his proposal did not speak of " majority ".

32. Mr. Alfaro had said that a stateless person should not be in a privileged position by comparison with any other alien in respect of the acquisition or loss of nationality. He (Mr. François) thought that that went without saying, and that it applied to both the draft conventions.

33. He thought that the Commission should ensure an adequate guarantee of the link between child and State; otherwise countries applying the principle of *jus sanguinis* would not be satisfied. Mr. Yepes' suggestion did not, in his view, tend to establish such a link. He thought, however, that his own proposal might serve as a useful compromise between the views stated in the discussions.

34. Mr. LAUTERPACHT, welcoming Mr. François' proposal, supported it fully and withdrew his own amendment in its favour. To his mind, Mr. François' amendment went further than did the Special Rapporteur's proposal in the direction which the latter would prefer. It would tend to eliminate statelessness from birth, and a child acquiring a nationality pursuant to it would not lose that nationality except by reason of absence of habitual residence. The proposal did not aim so high as the complete elimination of statelessness, but it provided a practical solution to most of the practical problems involved. He urged members of the Commission not to press their own proposals.

35. Mr. ALFARO, too, supported the Chairman's proposal, which met all the difficulties to which attention had been drawn. It was particularly satisfactory to him, in that it ensured that a stateless child would not be in a privileged position relative to other children born in the country concerned; but to make doubly sure on that point, he would suggest that the following clause be inserted in paragraph 2, after the word " eighteen ":

" and provide that to retain that nationality he must, on attaining majority, comply with such other

conditions as are required from all persons born in the Party's territory."

36. He could not support Mr. Yepes' amendment.[7]

37. The CHAIRMAN pointed out that Mr. Alfaro's suggestion should relate to the relevant articles in *each* convention.

38. Mr. ALFARO thought, on the other hand, that the draft Convention on the Elimination of Future Statelessness was intended to provide absolute rules. Any attenuating principles such as the proposal he had just made should, according to his understanding, be placed only in the draft Convention on the Reduction of Future Statelessness; for some countries, he was sure, including his own, would be unable to accept the former.

39. Mr. HSU congratulated the Chairman on his flexible and reasonable proposal.

40. Mr. SANDSTRÖM had some difficulty in accepting the Chairman's proposal. Absence from one's country of birth seemed to him in itself to be perfectly innocent; yet, the amendment would prevent the nationality of a State being conferred on a person who had been abroad. He thought it preferable to wait eighteen years from the birth of a child and to confer nationality on it then.

41. Mr. SCELLE considered that the Commission's main objective must be to prevent a child being left stateless from birth to the time of its majority. He agreed that it was necessary to ensure that persons acquiring the nationality of a State became members of the national community in a more spiritual sense.

42. Mr. François' proposal seemed to him to meet all requirements, and he supported it as it stood.

43. Referring to Mr. Alfaro's concern that no distinction should be made between the children of stateless persons and the children of other aliens, he said that it went without saying that all normal conditions should apply to stateless children as to others, and he doubted whether there was any need to state the principle explicitly. Could Mr. Alfaro give any examples of the discrimination he had in mind?

44. Mr. YEPES could not support Mr. François' amendment. He had objections of principle, as well as objections to the drafting, for it seemed to him quite illogical to state that, if a child had not acquired nationality *jure soli*, it should acquire the nationality of the State on whose territory it was born; if that was not *jus soli* what was?

45. Further, Mr. François' proposal was not in keeping with just his (Mr. Yepes') conception of nationality, for it provided not just a material but rather a spiritual and even sentimental link between the individual and the State. Underlying the concept of nationality there was always a philisophical notion which it would be a mistake to overlook. He felt that the link between the individual and the State should be provided by circumstances other than the mere fact of birth; in his proposal, habitual residence, the domicile of the parents, and option, were all provided as links. In particular, Colombian legislation was not in conformity with the principles of Mr. François' amendment.

46. Referring to his (Mr. Yepes') proposal that five year's residence immediately before attaining majority should be required as a condition precedent to the acquisition of the nationality of the country in whose territory a stateless child had been born, Mr. François had suggested that a young person born in France, but brought up in Germany, and therefore not regarded as French, might acquire French citizenship under it. But it seemed to him that Mr. François' argument proved too much, since, if accepted, it would prevent normal naturalization. Prior to the five years' period of residence an applicant for naturalization usually had had little connexion with the State whose nationality he was seeking. He could see no reason why an applicant for naturalization should be treated more favourably than stateless persons born in the country. To his mind, to require eighteen years' continuous residence was an unjust discrimination against a person who already had a link with the country because he had been born in it. The five years' prior to majority were decisive in the matter of nationality, for it was then that a man chose his profession and, often, his wife, and that the general direction of his life was usually determined.

47. The CHAIRMAN, speaking as a member of the Commission, said that he agreed entirely with Mr. Yepes that paragraph 1 of his proposal, which was merely the text adopted by the Commission for article I of the draft Convention on the Elimination of Future Statelessness, needed re-drafting.

48. But he could not agree with Mr. Yepes about the necessary period of habitual residence. Mr. Yepes seemed to have forgotten that naturalization was a privilege, whereas the convention under discussion would confer a right; there was a great difference between the two.

49. Mr. LIANG (Secretary to the Commission) said that it was his understanding that the Commission had not finally adopted any particular text for article I of the draft Convention on the Elimination of Future Statelessness. His recollection was that the draft of article I had been submitted to the Drafting Committee, but that the latter had not yet considered it.

50. Mr. AMADO could not understand Mr. Yepes' objections to Mr. François' proposal. Leaving aside the question of the words "either *jure sanguinis* or *jure soli*", that proposal seemed to express exactly what the Commission required, and he would vote in favour of it. The conditions which Mr. Yepes proposed were much more liberal, and did not constitute a sufficient link between the State and the individual.

Mr. Alfaro, on the other hand, proposed that the individual should have to comply with any conditions prescribed by the law of the State. In his (Mr. Amado's) view it was not reasonable that the State should require an individual to do more than be normally resident in

[7] See *supra*, para. 28.

its territory until the age of eighteen, as proposed by Mr. François. If a person was normally resident in the territory of a State during his formative years, sufficient link between him and it would have been created to justify its nationality being conferred upon him.

51. Mr. CÓRDOVA said that he could add little to what had already been said by the Chairman in the course of his masterly exposition. The text proposed by Mr. Alfaro and by Faris Bey el-Khouri shared the disadvantage of making it possible for the State to prescribe excessive conditions for the acquisition of nationality. On the other hand, none of the three conditions listed by Mr. Yepes constituted a sufficient link between the individual and the State. Moreover, if it was sufficient that both parents, or the one exercising parental authority, should be domiciled in a country at the time of their child's birth, the effect of the present convention would be almost identical with that of the draft Convention on the Elimination of Future Statelessness. Mr. François made it possible for the retention of nationality to be made subject only to habitual residence until the age of eighteen; his proposal hit the happy mean, and he (Mr. Córdova) would vote in favour of it.

52. Mr. ALFARO felt it necessary to explain why he considered that the adoption of Mr. Francois' proposal would place the children of stateless persons in a more privileged position than the children of other aliens. A child born of two French nationals in Panama was, according to the Panamanian Constitution, *prima facie* a national of Panama. The Constitution, however, also provided that on attaining his majority such a person should forfeit Panamanian nationality if he did not renounce his parents' nationality, swear allegiance to the Republic of Panama, show that he could speak the language of the country and knew something of its geography, history and political structure, and, in general, prove that he was physically and morally integrated into the life of the country. If he wished to exercise political rights, he was also required to have lived in Panama during the two years preceding his majority.

53. Those conditions might appear excessively onerous; the reason for them lay in the fact that since the opening of the Panama Canal, large numbers of aliens had settled in the country; they had lived a life apart, however, and not become integrated in the nation's life. It was clearly unreasonable that children born to such people should remain Panamanian nationals unless they fulfilled the conditions he had mentioned, and it was in order to protect the independence of the nation that the Constitution contained the provisions he had referred to. Similar provisions were to be found in the constitutions of a number of other Latin-American States. He did not see how such States could accept a proposal which made habitual residence in the country until the age of eighteen the sole qualification for retention of nationality.

54. Faris Bey el-KHOURI said that his proposal did not mean that States would be able to prescribe special conditions which would have to be fulfilled by persons born stateless, but only that such persons should comply with the relevant laws applying to all the inhabitants of the territory. It was surely obvious that persons born stateless should be subject to the same laws as the other inhabitants of the country whose nationality they possessed.

55. Mr. SANDSTRÖM said that the "normal residence" condition proposed by Mr. François would give rise to serious uncertainties in practice. For example, if a person was abroad for one or two years, was he to be considered as being "normally resident" in the country in which he had been born? That objection was so serious that he could not vote for Mr. François proposal. In his own, he requested that the word "majority" be changed to the word "eighteen".

56. Mr. LAUTERPACHT said that if he had to choose between a provision which would leave stateless until the age of eighteen persons born stateless and a provision which would give them nationality at birth but which might — though he did not think it would — give rise to certain doubts about the retention of such nationality at the age of eighteen, he would choose the latter. He had already pointed out, however, that he did not think such doubts could arise. Absence for one or two years would not matter.

57. With reference to what Mr. Alfaro had said, he wished to point out that the Commission was endeavouring to formulate a general rule, not one which would take into account the peculiar circumstances which might obtain in various countries. He did not see the relevance of the example chosen by Mr. Alfaro to support his proposal. In the case of stateless persons the question of renouncing another nationality did not arise; and if they were habitually resident in Panama until the age of eighteen, it was reasonable to suppose that they would speak the language and have some knowledge of the country's history and geography. He was therefore still unable to understand why Mr. Alfaro should be unwilling to accept the text proposed by Mr. François.

58. Mr. AMADO said that he was unfortunately obliged to leave the meeting, but he wished to place on record the fact that the statements which had been made since he had last spoken had not shaken his support for Mr. François' proposal, and that had he been present for the vote, he would have voted in favour of it.

59. Mr. ZOUREK felt that the main objection which had been lodged against Mr. François' proposal was valid, namely, that it made nationality solely dependent on the place of birth. In inserting the proviso contained in paragraph 2 of his proposal, Mr. François had perhaps tried to take into account the preoccupations of *jus sanguinis* countries, but States might wish to prescribe many other conditions for the retention of nationality than that of normal residence until the age of eighteen. Moreover, as Mr. Sandström had pointed out, paragraph 2 of the text proposed by Mr. François introduced a serious element of uncertainty. For example, a person might go abroad before the age of

eighteen intending to remain for a matter of weeks or months; circumstances could change, however, and he might remain abroad for years; in such a case, when, under Mr. François' proposal, would he lose his nationality?

60. The text proposed by Mr. Sandström was preferable, though if the individual was given the right of option, the State concerned should also be given its say.

61. Mr. YEPES proposed that the words "either *jure sanguinis* or *jure solis*" in paragraph 1 of Mr. François' proposal be replaced by the words "*jure sanguinis*", and that the following phrase be added to paragraph 2:

> "or impose other conditions regarded as necessary to make certain that there are genuine links with the country of birth".

62. He did not consider that mere habitual residence in a country until the age of eighteen was sufficient evidence of a link between the individual and the State. States might well consider that other conditions should be fulfilled. If his amendment to Mr. François' proposal was not adopted, he would ask that a vote be taken on the proposal which he had made.[8]

63. The CHAIRMAN said that, as Mr. Córdova had withdrawn the text proposed in his report, and as Mr. Lauterpacht and Faris Bey el-Khouri had withdrawn their proposals, the Commission had before it only the proposals made by Mr. Sandström and Mr. Yepes, and that made by himself, together with the amendments to the latter proposed by Mr. Alfaro and Mr. Yepes. The latter's proposed amendment to paragraph 1 was a drafting point which could be referred to the Drafting Committee.

64. Mr. YEPES agreed with the Chairman's suggestion. Instead of the words "*jure sanguinis*" the Drafting Committee might think it preferable to use the term "for any reason whatsoever".

65. The CHAIRMAN then put Mr. Sandström's proposal to the vote, with the amendment made by its author, namely, the substitution of the word "eighteen" for the word "majority".

Mr. Sandström's proposal was rejected by 5 votes to 1, with 4 abstentions.

66. The CHAIRMAN invited comments on Mr. Yepes' amendment to paragraph 2 of his proposal.

67. Mr. SCELLE understood the preoccupations of Mr. Yepes and Mr. Alfaro. The Commission, however, was trying to restrict statelessness. If it left States free to impose whatever conditions they liked for the retention of nationality, it would be defeating its purpose.

68. Mr. ALFARO said that he had supported all proposals to give the child of stateless parents the nationality of the country in which he was born. Once the child acquired that nationality, however, he must not be placed in a more privileged position than the children of other aliens. If he failed to retain the nationality he acquired, the responsibility lay with him, not with the State. He (Mr. Alfaro) must therefore support Mr. Yepes' amendment, which had the same purpose as his own.

69. The CHAIRMAN pointed out that Mr. Yepes' amendment went far beyond Mr. Alfaro's.

70. Mr. CÓRDOVA agreed with Mr. Scelle that if Mr. Yepes' amendment left States free to impose any conditions they wished for the retention of nationality, the Commission would be defeating its own ends by adopting it.

Mr. Yepes' amendment to paragraph 2 of Mr. Francois' proposal was rejected by 5 votes to 4, with 3 abstentions.

71. Mr. YEPES then withdrew his own proposal for article I.

72. The CHAIRMAN invited comments on the amendment proposed by Mr. Alfaro to paragraph 2 of his proposal. He would first ask Mr. Alfaro whether the words "on attaining majority" should not be deleted, since some States at least might oblige persons who had acquired their nationality to comply with certain conditions at other times.

73. Mr. ALFARO said that he saw no harm in deleting those words. What he had had in mind had been the conditions which had to be fulfilled at the time the acquisition of nationality lost its provisional character. The withdrawal of nationality at a later date was a quite separate matter.

74. The CHAIRMAN said that he saw no difficulties arising out of Mr. Alfaro's amendment in the case of *jus soli* countries, but that, at first sight at least, it appeared to give *jus sanguinis* countries the possibility of frustrating the whole purpose of the Convention; for a country applying *jus sanguinis* could make it one of the "conditions" that one or both of the parents should have its nationality.

75. Mr. ALFARO said that neither his country nor, he believed, any other adhered strictly to the principle of *jus soli*. His point might be made clearer by adding the words "of alien parents" before the words "in the Party's territory", but he did not think that was necessary, since no such conditions were required from persons born of nationals.

76. Mr. HSU said that as the Convention was intended to be supplementary to the existing law, there was no need to say that the existing law must be complied with.

77. Mr. ALFARO pointed out that the whole purpose of his amendment was to avoid irregularity in the application of the existing law.

78. Faris Bey el-KHOURI said that, as the amendment proposed by Mr. Alfaro would improve the text, he would vote in favour of it. That did not mean, however, that he could vote for the article as a whole or for the

[8] See *supra*, para. 28.

convention, so long as they failed to distinguish between stateless individuals and stateless masses.

79. Mr. LIANG (Secretary to the Commission) suggested that the aim of the constitutional provisions to which Mr. Alfaro had referred was to prevent a person who would acquire another nationality *jure sanguinis* from acquiring Panamanian nationality as well, by the mere fact of his having been born in that country. The Commission's aim was different; it was to confer a nationality on persons who would otherwise have no nationality at all. In his view, therefore, the argument that the text proposed by Mr. François would place persons who would otherwise be stateless in a privileged position failed to take into account the general aim of the Convention.

80. The CHAIRMAN said that he would vote in favour of Mr. Alfaro's amendment on the understanding that the various drafting points which had been raised with regard to it would be referred to the Drafting Committee.

On that understanding, *the amendment proposed by Mr. Alfaro to paragraph 2 of Mr. François' proposal was adopted by 5 votes to 2, with 5 abstentions.*

Paragraph 1 of Mr. François' proposal was adopted by 7 votes to 1, with 4 abstentions.

Paragraph 2, as amended, was adopted by 7 votes to 1, with 4 abstentions.

Mr. Francois' proposal as a whole was adopted, as amended, by 7 votes to 1, with 4 abstentions. Subject to any drafting changes made by the Drafting Committee, the text read as follows:

"1. If no nationality is acquired at birth, either *jure sanguinis* or *jure soli*, every person shall acquire at birth the nationality of the Party in whose territory he is born.

"2. The national law of the Party may make preservation of such nationality conditional on the person's being normally resident in its territory until the age of 18 and provide that to retain nationality he must comply with such other conditions as are required from all persons born in the Party's territory."

Article II [2]

81. The CHAIRMAN then drew attention to article II, which, in the text proposed by the Special Rapporteur (A/CN.4/64), read as follows:

"For the purpose of article I, a foundling shall be presumed to have been born in the territory of the Party in which it is found, until the contrary is proved."

He recalled that, in considering an identical provision in the draft Convention on the Elimination of Future Statelessness, the Commission had deleted the words "until the contrary is proved", and inserted the words "whose place of birth is unknown" after the word "foundling".

82. Mr. LAUTERPACHT felt that for the sake of uniformity the same changes should be made in the text of article II of the draft Convention on the Reduction of Future Statelessness.

83. Mr. YEPES and Mr. SCELLE felt that the words "until the contrary is proved" should be retained, since it was a violation of judicial practice to withhold a nationality from anyone who could prove that he had a right to it.

84. Mr. ZOUREK said that he need merely repeat what he had said during the discussion on the draft Convention on the Elimination of Future Statelessness, namely, that the deletion of the words "until the contrary is proved" was illogical and wholly inappropriate, particularly in view of the fact that the Commission had decided to place no age limit on foundlings. It was by no means exceptional for the origin of a foundling to be subsequently cleared up; it had happened tens of thousands of times during and immediately after the second World War.

85. Mr. LIANG (Secretary to the Commission) pointed out that the effect of the words "whose place of birth is unknown" was, at least, very similar to the effect of the words "until the contrary is proved". If the foundling's place of birth became known, article II would cease to apply.

Further discussion of article II was adjourned until the next meeting.

The meeting rose at 1 p.m.

221st MEETING

Wednesday, 22 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Article II [2] (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article II of the draft Convention on the Reduction of Future Statelessness. He had consulted the provisional summary record of the meeting at which the Commission had discussed the corresponding article of the draft Convention on the Elimination of Future Statelessness.[1] It appeared that Mr. Córdova had then proposed deletion of the words "until the contrary is proved" on the grounds that that convention was designed to bring about the complete elimination of statelessness. After a lengthy discussion, Mr. Córdova's proposal had been adopted by 7 votes to 6, with 1 abstention. Faris Bey el-Khouri had, however, suggested the addition of the words "whose place of birth is unknown" in order to obviate the objections to which Mr. Córdova's proposal had given rise.

2. There was therefore, as the Secretary had said at the previous meeting, a close connexion between the two phrases. Faris Bey el-Khouri's suggestion had been adopted by 10 votes to none, with 4 abstentions, and the article in its amended form had been adopted by 9 votes to 3, with 2 abstentions. In view of the large majority by which the article had been adopted in its amended form, he saw no reason why there should be any serious objections to the same texts being inserted in the draft convention at present under consideration.

3. Mr. KOZHEVNIKOV said that there was no doubt that the draft Convention on the Reduction of Future Statelessness was very close in substance to the draft Convention on the Elimination of Future Statelessness. His attitude to both was therefore much the same; both were based on the — to him unacceptable — principle that international law should have precedence over the sovereignty of States. The draft convention at present under consideration was not, however, intended to be a supplement to the other; it was intended to be an independent convention, and there was no reason why a question which had been decided one way in one convention should not be decided differently in the other. Even though the Commission had deleted the words "until the contrary is proved" from article 2 in the first draft convention, he was in favour of their retention in the second.

4. Mr. YEPES agreed that those words should be retained, for the reasons which had been given during the discussion on article 2 of the draft Convention on the Elimination of Future Statelessness. The fact that an error had been committed was no reason for repeating it.

5. Mr. SANDSTRÖM said that in principle he agreed with Mr. Kozhevnikov that there was no reason why the wording of one convention should necessarily conform to that of the other. In the present instance, however, he saw no reason why the wording which had been adopted for the first draft convention should not be used for the second, since in practice there was no difference between that wording and the wording proposed in the Special Rapporteur's report.

6. Faris Bey el-KHOURI said that although it was, of course, true that the two conventions were not identical in all respects, they were identical in so far as concerned what they proposed with regard to foundlings.

7. The CHAIRMAN agreed that the same wording must be used in both, since otherwise it would be assumed that two different things were meant. If the Commission wished to adopt a different wording from that which it had already adopted for article 2 of the draft Convention on the Elimination of Future Statelessness, the Drafting Committee should bring that article into line.

8. Mr. ALFARO said that in his view the situation did not require that the article should rest on a *juris et de jure* presumption instead of on a *juris tantum* presumption. The circumstances surrounding a foundling's birth might at any time be clarified, and if they were, and the foundling was discovered to have the right to a nationality other than that of the State in which he had been found, there was no reason to deprive him of the former. He therefore favoured the retention of the words "until the contrary is proved".

9. Mr. SCELLE agreed that those words should be retained.

10. Mr. LAUTERPACHT suggested that all difficulties would be removed if the text were amended to read:

> "For the purpose of article I a foundling, so long as the place of his birth is unknown, shall be presumed to have been born in the territory of the Party in which he is found."

11. The CHAIRMAN said that he had interpreted the words which, at the suggestion of Faris Bey el-Khouri, had been added to article 2 in the first draft convention as meaning "so long as the place of his birth is unknown", but that he had no objection to making the point explicit, in the way suggested by Mr. Lauterpacht.

12. Mr. YEPES said that he could accept Mr. Lauterpacht's suggestion.

[1] See *supra*, 213th meeting, paras. 31-75.

Mr. Lauterpacht's suggestion was adopted by 10 votes to none, with 3 abstentions.

13. The CHAIRMAN said that the Drafting Committee would doubtless bear in mind the desirability of making the same change in article 2 of the draft Convention on the Elimination of Future Statelessness.

Article III

14. He then drew attention to article III, relating to children born to persons enjoying diplomatic immunity, and recalled that the corresponding article had been deleted from the draft Convention on the Elimination of Future Statelessness.[2] Should it not also be deleted from the draft Convention on the Reduction of Future Statelessness?

It was so agreed.

Article IV [3]

15. The CHAIRMAN then drew attention to article IV, dealing with births on vessels or aircraft, and recalled that for the corresponding article in the draft Convention on the Elimination of Future Statelessness the Commission had adopted the following text:

> "For the purposes of article I, birth on a vessel shall be deemed to have taken place within the territory of the state whose flag the vessel flies. Birth in an aircraft shall be considered to have taken place within the territory of the state where the aircraft is registered."[3]

16. Mr. CÓRDOVA (Special Rapporteur) said that he still preferred the text contained in his report to that which the Commission had adopted, but that since it had adopted it for one convention, it was logical to adopt it for the other.

It was agreed by 9 votes to none, with 4 abstentions, to use for article IV the same wording as had been adopted for article 4 of the draft Convention on the Elimination of Future Statelessness.

Article V [4]

17. The CHAIRMAN then drew attention to article V as proposed by the Special Rapporteur, which read as follows:

> "If a child does not acquire at birth any nationality, either *jure soli* or *jure sanguinis*, it shall acquire the nationality of one of its parents. In this case the nationality of the father shall prevail over that of the mother."

18. Mr. CÓRDOVA said that article V was designed to cover cases where a child born in a *jus sanguinis* country to nationals of a *jus soli* country did not fulfil the conditions laid down in article I. It would not, however, cover cases where the parents were stateless or unknown, and its effect would therefore be the reduction, not the elimination, of statelessness so arising. In view of the changes which had been made in article I, the wording of article V would need some amendment.

19. The purpose of the second sentence was to avoid cases of dual nationality.

20. Mr. SCELLE said that in the French version, at least, the second sentence could only mean that the child should choose the nationality of its father in preference to that of its mother.

21. Mr. LAUTERPACHT suggested that, in view of the changes which had been made in article I, article V should be amended to read:

> "If in consequence of the operation of the conditions provided in article I a person does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents. In the latter case, the nationality of the father shall prevail over that of the mother."

22. The CHAIRMAN pointed out that the text proposed in the Special Rapporteur's report served another purpose than that which he had mentioned. It would ensure that a nationality was conferred upon a child born in a *jus sanguinis* country which was not a Party to the convention, provided that one of its parents was the national of a State which was a party to the convention. Assuming that the Netherlands signed the convention, Netherlands nationality would, for example, under the terms of article V, be conferred on a child born in Germany to a stateless father and a Netherlands mother even if Germany was not a party to the Convention.

23. Mr. CÓRDOVA agreed that the text proposed in his report would have that effect too.

24. Mr. LAUTERPACHT said that the question which the Chairman had raised was one which must be dealt with separately. The text which he (Mr. Lauterpacht) had proposed to cover cases where the provisions laid down in article I were not fulfilled should therefore form an additional article, and the text of article V, as contained in the Special Rapporteur's report, should be retained, though possibly with some drafting amendments.

25. Mr. CÓRDOVA felt that the same text could cover both types of case. If the text began "If a child does not, under the provisions of article I, acquire at birth any nationality...", the words "under the provisions of article I" could mean in the one case "because he does not comply with the conditions provided in paragraph 2 of article I", and in the other "because, being born in the territory of a State which is not a party to the Convention, he falls outside the scope of article I".

26. Mr. LIANG (Secretary to the Commission) said that if the Commission wished to insert in the draft Convention on the Reduction of Future Statelessness a provision covering persons born in a State which was

[2] *Ibid.*, para. 85a.

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

not a Party to the convention, but who had a parent who was the national of a State which was a Party to the convention, it seemed that it should *a fortiori* include the same provision in the draft Convention on the Elimination of Future Statelessness.

26a. Mr. CÓRDOVA agreed.

27. Mr. SANDSTRÖM also agreed, but observed that the point raised by the Chairman emphasized the fact that the success of the Commission's endeavours to reduce or eliminate statelessness would depend less on the wording of the Conventions than on the number of States that acceded to them.

28. He suggested that, in order to make quite clear the point which the Chairman had in mind, the words "provided the State of which such parent is a national is a Party to the Convention" be inserted after the words "it shall acquire the nationality of one of its parents".

29. The CHAIRMAN thought that that went without saying.

30. Mr. YEPES pointed out that the text proposed in the Special Rapporteur's report failed to distinguish between legitimate and illegitimate children. In the case of the latter, account should be taken of the parent to whom filiation was first established. He therefore proposed the addition of the following sentence, based on article 17 of the French law of 1945:

"An illegitimate child shall acquire the nationality of the parent to whom filiation is first established."

31. Mr. KOZHEVNIKOV said that, if Mr. Yepes' proposal were adopted, it would only strengthen his opposition to article V, since Soviet law recognized no distinction between legitimate and illegitimate children.

32. Mr. YEPES said that, no matter what the law of individual countries might say, such a distinction existed in fact.

33. Mr. CÓRDOVA did not understand Mr. Yepes' proposal, since it was necessarily the mother to whom filiation was first established.

34. Mr. SCELLE agreed, but said that he would have to vote for Mr. Yepes' proposal, since it appeared to be based on the law of his (Mr. Scelle's) country.

35. Mr. ALFARO felt that it was unnecessary, for the purposes of the convention, to make such fine distinctions, particularly if they were abhorrent to the legal systems of certain countries. The case of illegitimate children would be covered, and the possibility of dual nationality excluded, if the second part of the article were amended to read simply "it shall acquire the nationality of its father and, in default thereof, the nationality of its mother".

36. The CHAIRMAN said that he would first put to the vote the amendment proposed by Mr. Yepes to the text contained in the Special Rapporteur's report.

Mr. Yepes' amendment was rejected by 7 votes to 2, with 4 abstentions.

37. Mr. ALFARO pointed out that, as it stood, the Special Rapporteur's text, if taken in conjunction with article I, seemed to imply that there were two different rules for the one situation. In one case it was stated, "If a child does not acquire at birth any nationality, either *jure soli* or *jure sanguinis*, it shall acquire the nationality of one of its parents"; in the other it was stated, "If no nationality is acquired at birth either *jure sanguinis* or *jure soli*, every person shall acquire at birth the nationality of the Party in whose territory he is born".

38. Mr. CÓRDOVA agreed that some reference to article I would have to be inserted in the text of article V.

39. Mr. LAUTERPACHT suggested that the Commission should first vote on the additional article which he had proposed.

The additional article proposed by Mr. Lauterpacht was adopted by 5 votes to 3, with 5 abstentions.

40. Mr. YEPES explained that he had voted against that article because he thought it gave *jus sanguinis* an unjustified preponderance over *jus soli*.

41. The CHAIRMAN then put to the vote the text of article V proposed by the Special Rapporteur.

That text was adopted by 6 votes to 4 with 3 abstentions.

42. Mr. SCELLE said that he had abstained from voting because the French text, at least, made no sense. He hoped that it would be carefully scrutinized by the Drafting Committee.

43. Mr. ALFARO said that he had voted against the text just adopted because it made no sense in English either. The Commission had apparently decided that it was unnecessary to refer in the text to the circumstances in which the article would apply. He hoped that such a reference would at least be made in the report.

44. Mr. CÓRDOVA proposed that the text just adopted be also inserted in the draft Convention on the Elimination of Future Statelessness, since, as the Secretary had said, that seemed only logical.

45. Mr. LAUTERPACHT suggested that a decision on that question be deferred until the Commission had had an opportunity of viewing both conventions as a whole.

It was so agreed.

Article VI [5 and 6]

46. The CHAIRMAN invited comments on article VI, which read as follows:

"1. If the law of the contracting party whose nationality is possessed by a person recognizes that such nationality is lost as a consequence of a change in the person's personal status (marriage, termination of marriage, legitimation, recognition, adoption), such loss shall be conditional upon the acquisition of the

nationality of another State in consequence of the change of personal status.

"2. The change or loss of the nationality of a spouse or of a parent shall not entail the loss of such nationality either by the other spouse or by the minor children, unless they acquire another nationality.

"3. No renunciation of nationality by a person shall be effective unless such person, at the time of the renunciation, acquires another nationality.

"4. Persons seeking naturalization in a foreign country shall not lose their nationality until they have acquired another."

47. He pointed out that paragraphs 1 and 2 were slightly different from article 5 in the draft Convention on the Elimination of Future Statelessness in the form in which it had been adopted by the Commission.

48. Mr. CÓRDOVA said that the article under discussion was identical with article 5 of the draft Convention on the Elimination of Future Statelessness as he had originally drafted it. The Commission had decided to divide article 5 of that convention into two articles; he asked whether the article under discussion should in consequence be divided similarly, and suggested that the text of the article or articles to be adopted by the Commission in the draft Convention on the Reduction of Future Statelessness should follow that of articles 5 and 6 of the Convention on the Elimination of Future Statelessness in the form in which they had been adopted.

49. The CHAIRMAN recalled that, in the course of its discussions on the draft Convention for the Elimination of Future Statelessness, the Commission had added a third paragraph to article 6, reading:

"3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or on any other similar ground."[4]

50. The article under discussion contained no equivalent paragraph. He wondered whether such a provision was appropriate to the draft Convention on the Reduction of Future Statelessness.

51. Mr. LAUTERPACHT said that the article under discussion, like articles 5 and 6 of the draft Convention on the Elimination of Future Statelessness, contained no drastic innovations. They reproduced almost literally the text of the Convention on Certain Questions relating to the Conflict of Nationality Laws agreed at The Hague in 1930.[5]

It was agreed, by 8 votes to 1 with 4 abstentions, that paragraphs 1 and 2 of article VI of the draft Convention on the Reduction of Future Statelessness should be identical with article 5 of the draft Convention on the Elimination of Future Statelessness as adopted by the Commission at its 218th meeting.

It was also agreed, by 8 votes to 2 with 3 abstentions, that paragraphs 3 and 4 of article VI of the draft Convention on the Reduction of Future Statelessness should be identical in text with paragraphs 1 and 2 of article 6 of the draft Convention on the Elimination of Future Statelessness as adopted by the Commission at its 218th meeting.

It was further agreed, by 6 votes to 2 with 5 abstentions, that another paragraph should be added to article VI of the draft Convention on the Reduction of Future Statelessness identical with paragraph 3 of article 6 of the draft Convention on the Elimination of Future Statelessness as adopted by the Commission at its 218th meeting.

52. The CHAIRMAN said that it would be left to the Drafting Committee to decide whether article VI of the draft Convention on the Reduction of Future Statelessness should be divided into two, following the precedent of the draft Convention on the Elimination of Future Statelessness.

53. Mr. YEPES raised a question of principle. If article VI of the draft Convention on the Reduction of Future Statelessness was to be identical with articles 5 and 6 of the draft Convention on the Elimination of Future Statelessness, was there any point in having two separate conventions?

54. The CHAIRMAN said there were many differences between the two conventions. Article VII of the draft Convention on the Reduction of Future Statelessness was one example.

55. Mr. YEPES questioned the utility of incorporating identical articles in each of the two draft conventions.

56. Mr. SCELLE said that in his view Mr. Yepes' point should be taken when the texts of the two conventions had been completed; it might then indeed seem unnecessary to have two conventions.

57. Mr. YEPES explained that his abstention from the three previous votes reflected the doubts he had just expressed.

Article VII [7]

58. The CHAIRMAN invited discussion of article VII of the Convention on the Reduction of Future Statelessness. It read:

"1. No State shall deprive any person of its nationality by way of penalty, except on the following grounds:

"(*a*) Entry into the service of the government of an enemy State, or enrolment in the armed forces of such State;

"(*b*) Expatriation to avoid military obligations;

"(*c*) If naturalized:

(i) When naturalization was obtained by fraud;

(ii) When the naturalized person has resided in the country of his origin during five years or more.

[4] See *supra*, 218th meeting, para. 68.

[5] See text in *Laws concerning nationality* (United Nations publication, Sales No.: 1954.V.1), p. 567.

"2. In the cases to which paragraph 1 above refers, the deprivation should be decided in each case only by a judicial authority acting in accordance with due process of law.

"3. No State shall deprive any person of its nationality on any other ground unless such a person, at the time of deprivation, acquires the nationality of another State."

59. Mr. CÓRDOVA said that in preparing his draft he had followed as closely as possible the instructions given to him by the Commission. He called attention in paragraph 1 (*a*) to the use of the phrase "enemy State". Service with a foreign government, as such, did not violate any principles of international comity; indeed, it was frequently advantageous for individuals to serve foreign governments, and that might even be the case with service in armed forces other than those of an individual's own State — a United Nations army, for example.

60. In paragraph 1 (*b*), he had had in mind the distinction between evasion of military obligations and expatriation to avoid them; evasion without expatriation could be punished by the State affected.

61. With regard to paragraph 1 (*c*) i, he recalled that Mr. Scelle had pointed out that naturalization obtained by fraud was null and void, he therefore proposed that that provision be deleted. Paragraph 1 (*c*) (ii) should be retained, however, as it seemed to him that a person's residence in his country of origin demonstrated his willingness and desire to be linked with that country.

62. He asked the Commission to note his suggestion in paragraph 2 that deprivation of nationality should not be automatic. In his view, the individual should be entitled to the protection of judicial procedure. Paragraphs 1 and 2 were the exceptions to the general rule, stated in paragraph 3, that a person should not be denationalized unless he acquired another nationality.

63. Mr. YEPES pointed out that the article under discussion covered a number of different questions; he suggested that it should be discussed paragraph by paragraph. Furthermore, it was in contradiction with article 7 of the draft Convention on the Elimination of Future Statelessness under which a person might not be denationalized by way of penalty so as to render him stateless.

64. The CHAIRMAN said that there was no contradiction between the two conventions. The differences between them were deliberate and resulted from their different objectives. The Convention on the Reduction of Future Statelessness would involve States in obligations of smaller scope than those consequent upon acceptance of the Convention on the Elimination of Future Statelessness.

65. He invited the Commission to start by discussing article VII in general and then to consider it point by point.

66. Mr. ALFARO thought that, generally speaking, the text took a reasonable view of the circumstances in which denationalization was regarded as justified.

67. Mr. LAUTERPACHT, on a drafting point, said that paragraph 1 (*c*) gave the impression, which was obviously not intended, that a naturalized person could not be denationalized in the circumstances described in paragraphs 1 (*a*) and 1 (*b*).

68. Mr. KOZHEVNIKOV said that, quite apart from general considerations concerning the draft convention as a whole, he felt that article VII was not complete as it stood, since it limited unduly the circumstances in which deprivation of nationality might take place. Furthermore, under paragraph 2, there was undue limitation of the authority which might decide on denationalization in each case. In many countries, denationalization was the concern not only of the judicial authorities; for example, in the Soviet Union the Praesidium of the Supreme Council was also competent in those matters. Again, he could not understand the object of paragraph 3, which seemed to him to override paragraphs 1 and 2, and he asked the Special Rapporteur to explain that point.

69. Mr. CÓRDOVA explained that the object of the article was to avoid denationalization. In the draft Convention on the Elimination of Future Statelessness, the somewhat drastic rule had been laid down that the State could not make anyone stateless unless he acquired another nationality. But certain States might not be able to accept so absolute a principle, and consequently, the Convention on the Reduction of Future Statelessness included certain exceptions, which had, however, been kept as few as possible.

70. It was, of course, open to the Commission to recommend that States might deprive persons of their nationality whenever and however they thought fit. Such a recommendation would, however, neither eliminate nor reduce statelessness.

71. The CHAIRMAN recalled that during the discussion on the draft Convention on the Elimination of Future Statelessness, the Commission had wished to draw a distinction between deprivation of nationality as a penalty and deprivation of nationality on other grounds. He wondered whether the same course should be followed in the Convention on the Reduction of Future Statelessness.

72. Mr. SANDSTRÖM, referring to paragraph 1 (*a*), suggested that there were other actions besides that of entry into the service of the government of an enemy State that were equally detrimental to the State of which the person concerned was a national; he instanced spying and treason. He felt that the Convention might be more acceptable if the article under discussion included some mention of such other actions.

73. Mr. ZOUREK, referring also to paragraph 1 (*a*), suggested the replacement of the word "enemy" by the word "foreign". The word "enemy", taken in its technical sense, would have no application except in wartime. As for Mr. Córdova's mention of a United Nations army, such a force as at present understood would consist of national contingents; there was no

need, therefore, to legislate for membership of such a force.

74. Secondly, State practice in the matter of denationalization was wider than what would be permitted under the text proposed for article VII. In addition to entry into the service of the government of an enemy State or enrolment in its armed forces, there were equally grave or even graver activities, some of which had been instanced by Mr. Sandström, and which were normally causes of denationalization. Some of those causes were mentioned in the Secretariat's "Study of Statelessness".[6]

75. Thirdly, there were many States in which questions of nationality were within the competence of the administrative authorities. He doubted whether it was wise to restrict decisions in cases of denationalization to the exclusive competence of the judicial authorities.

76. Fourthly, he considered that paragraph 3 was in contradiction with paragraphs 1 and 2.

77. Mr. SCELLE disapproved in general the phrase "enemy state" in paragraph 1 (*a*); on the one hand, it was only truly applicable in wartime and, on the other, if the terms of the United Nations Charter were followed, it was possible that only an aggressor might technically be classified as an enemy. Secondly, he thought that high treason, spying and similar actions detrimental to the State should be mentioned in paragraph 1, along with entry into the services of the government of an enemy state and enrolment in its armed forces. He entirely agreed, however, with paragraph 2.

78. The CHAIRMAN said that the equivalent article in the Convention on the Elimination of Future Statelessness was article 7, according to which States should "not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless". He suggested that the first clause of paragraph 1 of the article under discussion should accordingly read:

> "No state shall deprive any person of his nationality by way of penalty if he would thus become stateless except on the following grounds:"

The Chairman's text was adopted by 9 votes to 2, with 2 abstentions.

79. The CHAIRMAN then invited comment on sub-paragraph (*a*).

80. Mr. SCELLE thought that the text should contain the idea that service with the government of a foreign state, if with the permission of the individual's own government, should not result in denationalization. He instanced the case of Professor N. Politis, professor of international law at Paris, who had become Greek Minister; no one had dreamed of denationalizing him.

81. Mr. AMADO said that during the first World War many Brazilians had jointed the French Army; there was no thought of their denationalization either, although in that case they had all had permission for acting as they had done.

82. Mr. YEPES thought the text would be inacceptable if the word "enemy" were deleted; there were many persons serving foreign States — for example under the United States Point-4 Programme — in whose case denationalization would be entirely inappropriate.

83. The CHAIRMAN suggested that if the word "enemy" were deleted from the sub-paragraph, the Commission should include either the notion that foreign service was allowed subject to the previous permission of the individual's government — as was the case in Brazil and the Netherlands — or the notion — which followed French practice — that denationalization was appropriate if a person serving a foreign State continued to do so when requested to desist. He considered that only voluntary enrolment in a foreign army should lead to denationalization.

84. Mr. LAUTERPACHT suggested the following text for the sub-paragraph:

> "(*a*) Voluntary entry or continuance in the service of an enemy state or enrolment in the armed forces of such state;
>
> "(*b*) Treason;",

the rest of paragraph 1 remaining as it stood. He considered that civilian service for a non-enemy State should be permitted, but could not immediately see how account could be taken of the point raised by Mr. Scelle except by mentioning it in the general report.

85. The CHAIRMAN reminded the Commission that many States deprived their nationals of nationality for the simple fact of service in the government of a foreign State without permission, and for the simple fact of continuance in that service after being asked to desist. He wondered how far the Commission should follow that practice.

86. Mr. LAUTERPACHT thought it depended on how far the Commission considered the practice to be reasonable. In his view, the precedent of such practice was not, by itself, of governing importance for the Commission, for there would be no justification for the convention if the Commission were to do no more than codify existing practice.

87. Mr. AMADO said that the Commission's concern was to ensure acceptance of the Convention on the Reduction of Future Statelessness by as many States as possible. It was possible that some States, faced with the necessity of making constitutional amendments to ensure conformity with the Convention, might sign with reservations on article VII; Brazil, he expected, would be in that position.

88. Mr. CÓRDOVA said that almost all constitutions were concerned with nationality and the deprivation of nationality; governments would have to consider how far the rules enunciated in the convention required constitutional revision.

[6] United Nations publication, Sales No.: 1949.XIV.2.

89. As to the sub-paragraph under discussion, he suggested a text reading:

"(*a*) Entry to the detriment of the State into the service of the government of a foreign State, or enrolment in the armed forces of such State;".

Such a text would make for greater flexibility, in that each State would be in a position to judge what was detrimental to its interests.

90. Faris Bey el-KHOURI was against the idea that deprivation of nationality was an appropriate principal penalty; in the circumstances the Commission was discussing, it might perhaps be a complementary penalty. For instance, the principal penalty for treason was capital punishment; denationalization was superfluous. He favoured both Mr. Lauterpacht's proposal and the inclusion in the sub-paragraph of the idea that continuance in the service of a foreign State in the face of a prohibition by the individual's own government might be considered a sound reason for denationalization.

91. Mr. ALFARO thought that normal entry into the service of a foreign government should be permitted. He suggested the following wording for the sub-paragraph:

"(*a*) Entry into the governmental or military service of a foreign country against the interests or to the detriment of the State of which a person is a national;".

92. Mr. SCELLE doubted whether the Commission should adopt a formula along the lines of those suggested by Mr. Córdova and Mr. Alfaro; it would be extremely difficult to evaluate the acts of each individual. He would prefer a sub-paragraph reading:

"(*a*) Service of a foreign government against the wish of his own government;".

93. It was impossible to retain the word "enemy". Taken literally, it was inapplicable except in wartime. Yet everyone recalled that different countries had their "hereditary enemies"; England and Germany had at one time been the "hereditary enemies" of France. In addition, what was the situation during the "cold war"? To his mind, the word "enemy" had no meaning in modern international law, particularly when the notion of collective security was taken into account.

94. Mr. YEPES said that the disadvantage of Mr. Alfaro's suggestion was that it contained a subjective element, namely, the notion of detriment to a State, objective evaluation of which was impossible. It would be preferable for the sub-paragraph to read:

"(*a*) Entry into the service of the government of a foreign State, or enrolment in its armed forces, contrary to the laws of his State of origin;".

95. If those laws involved denationalization in the case of foreign service without permission, or if they permitted denationalization only when foreign service was persisted in after formal prohibition, they would be equally in conformity with the terms of the convention.

96. Mr. HSU supported Mr. Lauterpacht's proposal. He did not support Mr. Córdova because it seemed to him that the conception of the State's interests was too vague. He could see nothing wrong with the use of the word "enemy".

97. Mr. SANDSTRÖM supported Mr. Scelle, and agreed that a formula along the lines suggested by Mr. Córdova and Mr. Alfaro was too vague; the declared wish of a State was a better basis for judgment than either its interests or its detriment, both of which involved subjective evaluation. Those members of the Commission who objected to the use of the word "enemy" could also support Mr. Scelle's formula which, so far as he recollected, was not far removed from Mr. Lauterpacht's proposal.

98. Mr. SPIROPOULOS protested against the futility of the present discussion; he was not suggesting that there should be no discussion, but it was essential for members to have precise texts in front of them.

99. Mr. LAUTERPACHT thought the discussion should continue until greater clarity had been achieved. His proposal had been tentative. Nevertheless, the conception of detriment to a State seemed subjective, and the formula proposed by Mr. Scelle, containing the phrase "... against the wish of his own government", was lacking in precision. He would prefer the phrase "... without the permission of his own government"; this was a clear rule that would not be too burdensome, for it was reasonable to expect a person to take the trouble to find out whether or not his government would give him permission to serve a foreign government. He doubted the usefulness of Mr. Yepes' suggestion for the inclusion of the phrase "... contrary to the laws of his state of origin", since the aim of the convention was to limit, where necessary, the application of existing laws. He would therefore support Mr. Scelle's proposal if it were re-worded as he had suggested.

100. Mr. SANDSTRÖM supposed that Mr. Scelle had had in mind not so much the general as the expressed wishes of the government concerned.

Mr. SCELLE replied in the affirmative.

101. Mr. AMADO suggested the sub-paragraph might read:

"(*a*) Entry into the service of the government of a foreign state or enrolment in its armed forces without the permission of the government of the State whose nationality he has;".

102. Mr. SANDSTRÖM pointed out that such phraseology was even wider than that previously suggested, as the limitation to detrimental services was omitted.

103. Faris Bey el-KHOURI approved Mr. Scelle's formula, though he regarded it as essential that what was intended should be the expressed wish of the government concerned. There seemed to him to be no need for a person to ask the permission of his government before entering the service of a foreign State; there might be long administrative delay in granting

permission; informing the government of his intention to serve a foreign government ought to be enough. On the other hand, if his government then expressed its wish that he should withdraw from foreign service, and he disobeyed, there seemed to be a good ground for denationalization.

104. Mr. ALFARO said that it seemed to him that his own views, together with those of Mr. Córdova, Faris Bey el-Khouri, Mr. Lauterpacht and Mr. Yepes, all derived from the following principles; first, that there was no harm in entering the service of a foreign government if that act was not to the detriment of one's own government; and secondly, that the person so serving should desist if the government of his own State was opposed to such service. Service of a potential enemy might well be detrimental to the individual's own State, but to demand that the individual must seek permission of his own government in each case was going too far. He therefore suggested that the sub-paragraph might read:

"(*a*) Entry into and continuance in the service of a foreign state against the expressed will of the government of his own state;".

105. Mr. SPIROPOULOS agreed that it was quite impracticable to demand that, in order to avoid being denationalized, all nationals working abroad should seek the permission of the government of their country of nationality. There were very many Greeks in the United States, for example, many of whom retained their Greek nationality, working in all spheres of life; it was unthinkable that they should all have to approach the Greek Government for permission to continue in that position. Denationalization, to his mind, was a penalty to be applied in exceptional cases for action prejudicial to the State of origin. He therefore approved Mr. Alfaro's proposal and hoped that the matter could be disposed of by a vote on a definite text.

106. The CHAIRMAN asked members of the Commission to submit their amendments in writing to the Secretary.

The meeting rose at 1.5 p.m.

222nd MEETING

Thursday, 23 July 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Article VII [7] (continued)

Sub-paragraph 1 (a)

1. The CHAIRMAN invited the Commission to continue its discussion on article VII of the draft Convention on the Reduction of Future Statelessness. It had before it two amendments to sub-paragraph 1 (*a*). The first, in the name of Mr. Alfaro, read:

"(*a*) Voluntary entry into and continuance in the service of a foreign State against the expressed will or the interests of the State."

There was a possible discrepancy between the English and French texts of that amendment.[1] The French text made it clear that both entry into and continuance in the service of a foreign State had to be voluntary in order to bring the case within the scope of the amendment; in the English text, entry had to be voluntary, but it appeared that continuance need not be. He asked Mr. Alfaro to explain what his intention had been.

2. The second amendment before the Commission was in the name of Mr. Yepes, and read:

"(*a*) Entry into or remaining in the service of the government of a foreign State contrary to the laws of his country of origin."

3. Mr. ALFARO said that he had intended the word "voluntary" to qualify both the entry into and the continuance in the service of a foreign State; some members of the Commission had felt that obligatory continuance in such service should not be penalized.

4. The phrase "expressed will" was intended to refer to specific requests to the individual concerned to desist from the foreign service entered into; it was not intended to refer merely to a general law. The phrase "against... the interests of the State" was intended to cover entry into or continuance in the service of a foreign

[1] The French text read as follows: "a) *S'il est entré et demeure volontairement au service d'un Etat étranger, contrairement à la volonté formelle ou à l'intérêt de l'Etat*".

State that was not technically an enemy State. To serve a potential enemy might well be reprehensible; and if a person served a foreign State clandestinely, his service being unknown to the government of the State whose nationality he possessed, he could hardly be said to be acting against the will of the latter. He (Mr. Alfaro) thought it necessary for a State to be able to take action against such a person who had acted against its interests, even though it might not have expressed its will in the matter.

5. Mr. KOZHEVNIKOV said that he and other members of the Commission considered the original version of article VII to be obscure, but he could not agree that the amendments before the Commission improved it. He noted that the Chairman had questioned the precise meaning of the English text, and he (Mr. Kozhevnikov) found it difficult to understand either what was meant by the phrase "expressed will ... of the State", or who was to determine what were "the interests of the State", or even what State was referred to. He presumed that the text intended to refer to the State of which the person concerned was a national, but that was not self-evident. He thought, too, that it was tautological to mention both the expressed will and the interests of the State.

6. Mr. Yepes' amendment, too, required clarification. For example, the country of origin of the person concerned would not necessarily be that of his nationality

7. In his view, the preparation of an international convention along the lines the Commission was following was doomed to failure, for the questions with which the Commission was concerning itself fell within the competence of States. The Commission's attempts to anticipate every possible contingency gave rise to unending discussion and frequently caused a deadlock. The results of its work would be negligible.

8. Mr. HSU thought that the amendments before the Commission admirably met the wishes of members. He suggested that Mr. Alfaro's amendment might be improved if the conjunctions "and" and "or" were interchanged, so that it read "voluntary entry into or continuance in the service of a foreign State against the expressed will and the interests of the State". The expressed will of a State would not necessarily be identical with its interests.

9. Mr. SANDSTRÖM agreed with Mr. Hsu that Mr. Alfaro's amendment would be improved if entry into and continuance in the service of a foreign State were made alternative, as in Mr. Yepes' amendment. But as the concept of the "interests of the State" was indefinite, there was no need to mention more than its "expressed will". He agreed with Mr. Kozhevnikov that it was necessary to make clear which State was meant.

10. Mr. Yepes had constructed his amendment on the limited basis of "the laws of his country of origin"; but he (Mr. Sandström) considered that the will of the State was frequently expressed by means other than legislation.

11. For those reasons he suggested that sub-paragraph 1 (*a*) might be amended to read as follows:

> "(*a*) Voluntary entry into or continuance in the service of a foreign State against the expressed will of the State of which he is a national."

12. Faris Bey el-KHOURI considered Mr. Alfaro's amendment to be most appropriate, particularly as it contained a number of suggestions — of which he approved — made previously by Mr. Lauterpacht. Nevertheless, the expression of the will of a State would normally comprehend a determination of its interests, which would otherwise be open to discussion and misunderstanding; the phrase "or the interests" should therefore be deleted as superfluous. He entirely agreed that both the entry into and the continuance in the service of a foreign State should be voluntary if resulting denationalization was to be equitable.

13. The effect of Mr. Yepes' amendment, depending as it did on "the laws of his country of origin", would be that the draft convention would provide sanctions for unauthorized foreign service in addition to the penalties laid down by municipal law. He would disapprove of that result.

14. He would therefore support Mr. Alfaro's amendment provided the reference to the interests of the State were deleted.

15. He entirely agreed with the aims of paragraph 2 of article VII. Deprivation of nationality should be determined by juridical procedures which would allow the individual some opportunity of defence.

16. Mr. YEPES thought that his own amendment was preferable to that of Mr. Alfaro, in which he found the subjective elements particularly objectionable. What, for example, was the expressed will of the State, and who was to formulate it? What were the interests of the State, and who was to determine them? By contrast, everyone knew what the law was; to his mind, it included not only legislative acts *stricto sensu* but also administrative measures. He agreed, however, that his amendment would be made clearer if the words "of his country of origin" were replaced by the words "of the State whose nationality he claims".

17. He understood that Mr. Scelle intended to propose another amendment in which the prohibition of the State was to be the determining criterion. He (Mr. Yepes) would accept any such amendment and withdraw his own in favour of it.

18. Mr. LAUTERPACHT supported both Mr. Alfaro's amendment and his grounds for moving it. He (Mr. Lauterpacht) had previously drafted a very similar amendment; his slight departures from Mr. Alfaro's wording might to some extent meet the misgivings expressed by Mr. Kozhevnikov and Mr. Sandström. He could not, however, agree with Faris Bey el-Khouri that it was enough to refer only to the expressed will of the State, for a government could not prohibit an act of which it was ignorant. He noted that Faris Bey el-Khouri had given a complete answer to Mr. Yepes'

question concerning who would determine what was detrimental to the interests of the State: he entirely agreed that that task should be the responsibility of the judicial authority.

19. The text he suggested for sub-paragraph 1 (*a*) read as follows:

> "(*a*) if that person voluntarily enters or continues in the service of a foreign country in disregard of an express prohibition or to the grave prejudice of the interests of his State."

20. Mr. SCELLE said that it seemed to him that determination of the detrimental effects of any service with a foreign state was a governmental responsibility. The sub-paragraph might therefore read somewhat as follows:

> "(*a*) Voluntary entry into or remaining in the service of a foreign State in spite of the prohibition of his own government."

21. He had, however, been reconsidering the whole matter. A sub-paragraph along the lines suggested by several members of the Commission would enable a government acting against the United Nations Charter to denationalize one of its subjects who was aiding a foreign government acting in defence of the Charter. He questioned whether such a possibility was in harmony with the new principles of international law, for it could only be of assistance to governments acting contrary to the Charter and the new principles enunciated therein. It might well be in keeping with the principles of sovereignty that governments should be permitted so to act, but for his part he believed that international law should have precedence over the sovereignty of States. He was, therefore, hesitant about the very principle of the sub-paragraph, and did not wish to submit a formal amendment.

22. Mr. SANDSTRÖM withdrew his objection to the inclusion of a phrase mentioning the interests of the State. He felt, however, that those interests should be qualified by the word "manifest".

23. Mr. ALFARO believed that Mr. Lauterpacht's observations, which accurately interpreted his own thoughts concerning his amendment, would dispel any doubts that might remain in the minds of members of the Commission about the necessity of amending the original draft. He therefore withdrew his own amendment in favour of Mr. Lauterpacht's.

24. Several speakers had expressed the view that the "interests of the State" was an indefinite concept. Mr. Scelle, in particular, had thought that mention of the "expressed will of the State" or of "the prohibition of his own government" would cover the contingencies that the Commission had in mind. He (Mr. Alfaro) still maintained that such phrases would be inadequate to bring within the scope of the sub-paragraph actions of which a government did not and could not know. Suppose relations between two governments to be strained; a national of one State clandestinely entering the service of the other and acting against the manifest interests of his own State would not be acting in the face of any specific prohibition or the expressed will of the latter; it would, however, be entirely just for him to be deprived of his nationality when his action was discovered. The State itself, through the intermediary of its judicial system, would be able to decide what activities were detrimental to its interests.

25. As for Mr. Yepes' amendment, he felt that the Commission should take into account the possibility that an individual might innocently, through ignorance or forgetfulness, fail to comply with a purely formal regulation requiring him to obtain the permission of his own government before entering the service of another for some scientific, educational or other completely innocuous purpose. It was surely not intended that in such circumstances the person involved should be liable to denationalization.

26. Mr. CÓRDOVA (Special Rapporteur) agreed with Mr. Alfaro that mention of both the expressed will and the interests of the State should stand in the sub-paragraph. Mr. Lauterpacht's amendment was in substance identical with Mr. Alfaro's.

27. It seemed that Mr. Scelle was afraid that Mr. Alfaro's amendment might be prejudicial to individuals serving in a United Nations force. The amendment, however, mentioned only service with a foreign State, and therefore was not concerned with service with the United Nations.

28. Mr. LAUTERPACHT accepted Mr. Sandström's suggestion that the phrase "manifest detriment" be substituted for the phrase "grave prejudice" in his amendment.

29. Mr. SCELLE was concerned not only with the effect of the sub-paragraph on service with foreign States in present circumstances, but also with that of other foreign service in the future. The implication of the sub-paragraph and of the amendments thereto was that a State preparing to act in a manner contrary to the Charter of the United Nations would be able to threaten with denationalization any of its nationals, serving either with a foreign State or in an international organization, whom it suspected to be acting contrary to its aggressive intentions.

30. Faris Bey el-Khouri had said that judicial procedures ought to be obligatory in cases of deprivation of nationality, and with that he was in agreement; but it was evident that a national tribunal would condemn a person who acted in the way he had just suggested. Therefore, in his view an international tribunal was essential. A State must not be allowed to exercise dictatorial powers over individuals contrary to the new principles of international law.

31. Mr. HSU thought that a State should be required to give a reasoned explanation of its expressed will. He agreed with those members of the Commission who thought that the reference to the interests of the State had a place, particularly since the Commission seemed to have decided to discard the qualification of "enemy"

State. The convention might not unduly limit the powers of States. On the other hand, in the present transitional stage in international affairs, peace was often equated with war and friends with enemies. If too much power were left to a State, it might denationalize its nationals because of activities which were in conflict with interests of the State of which the perpetrator might even have been ignorant.

32. Mr. AMADO said that, in spite of the time that the Commission had spent on the sub-paragraph under discussion, he could not yet see a draft that would command unanimous approval. He could understand the text suggested by Mr. Lauterpacht to the extend that it would authorize the denationalization of a person who had acted in disregard of an expressed prohibition. It would, however, be quite unrealistic to attempt to determine what action a State might be permitted to take in defence of its own interests. The Commission should not be unduly idealistic but should bear in mind day-to-day realities. It was impossible to legislate for the susceptibilities of States or to anticipate their interests. He was therefore unable to accept the final phrase, concerning the manifest detriment of the interests of the State, in Mr. Lauterpacht's amendment.

33. Mr. KOZHEVNIKOV said that he agreed with the outstanding statement just made by Mr. Amado. The Commission should not endorse the nebulous formula suggested by Mr. Lauterpacht, for no obligation could be imposed on the State.

34. Even the Special Rapporteur's original draft, in his view, went too far, but now the Commission was going much farther. Where would it stop? International organizations, which were not even subjects of international law, were being brought into the discussion; and the Commission had been told that an international tribunal should be set up. Nevertheless, the Commission should not lose sight of the true meaning of sovereignty, and should remember that all questions of nationality were within the domestic jurisdiction of States.

35. Mr. SPIROPOULOS agreed with the opinion expressed by Mr. Amado and Mr. Kozhevnikov. It was quite unpractical for the Commission to consider regulating the domestic legislation of States as to deprivation of nationality by way of sanction. The Commission's objective was the reduction of statelessness, but the discussion had developed not so much into a consideration of that subject, as into a consideration of the relationship between a State and its nationals, and the right of a government to withdraw nationality. The suggestions so far made had no relevance to the facts either of life or of law. If a State wished to withdraw its nationality from an individual, it could not be prevented by the international community from so doing. The right to withdraw nationality was an existing right similar to the right of a community to exclude a member: a State, under the Charter of the United Nations, could be expelled from the United Nations, just as a student could be expelled from a university. It was therefore manifestly absurd for the Commission to conclude that a State could not expel a national. The interests of the State were paramount in that respect; such criminals as might be denationalized deserved no consideration.

36. Mr. AMADO, supported by Faris Bey el-KHOURI, proposed the deletion from Mr. Lauterpacht's amendment of the phrase " or to the manifest detriment of the interests ".

37. Mr. ALFARO said that the proposal just made clarified the discussion and that the Commission should vote on it.

38. The CHAIRMAN asked Mr. Yepes whether he would withdraw his amendment.

39. Mr. YEPES said that the discussion had shown him that the Commission had been following the wrong course. If a State had no other sanction against action detrimental to its interests, he would agree that deprivation of nationality might be an appropriate penalty; but as there were other possibilities open to States, he concluded that the whole idea of article VII was baseless. He therefore returned to his original position, namely, that a State should not be permitted to deprive anyone of its nationality by way of penalty. Nevertheless, since he had proposed it, his amendment should be put to the vote.

Mr. Amado's proposal that the phrase " or to the manifest detriment of the interests " be deleted from Mr. Lauterpacht's text was adopted by 5 votes to 4, with 4 abstentions.

Mr. Lauterpacht's text for sub-paragraph 1 (a), as amended, was adopted by 8 votes to 2, with 2 abstentions.

40. Mr. LAUTERPACHT explained his vote. As one who hoped to see statelessness eliminated, he welcomed the amendment proposed by Mr. Amado (despite the fact that it would tend to make the draft Convention less acceptable to governments), because it deprived a State of the right to denationalize a person on the ground that he had acted against its interests. Nevertheless, in his view the amendment adopted was unreasonable and he had therefore abstained from voting.

41. Mr. CÓRDOVA said that any proposal tending to eliminate statelessness would have his support. Nevertheless, in adopting Mr. Amado's amendment, the Commission had left States without the legal possibility of denationalizing traitors, whose actions were clearly against the interests of the States of which they were nationals but were *ex hypothesi* not known to the authorities at the time when their prohibition might have been in point.

42. Mr. KOZHEVNIKOV said that he had voted against Mr. Lauterpacht's proposal because, in his view, all issues pertaining to nationality fell within the domestic jurisdiction of the State.

43. Faris Bey el-KHOURI said that he had voted in favour of Mr. Amado's amendment because its acceptance would bring the whole article nearer to his

view that deprivation of nationality should not be used as a sanction. He considered that nationality was a natural right of the individual; every State had in its penal code measures adequate to deal with activities detrimental to it.

44. Mr. AMADO failed to understand Mr. Córdova and Mr. Lauterpacht. As a sincere man of good will and good faith, he could not see how his amendment had taken away from States the right to denationalize persons acting contrary to their interests.

45. Mr. YEPES said that he had abstained from the vote because, in his conception of human rights, no State had the right to deprive one of its citizens of nationality acquired by birth; the more so as States possessed other sanctions adequate to deal with those of their citizens who acted contrary to the national interest.

46. Mr. ZOUREK believed that a State had the right to withdraw its nationality from a person who entered into or continued in the service of a foreign State in disregard of an expressed prohibition by his own State. Nevertheless, in view of the general concepts on which article VII was based, and because the deprivation of nationality in the circumstances under consideration in his view fell within the domestic jurisdiction of States, he had voted against Mr. Lauterpacht's proposal.

47. Mr. HSU said that he had regarded the phrase "or to the manifest detriment of the interests of his State" as so broad as to justify its elimination. He was, however, not opposed to treason being regarded as a just cause for the withdrawal of nationality.

48. Mr. ALFARO pointed out that article VII, as approved by the Commission, would not permit a State to withdraw its nationality from a traitor.

Sub-paragraph 1 (b)

49. The CHAIRMAN invited comments on sub-paragraph 1 (*b*).

50. Mr. YEPES asked what was meant by "expatriation", which was not an unequivocal term. In any case it was not a legal term and needed clarifying.

51. Mr. CÓRDOVA said that by "expatriation" he meant no more than departure abroad.

52. Mr. LIANG (Secretary to the Commission) said that, in ordinary parlance, "expatriation" might well mean no more than departure abroad; but it also had a precise legal meaning, namely, transferring allegiance to another country, as used in the comments of the United States Government on the bases for discussion prepared for the Codification Conference at The Hague in 1930.

53. The CHAIRMAN asked whether it would not be logical, if one deprived persons of their nationality if they went abroad with the intention of military obligations, to do the same if, with the same intention, they failed to return from abroad.

54. Mr. SCELLE said that in French the word "*insoumis*" was used to cover all cases of evasion of military obligations, whether by flight abroad or by concealment within the country.

55. Replying to a question by Mr. SANDSTRÖM, he said that the term "*insoumis*" did not cover conscientious objectors.

56. Mr. CÓRDOVA pointed out that in cases where the person did not leave the country, there was no need for his State to deprive him of its nationality, since it had other ways of punishing him. In cases where he went abroad, or failed to return from abroad, with the intention of evading military obligations, it had usually no possibility of punishing him other than by depriving him of his nationality, since most countries did not regard the evasion of military obligations as an extraditable offence.

57. The CHAIRMAN pointed out that it was always difficult to prove intent. It might therefore be better if the text were worded: "Evasion of military obligations by absence abroad".

58. Faris Bey el-KHOURI pointed out that all States prescribed certain penalties for the evasion of military obligations, but that by no means all of them provided for deprivation of nationality in such cases. It was surely none of the Commission's business to make existing laws more severe.

59. Mr. SCELLE agreed.

60. Mr. LIANG (Secretary to the Commission) said that the most recent relevant United States law, the McCarran Act of 1952, referred to "departure from the United States or remaining outside in wartime".

61. Mr. ALFARO said that, in his experience as well as etymologically, the word "expatriation" could mean only "absence from one's country". It therefore seemed to cover all the cases which the Commission had in mind. The language of the McCarran Act was more specific, but added nothing.

62. He drew Faris Bey el-Khouri's attention to the fact that article VII did not mean that States should deprive persons of their nationality for the reason stated, but only that they could if they so desired.

63. Mr. YEPES said that he would vote against sub-paragraph 1 (*b*), which would not only lead to an increase in statelessness, but would also have the effect of legalizing the position of persons who went or remained abroad to evade their military obligations and thus depriving the State of the means of punishing them, if they later came within its jurisdiction.

64. Mr. CÓRDOVA said that as he was in favour of the principle that no one should be deprived of his nationality by way of penalty, he was quite prepared to vote against sub-paragraph 1 (*b*), as he was equally prepared to vote against the paragraph as a whole. The only reason why he had inserted it was that, in accordance with his instructions, he had been seeking an attenuation of that principle. The text he proposed could in no case lead to an increase in statelessness,

since, as Mr. Alfaro had pointed out, it did no more than imply that States which already deprived persons of their nationality for going or remaining abroad in order to evade military obligations would be free to continue to do so.

65. Mr. SANDSTRÖM agreed, but felt that the desirability of inserting such a clause in the draft convention depended in large measure on the number of States whose laws provided for the deprivation of nationality on that ground.

66. Mr. CÓRDOVA drew attention to the memorandum prepared by Mr. Kerno entitled: "National Legislation concerning Grounds for Deprivation of Nationality" (A/CN.4/66), from which it appeared that the only countries whose laws contained such a provision were France (for naturalized persons only), Germany, Poland and Turkey.

67. Since so few States had such a provision in their laws, and since paragraph 1 (*a*), in the form in which it had been adopted, already gave States a fairly wide safeguard, he saw no reason why sub-paragraph 1 (*b*) should not be deleted.

68. Mr. HSU agreed, and said that he would accordingly vote against sub-paragraph 1 (*b*).

69. Mr. ZOUREK pointed out that the deletion of paragraph 1 (*b*) would deprive the contracting States of all possibility of punishing such of their nationals as, in order to evade their military obligations, remained abroad or fled abroad. He reminded the Commission that such flight was often clandestine.

70. Faris Bey el-KHOURI said that he could not accept the view that sub-paragraph 1 (*b*) would not bring about an increase in statelessness. For, if the Commission adopted it, it would be giving its legal sanction to a practice which was at present followed by only a few States, and would thereby encourage other States to adopt that practice in turn. He therefore proposed that the sub-paragraph be deleted.

Faris Bey el-Khouri's proposal was adopted by 9 votes to 2, with 2 abstentions.

71. Mr. CÓRDOVA said that he had voted in favour of the deletion of sub-paragraph 1 (*b*) despite the fact that he had proposed it in his report, because, as he had already said, he was altogether opposed to deprivation of nationality by way of penalty.

72. Mr. ALFARO said that his previous remarks had concerned only the drafting of the sub-paragraph; he considered that the wording proposed by the Special Rapporteur expressed what he (the Special Rapporteur) had had in mind. He (Mr. Alfaro) had voted against the sub-paragraph, because it seemed illogical to allow States to deprive persons of nationality for evasion of military obligations, when, under the terms of sub-paragraph 1 (*a*), in the form in which it had been adopted, they were not allowed to deprive them of nationality for treason.

73. Mr. AMADO did not agree that sub-paragraph 1 (*a*), in the form in which it had been adopted, ruled out treason as a ground for the deprivation of nationality.

Sub-paragraph 1 (c)

74. The CHAIRMAN invited comments on sub-paragraph 1 (*c*), and recalled that Mr. Córdova had already proposed, at the previous meeting, that item (i), "When naturalization was obtained by fraud", should be deleted, since naturalization obtained by fraud was null and void and the question of deprivation therefore could not arise.

75. Mr. YEPES maintained that those words must be deleted, since their retention would give rise to statelessness. Under the laws of certain countries a person who was naturalized could automatically lose his previous nationality even if the naturalization had been obtained by fraud. Unless the words were deleted it would mean that the possible causes of statelessness were being artificially increased.

76. Mr. SANDSTRÖM recalled that during the discussion on the draft Convention on the Elimination of Future Statelessness, he had argued that naturalization obtained by fraud was not null and void but voidable, and that the loss of a nationality so obtained did constitute deprivation by way of penalty.

77. Mr. CÓRDOVA recalled that the other members of the Commission had not accepted Mr. Sandström's views, but had agreed that naturalization obtained by fraud was null and void.

78. Mr. SCELLE agreed that the words in question should be deleted. Cases where naturalization was believed to have been obtained by fraud would be referred to a judicial tribunal, which would either find that the naturalization had been obtained by fraud and that the acquisition of nationality was therefore null and void, or that the naturalization had not been obtained by fraud, and that the acquisition of nationality was therefore valid.

It was agreed that item (i), "When naturalization was obtained by fraud", should be deleted.

79. With reference to item (ii), Mr. ALFARO suggested that, for the sake of clarity, the words "during five years or more" should be replaced by "during five consecutive years or more", if that was what the Special Rapporteur meant.

80. Mr. CÓRDOVA accepted the amendment suggested by Mr. Alfaro.

81. Mr. SANDSTRÖM felt that it would again be interesting to know how many States at present had a similar provision in their existing laws.

82. Mr. CÓRDOVA said that it appeared from Mr. Kerno's memorandum (A/CN.4/66) that the laws of the following States provided for the loss of nationality by a naturalized national who resided abroad for a specific period: Australia, Burma, Canada, Costa

Rica, Cuba, Greece, Guatemala, Ireland, Israel, Mexico, New Zealand, Nicaragua, Pakistan, Turkey, United Kingdom, Union of South Africa, United States of America and Yugoslavia.

83. Mr. YEPES added that the Convention establishing the Status of Naturalized Citizens who again take up their Residence in the Country of their Origin, signed by the Third Pan-American Conference at Rio de Janeiro on 13 August 1906, provided that a naturalized person who again took up his residence in his native country without the intention of returning to the country in which he had been naturalized should be considered as having reassumed his original nationality and as having renounced the nationality acquired by naturalization; and that the intention not to return should be presumed to exist, subject to evidence to the contrary, when the person in question had so resided in his native country for more than two years.

84. Neither that text nor the text proposed by the Special Rapporteur, however, covered cases where naturalization was obtained in bad faith. For example, the nationals of Latin-American countries enjoyed certain privileges within each other's territory and within the territory of the United States of America; it was not uncommon for persons from overseas to obtain naturalization in Latin-American countries, solely for the purpose of seeking employment in, for example, the United States of America, employment which they would have been unable to obtain as nationals of their country of origin. He therefore proposed that the words "in the country of his origin" be replaced by the word "abroad".

85. Faris Bey el-KHOURI said that he did not see why a person should lose the nationality he had acquired by naturalization, merely because he resided abroad for five consecutive years or more. It might be physically impossible for him to reside in the country whose nationality he had acquired, for reasons quite beyond his will; such cases had frequently occurred during the second World War, and they might well occur again.

86. Mr. SANDSTRÖM said that he, too, was quite opposed to creating two classes of nationals, one who could stay abroad for five consecutive years and one who could not.

87. Mr. ZOUREK, too, was opposed to what was unjustifiable discrimination against naturalized persons. Whatever the motives for which a person had obtained naturalization, once he had obtained it he should be on the same footing as nationals by birth.

88. Mr. YEPES said that he would not press his proposal if the principle of item (ii) were rejected.

89. The CHAIRMAN said that he would accordingly first put to the vote the question whether a provision should be retained to the effect that naturalized persons who had resided during five consecutive years or more in the country of their origin (or abroad) could be deprived of their nationality.

That question was decided in the negative by 10 votes to 1, with 2 abstentions.

90. The CHAIRMAN asked whether it was proposed that a new sub-paragraph be inserted to cover cases of treason.

91. In the absence of any such proposal, he drew attention to paragraph 2.

Paragraph 2

92. Mr. CÓRDOVA pointed out that the draft Convention on the Elimination of Future Statelessness contained no parallel provision, since, under that convention, no one could be deprived of his nationality by way of penalty. Even though the number of grounds on which a person could be deprived of his nationality by way of penalty under the present draft convention had been reduced to one, he still considered it desirable to provide that such deprivation should be decided only by a judicial authority acting in accordance with due process of law.

93. Mr. ALFARO and Faris Bey el-KHOURI agreed.

94. Mr. SANDSTRÖM said that he would merely observe that now that the present convention provided for only one ground on which a person could be deprived of his nationality by way of penalty, its effect would be very similar to that of the draft Convention on the Elimination of Future Statelessness.

95. The CHAIRMAN pointed out that the differences between the two conventions might be greater in the case of other articles. The relation between them would emerge more clearly when they could both be viewed as a whole.

96. He then put paragraph 2 to the vote.

Paragraph 2 was adopted by 11 votes to 2.

Paragraph 3

97. The CHAIRMAN recalled that it had already been suggested that paragraph 3 could be deleted, in view of the addition to paragraph 1 of the words "if such deprivation renders them stateless".

98. Mr. CÓRDOVA agreed that paragraph 3 could be deleted, but recalled that in the draft Convention on the Elimination of Future Statelessness the Commission had adopted an additional article (article 8) reading:

> "The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious or political grounds if such deprivation renders them stateless."[2]

99. He proposed that the same text be inserted in the draft Convention on the Reduction of Future Statelessness.

100. Mr. ZOUREK asked the Chairman to put to the vote first the suggestion that paragraph 3 of article VII

[2] See *supra*, 218th meeting, paras. 6 and 85.

should be deleted, since he was in favour of that suggestion, whether the addition proposed by the Special Rapporteur was made or not.

It was agreed by 12 votes to none, with 1 abstention, that paragraph 3 should be deleted.

Article VII, as amended, was adopted by 5 votes to 4 with 4 abstentions. The text read as follows:

"1. The Parties shall not deprive their nationals of nationality by way of penalty, if such deprivation renders them stateless, except on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State.

"2. In the case to which paragraph 1 above refers, the deprivation should be decided in each case only by judicial authority acting in accordance with due process of law."

Additional article

101. The CHAIRMAN then invited comments on Mr. Córdova's proposal to insert an additional article identical to article 8 of the draft Convention on the Elimination of Future Statelessness.[3]

102. Mr. YEPES pointed out that that text could be interpreted as meaning that the Parties could deprive persons or groups of persons of their nationality on racial, ethnical, religious or political grounds if such deprivation did not render them stateless. It was therefore conducive to cultural genocide, and he would be obliged to vote against it. It was sufficient to interpret it *a contrario sensu* to realize that, as at present drafted, the article presented grave dangers which ought to be eliminated.

103. Mr. CÓRDOVA observed that the same objection had been made during the discussion of the draft Convention on the Elimination of Future Statelessness, but that it had been pointed out that the Convention was solely concerned with the question of statelessness. He understood, however, that it would be stated in the comment that the article should not of course be interpreted in the way in which Mr. Yepes had pointed out that it could be interpreted.

104. Mr. KOZHEVNIKOV recalled that he had already stated his views on the text under consideration during the discussion of the draft Convention on the Elimination of Future Statelessness.[4] Quite apart from the fact that it was contrary to the sovereignty of States, it was, as had been pointed out, open to misinterpretation. He had voted against it before, and he would vote against it again.

105. Mr. SCELLE said that the basic purpose of the two conventions was to prevent individual hardship and suffering. The fact that an individual who lost his own nationality thereupon acquired another did not necessarily obviate the hardship and suffering entailed.

106. The CHAIRMAN pointed out that it would be incomprehensible if the Commission, which had retained the phrase "if such deprivation renders them stateless" in the first convention, deleted that phrase when inserting the article in the second convention.

107. Mr. ZOUREK recalled that he had already explained his opposition to the article during the discussion on the draft Convention on the Elimination of Future Statelessness. He was in favour of its omission from the draft Convention on the Reduction of Future Statelessness, and if it was felt essential that the texts of the two conventions should be the same in this respect, he for one would have no objection to the deletion of the article from the first.

108. Mr. SANDSTRÖM recalled that he had said during the discussion of the first draft convention that he found the text objectionable by its implications. He did not find it any less objectionable now. He proposed that the words "if such deprivation renders them stateless" be deleted, and that the same change be made in the draft Convention on the Elimination of Future Statelessness.

109. Mr. ALFARO supported Mr. Sandström's proposal. Existing international law, as witnessed by the Convention on Genocide and the Commission's own Draft Code of Offences against the Peace and Security of Mankind, was tending towards the complete prohibition of all forms of persecution on racial, ethnical, religious or political grounds. It would therefore be fully appropriate and in accordance with that trend for the Commission to state unconditionally that the parties to the convention should not deprive any person or group of persons of their nationality on such grounds. Moreover, in the vast majority of cases where persons were so deprived, they did not acquire another nationality and statelessness was thus created.

110. Mr. LAUTERPACHT said that it was not the Commission's present purpose to prevent persecution or the deprivation of nationality in general, but only such persecution and such deprivation of nationality as would result in statelessness. The text could of course be twisted to bear the interpretation which Mr. Yepes had said it could bear, and if it was really thought necessary, he would have no objection to its being clearly stated in the report that that was not an interpretation which the Commission could accept; he would prefer that course to the adoption of Mr. Sandström's proposal, which would give rise to a juridical inelegancy.

111. Mr. SCELLE supported Mr. Sandström's proposal. He did not agree that it was inappropriate, since, as had been stated, statelessness was caused in the great majority of cases where persons were deprived of their nationality on racial, ethnical, religious or political grounds.

Mr. Sandström's proposal was adopted by 7 votes to 1, with 5 abstentions.

[3] *Ibid.*

[4] *Ibid.*, para. 86.

The additional article proposed by the Special Rapporteur was adopted as amended by 8 votes to 2, with 3 abstentions.

The meeting rose at 1.5 p.m.

223rd MEETING

Friday, 24 July 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Article VIII [9]

1. The CHAIRMAN invited the Commission to continue its consideration of the draft Convention on the Reduction of Future Statelessness, beginning with article VIII.

2. Mr. CÓRDOVA (Special Rapporteur) proposed that article VIII be replaced by the text which the Commission had adopted for the corresponding article (article 9) of the draft Convention on the Elimination of Future Statelessness. That text read as follows:

"1. Treaties whereby territories are transferred must include the provisions necessary to ensure that inhabitants of the territories affected do not become stateless, while respecting their right of option.

"2. In the absence of such provisions, States to which territory is transferred, or new States formed on territory previously belonging to another State or States, shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality".[1]

3. Mr. YEPES supported Mr. Córdova's proposal as being the only logical course the Commission could follow.

Mr. Córdova's proposal was adopted by 9 votes to 2.

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*resumed from the 220th meeting*)

Article on the interpretation and implementation of the Conventions [Article 10]

4. The CHAIRMAN recalled that at the 219th meeting the Commission had considered a joint proposal by the Special Rapporteur and Mr. Scelle for an article dealing with the settlement by arbitration of disputes arising out of the draft Convention on the Elimination of Future Statelessness.[2] Some members had felt that it was undesirable to make provision for compulsory arbitration at all; others had been favourable to the idea in principle, but had pointed out that the joint proposal did not cover the case of disputes between a State and an individual. Mr. Hsu had subsequently submitted a proposal to the effect that an additional article, reading:

"A Commission under the auspices of the United Nations shall be established to act on behalf of stateless persons in cases of dispute contemplated in the preceding article",

be inserted after the joint proposal of the Special Rapporteur and Mr. Scelle, the latter proposal to be brought into line with it. The Special Rapporteur hal also submitted a revised proposal, reading as follows:

"The parties agree to the creation of an arbitral tribunal with jurisdiction to decide all controversial questions with regard to the interpretation of the terms of this Convention and to the determination of the nationality of individuals envisaged in its articles.

"Access to such tribunal will be open to the States parties to the Convention as well as to individuals whom the wrongful application of its provisions, or of those of the national legislations of such States, might render stateless".

5. Mr. HSU said that he had no objections to the new text proposed by the Special Rapporteur; the purpose of his own proposal had been to meet the objections which had been raised to the individual's having access

[1] See *supra*, 218th meeting, paras. 88-94.

[2] See *supra*, 219th meeting, paras. 45-63.

to the international tribunal, by providing for a commission which would act as an intermediary between him and it.

6. Mr. CÓRDOVA said that the sole aim of his new proposal was to clarify the main lines of the procedure which should be followed. As the question had already been discussed at length, he did not think that the Commission need go over the whole ground again.

7. Mr. KOZHEVNIKOV said that, as he had already made clear his general attitude in the matter,[3] he need only say that he could not accept the new text proposed by the Special Rapporteur, because, like the earlier joint proposal, it was based on two wholly unacceptable ideas. The first was that of compulsory arbitration, which was incompatible with such fundamental principles of international law as the sovereignty of States; the second was the idea that the individual could be a subject of international law. That idea was flatly contradictory to the existing structure of international law, which was designed to regulate relations between States.

8. Faris Bey el-KHOURI saw no need for setting up an arbitral tribunal, with the permanent staff and headquarters it would need, merely to settle disputes arising out of one particular convention. Disputes between States could be settled by the ordinary processes provided in the United Nations Charter, while if the dispute was between an individual and a State whose nationality he claimed, there was no reason why he should not apply to the national courts, which would have to apply the convention as part of national law. He could not therefore support the new text proposed by the Special Rapporteur.

9. Mr. ALFARO said that the joint proposal, Mr. Córdova's new proposal and Mr. Hsu's proposal all envisaged the possibility of some form of international tribunal to ensure the individual's right to a nationality. The fact that that might lead to litigation between individuals and States constituted no obstacle; as had been pointed out, there were several precedents for such litigation. There were, for example, the Anglo-Iranian dispute, and the arbitral tribunal in Upper Silesia. More important, there were all the claims commissions which States had set up to settle claims by the nationals of one of them against the government of the other. Litigation between individuals and States was, therefore, a juridical possibility.

10. It had been said that the individual could not be a subject of international law. He completely disagreed. That question was no longer a matter for academic disputation, as it had been when A. Alvarez and A. de Lapradelle had urged the opposite view at the Havana and Rome meetings of the American and European Institutes of International Law,[4] or when Spiropoulos and other authors had written books about it. The question had been juridically settled by the Charter of the United Nations, which contained no less than seven passages providing for the recognition, promotion and enforcement of the rights of the individual. The Judgment of the Nürnberg Tribunal, the Convention on Genocide and the Draft Code of Offences against the Peace and Security of Mankind also proved that the individual not only had certain rights before international law, but also had certain obligations, for the breach of which he could be summoned, tried and punished. The individual was now therefore recognized to be both an active and a passive subject of international law and he could not see why the Commission should be unwilling to include in the draft Convention on the Reduction of Future Statelessness a provision which would enable him to defend his rights before an international tribunal. If the Commission felt unable to do that, it should at least discuss fully the possibility and expediency of establishing such a tribunal, and should set down its conclusions in its report.

11. Mr. SCELLE warmly supported the new proposal submitted by the Special Rapporteur, and fully agreed with what Mr. Alfaro had just said. It was undeniable that the tendency of modern international law was to regard the individual as the primary cell of international society. That tendency was noted, for example, by an author such as Guggenheim, in his "*Lehrbuch des Völkerrechts*", which was purely positivist in approach, and did not proceed from any preconceived ideas as to what should be, but was solely concerned with presenting the facts as they were. The same tendency had been apparent in the Commission's own work. But the concept of the individual as a subject of international law was nothing new. Many precedents had already been mentioned, and he would only refer to the Mavromatis and Ambatielos cases, in which the intervention of a government on behalf of the individual had been pure formalities.

12. He still could not accept Faris Bey el-Khouri's argument that the individual would be free to appeal to national courts. However fair they might strive to be, such courts could not but be subject to countless different pressures, all combining to work on balance against the interests of the stateless individual.

13. It was again necessary to point out that the procedure which Mr. Córdova was proposing was not the ordinary long-drawn-out arbitral procedure, still less that of the International Court of Justice, it was a special procedure, which had a parallel in the European Court of Human Rights, to which Mr. Spiropoulos had drawn attention; that court, however, had to deal with violations of many different rights, whereas the proposed arbitral tribunal would have to deal only with violations of the right to nationality.

14. Mr. KOZHEVNIKOV said that the views expressed by certain authorities to the effect that the individual could be a subject of international law did not constitute proof, particularly when the contrary

[3] *Ibid.*, paras. 52-53, and 220th meeting, paras. 2-6.

[4] See, *inter alia*, *Annuaire de l'Institut de droit international*, 1921, pp. 203-224 and Instituto Americano de Derecho Internacional, *Actas y memorias y proyectos de las sesiones de La Habana* (New York, Oxford University Press, 1918), pp. 242-305; p. 312.

views of other authorities could be quoted, in even greater number, against them. It had also been argued that it was in accordance with the trend of international law to regard the individual as a subject of international law, but trends could be divergent, and even opposed. Certainly, there was a tendency to forsake such long-established principles of international law as that the sole subjects of international law were States; there was also a tendency to substitute for the sovereignty of States some kind of world government; but that tendency could only lead to the complete stultification of international law. It was not the Commission's task to create an entirely new system of international law but to codify and develop present law within its existing framework.

15. Several of the arguments which had been advanced in favour of the Special Rapporteur's proposal did not in fact buttress it at all. It was not true to argue, for example, that the Judgment of the Nürnberg Tribunal made the individual a subject of international law; international law forbade not only aggression itself, but also propaganda for and the preparation of aggression, as well as war crimes and crimes against humanity, and it was clear that any individuals guilty of those crimes should be punished. That however, in no way meant that the individual thereby became a subject of international law. The United Nations Charter, which began with the words "WE THE PEOPLES OF THE UNITED NATIONS" was also clearly based on the principle that international law was the means of regulating relations between "peoples", in other words between States.

16. The absurdity of the suggestion that international law was a matter for individuals could be seen if it were borne in mind that, in that case, all the texts which the Commission prepared should logically be submitted to individuals for approval. That of course was not the case. The texts were submitted to States, since States alone were responsible in the matter.

17. Many more arguments could be advanced against the Special Rapporteur's proposal, but he would confine himself to saying that in his view it was essential that the Commission should adhere to the recognized view of international law as an instrument for regulating relations between States.

18. Mr. LAUTERPACHT recalled that the Commission had agreed in principle that it would not be sufficient for it to refer to the question of settlement of disputes only in its report, but that it would consider an article along the lines of that proposed by the Special Rapporteur, even if it considered no other final clauses. There had been a full discussion at the 219th meeting, and further illuminating statements had been made at the present meeting by Mr. Alfaro and Mr. Scelle. He had no hesitation in supporting in principle the new text proposed by the Special Rapporteur.

19. That text, however, was incomplete in one respect. If it were adopted, the Parties would agree only to set up an arbitral tribunal at some indefinite date. It thus constituted what was sometimes called a "*pactum de contrahendo*". Had the Commission's draft on arbitral procedure been part of accepted law, that might have been sufficient, since in the event of the parties' failure to agree on the tribunal's composition and procedure, those matters would have been settled by the draft on arbitral procedure. That draft, however, was not yet law; moreover, it applied only to arbitral tribunals set up as occasion demanded to settle disputes between States, not to a permanent tribunal which would be mainly concerned with disputes between a State and an individual. He therefore proposed that the following paragraph be added to the new text proposed by Mr. Córdova:

> "If, after two years from the entry into force of this Convention, the parties have been unable to agree on the establishment of the arbitral tribunal referred to in paragraph 1 above, the composition and procedure of the tribunal shall be determined by the General Assembly."

20. Mr. CÓRDOVA said that he did not feel it necessary to reply again to the other arguments which had been advanced against his proposal. With regard to Faris Bey el-Khouri's, he would merely point out that the judges of any national tribunal were necessarily bound by existing national legislation and that the existing national law often resulted in statelessness.

21. Mr. ZOUREK recalled that he had already stated his views on the matter under discussion at the 220th meeting.[5] However, new arguments having been advanced, he felt obliged again to make his position clear.

22. In the first place, he considered that it was completely unnecessary to oblige States to have recourse to compulsory arbitration, as was proposed in the new text submitted by the Special Rapporteur; States which wished to settle their disputes by peaceful means could have recourse to many other procedures, for example, that provided in the optional clause of Article 36 of the Statute of the International Court of Justice. There was no good reason why States should be obliged to resort to arbitration in every case, unless the view was held, as it appeared to be held by some members of the Commission, that an arbitral tribunal constituted some kind of supra-national authority to which States were subject. That view, however, was quite unacceptable, and the arguments which had been advanced in favour of it were wholly unconvincing.

23. The new proposal by the Special Rapporteur also provided that access to the arbitral tribunal should be open to individuals not only in cases where they alleged that wrongful application of the provisions of the draft convention might render them stateless, but also in cases where they alleged that wrongful application of national legislation might have the same effect. It was true that individuals had been permitted access to an international tribunal in the past, but such access had always been exceptional, and severely limited in time

[5] See *supra*, 220th meeting, paras. 7-10.

and in space. The general practice was that an individual could be represented in international law only by the State of which he was a national, and the examples which had been adduced to the contrary only recoiled against those who had advanced them; the cases of Mavromatis and Ambatielos had only been submitted to an international tribunal because they had been taken up by the United Kingdom and Greek Governments. Reference to the Anglo-Iranian oil dispute revealed a regrettable confusion of mind between private international law and public international law; it was obviously an every-day occurrence for States to negotiate with individuals on matters of private international law. Finally, as Mr. Kozhevnikov had pointed out, the fact that individuals could be punished for certain offences against international law did not make them subjects of international law, and the Charter of the United Nations conferred certain rights and imposed certain duties not on individuals, but only on States. There was, of course, a "normativist" school of international law which maintained that the individual was the subject of international law, but that view was by no means generally accepted; at least as many authorities, no less eminent, could be cited in support of the contrary view.

25. For those reasons, and for other reasons too, he considered that the Commission would be wise to leave aside so controversial a matter as that raised by the Special Rapporteur's proposal.

25. Mr. SPIROPOULOS said that he started from the premise that the question of statelessness was only one aspect of the larger question of nationality. He agreed with Mr. Kozhevnikov that the question of nationality lay within the exclusive competence of States, provided, that was to say, that the actions taken by States in that field did not give rise to abuse. It was because statelessness was one such abuse that he agreed that the Commission was doing useful work by laying down certain standards or certain ideals towards which States should strive. The Commission had decided to embody those standards in a convention, though he personally did not see how any State could sign a convention on a matter which lay solely within its competence. If a State felt that it could sign such a convention, however, it would certainly not be deterred by the fact that it contained a provision such as that proposed by the Special Rapporteur.

26. Conventions sometimes contained special provisions relating to their implementation and interpretation, especially in the case of disputes; sometimes they did not, in which case it was understood that recourse would be had to existing tribunals and procedures. If the Commission's work on statelessness was to be cast in the form of a convention, it seemed to him obvious that in that convention, as in no other, it was absolutely essential that some such special provision should be made, since the existing tribunals and procedures would be unable to handle disputes arising out of it. By its very nature it was unlikely to give rise to disputes between States, which occurred only when there was a clash of interests. In the case of statelessness, the interests of States were not involved; it was only the individual who suffered. National tribunals naturally had to apply the law of the country, but if the convention was ratified it would automatically become the law of each ratifying State. To that extent Faris Bey el-Khouri was right. The national tribunals might, however, misinterpret the convention; such cases would be exceptional, but the Commission should not, for that reason, fail to provide for them.

27. The academic question whether or not the individual was a subject of international law was totally irrelevant to the practical question which the Commission had to consider. The International Court of Justice, for example, had never stopped to consider whether the claimant in any action brought before it was a subject of international law; its sole concern had been to ascertain whether under existing law he possessed certain rights, and whether those rights had been violated. If States were willing to conclude and sign a convention on statelessness, there was no reason whatsoever why they should not provide in it that individuals who considered that the rights which the convention conferred on them were threatened should be free and able to seek justice before an international tribunal. And, as had been pointed out, there were precedents for such a provision, in cases where it had not been so essential as in the present, where the intended beneficiaries of the Convention could look to no one but themselves to uphold their rights.

28. With regard to the detailed machinery which should be provided, he felt there was much to be said for Mr. Hsu's proposal, since the stateless person would usually have neither the means nor the knowledge to bring his case before an international tribunal; the proposed commission could, in that respect, take the place of his State, and it could also advise him whether his case was worth submitting to the arbitral tribunal.

29. Faris Bey el-KHOURI said that, no matter what other members of the Commission might have said, the Special Rapporteur's proposal would, for the first time in history, enable individuals to summon States before an international tribunal.

30. It had been argued that international tribunals had to pass judgment in accordance with the existing law, but his point was that, once ratified by Parliament, the convention would be part of a country's existing law. In theory, it was recognized that treaties were binding and superseded existing municipal law where they conflicted with it; it was unfortunately the fact that that principle was not everywhere respected. He hoped, however, and he believed that it was the intention of Mr. Lauterpacht, the Special Rapporteur for that subject, that when the Commission took up the law of treaties that principle would be clearly and explicitly confirmed.

31. Article VII, paragraph 2, of the draft Convention on the Reduction of Future Statelessness stated that deprivation of nationality, where allowed, "should be decided in each case only by a judicial authority acting

in accordance with the due process of law". In adopting that paragraph, the Commission had surely not been intending that decisions taken by a country's judicial authorities, in some cases after appeal to the Supreme Court, could be overridden by some outside authority.

32. The practical objections to the Special Rapporteur's proposal were also decisive. The establishment of an arbitral tribunal would encourage litigation, and the institution would be overwhelmed with literally thousands of cases.

33. Mr. AMADO said that he, like the country whose legal system he had the honour to represent, the country of Alvarez, had the most profound respect for arbitration as a means for the peaceful settlement of disputes. He was, however, with the best will in the world, utterly unable to comprehend how an individual, often without means and by definition without a State behind him, could engage in arbitration with a State, could conclude a *compromis* with it, agree on the composition of the tribunal, present his case and, in general, comply with all the costly and complicated formalities which arbitration entailed. As it stood, therefore, the Special Rapporteur's new proposal was quite impracticable, and he would be obliged to vote against it. However, as Mr. Spiropoulos had said, Mr. Hsu's proposal appeared to offer a way round the enormous practical difficulties.

34. Mr. SCELLE said that those members of the Commission who supported the Special Rapporteur's proposal did not do so in any academic spirit. Their purpose was severely practical; it was to make effective the bestowal of positive law on the individual. And Mr. Kozhevnikov and Mr. Zourek could not deny that to the extent that the convention was ratified, it would bestow a positive right on the individual.

35. The argument that the individual could not be a subject of international law could not for one minute be sustained; as he had said, "positivist" authors, whose only aim was to portray the facts as they were, not as they should be, recognized that the individual was both an active and a passive subject of international law. If the Commission accepted the contrary view, it would be fifty years behind the times; it would be ignoring not only the various precedents which had been mentioned, but also the Prize Court set up before the first World War and the mixed arbitral tribunals set up immediately after it. The fact that the State had been obliged to make a purely formal intervention in the Mavromatis and Ambatielos cases afforded an indication that international law had then been, in that respect, in a transitional stage.

36. There would, of course, be serious practical difficulties about applying the full arbitral procedure to disputes between States and individuals, but, as he had already pointed out, the proposal was to apply a special procedure, where the difficulties would be much less, particularly if Mr. Hsu's proposal were adopted. In any case, the difficulties had not been considered insurmountable in the case of the Prize Court; and the experience of that court had shown that even the least influential had been able to seek and obtain justice before it.

37. He could agree with some, but not with all, of what Mr. Spiropoulos had said. Least of all could he agree with the assertion that the question of nationality lay within the exclusive competence of States. It was true that the International Court of Justice had accepted that view "in principle", but agreement in principle could mean a great deal or it could mean very little. The whole Convention was a breach, and no small one, in the system of what States were pleased to term their "exclusive competence". In his view, the exclusive competence of States extended only so far as it was impossible to breach it, and that was all that the International Court of Justice had meant.

38. Mr. SANDSTRÖM was of the opinion that the article proposed by the Special Rapporteur should be accepted. As national tribunals tended to be at the mercy of political pressures, it seemed desirable to make provision for the individual to have recourse to a special jurisdiction.

39. Various objections had been raised to the proposal. It had been asserted, for example, that it was an innovation; but there were many examples of arrangements made to enable cases to be brought before mixed courts. Further, Mr. Amado had spoken of the difficulty of concluding a *compromis* between a State and an individual. But in his (Mr. Sandström's) view the Commission was not aiming at the creation of an arbitral tribunal in the strict sense of that term; and perhaps the wording of the article should be modified to bring that out.

40. The consideration that articles otherwise desirable might, if included in the convention, prevent States from accepting it, had loomed large in the Commission's discussions. That seemed to him, however, to be essentially a political issue; moreover, the chances of the Commission's getting States to accept unpalatable articles depended greatly on the way in which they were presented.

41. As to the precise wording of the article, he did not feel that the suggestion that the arbitral tribunal should "decide all controversial questions with regard to... the determination of the nationality of individuals" was happy; he would prefer the first paragraph of the article to read as follows:

> "The Parties agree to the creation of an arbitral tribunal with jurisdiction to decide all controversial questions concerning the interpretation of this convention or the claims to a nationality made pursuant to it by individuals."

42. Mr. HSU said that, in drafting his proposal, he had endeavoured to look at the question entirely from the point of view of the interests of the stateless person. He had hoped thus to avoid raising controversial issues: for example, whether or not the individual could be a subject of international law.

43. His intention was that the commission whose

establishment he proposed would not only entertain appeals from stateless persons, but would be empowered, perhaps through the agency of regional offices, to discover for itself what stateless persons needed help and in what form. As an international agency, it would not duplicate the function of local agencies, particularly as in his view stateless persons always enjoyed the possibility of appeal to local, national courts. The special commission he had in mind was to cater for circumstances in which it was desirable for the stateless persons involved to appeal direct to the arbitral tribunal.

44. It seemed that his proposal had found some support in the Commission. If it were to be thoroughly discussed, he would like to complete it, so that the whole article would then read:

"(1) The Parties agree to submit to arbitration any disputes arising from the application of the provisions of this convention.

"(2) A commission under the auspices of the United Nations shall be established to act on behalf of stateless persons in cases of dispute contemplated in the preceding paragraph."

45. Mr. ALFARO, referring to the difficulties which Mr. Amado had seen in the conclusion of the *compromis,* said that article 9 of the Commission's final draft on arbitral procedure opened as follows:

"Unless there are prior agreements which suffice for the purpose, the Parties having recourse to arbitration shall conclude a *compromis*..."

46. It seemed to him that, in the case of the tribunal which, it was suggested, might arbitrate in cases of dispute arising out of the implementation of the convention, there might well be prior agreements that would make it unnecessary to conclude a *compromis.* Further, there would normally be only one issue before the tribunal, namely, the claim of an individual to a nationality pursuant to the terms of the convention. Further, Mr. Hsu's excellent proposal concerning the establishment of a United Nations commission would ensure that the helpless individual would be heard by the tribunal and would not, whether by a government's arbitrary decision or by a misinterpretation of the convention made in good faith, be denied a nationality to which he was entitled.

47. He thought, therefore, that an article resulting from a proper combination of the proposals of the Special Rapporteur and of Mr. Hsu would enable the ideal that had been put before them by Mr. Scelle and Mr. Spiropoulos to be attained: the recognized rights of individuals would be guaranteed in practice. A working group, on which members of the Commission particularly interested in the clause might sit, would surely be able to draft an acceptable text.

48. In his experience of international arbitral tribunals it was not uncommon for an individual to appeal against a State; and such appeals were heard in the normal course of events and decided fairly.

49. Mr. SPIROPOULOS said that there seemed to be some misunderstanding between Mr. Scelle and himself. When he (Mr. Spiropoulos) had mentioned the exclusive competence of States in the matter of nationality, and their right to legislate for it as they pleased, he had assumed that it went without saying that that competence and that right should be exercised within the limits laid down by international law. Though it had to be recognized that it was impossible to prevent a State legislating in any way it pleased, and although questions of nationality were in fact decided by States, there were evident limits — for example, a State would not be competent to decide that someone flying in an aircraft over its territory should thereby acquire its nationality.

50. Mr. Amado had mentioned the difficulties that would arise in the conclusion of a *compromis* in arbitration proceedings between an individual and a State. To his (Mr. Spiropoulos') mind, a *compromis* was not in question; indeed, the very idea of a *compromis* between an individual and a State was extraordinary. The issue was whether or not an international institution to which an individual could address a claim should be established. The institution, once set up, might well decide to adopt a procedure akin to that of domestic tribunals.

51. Indeed, he suggested that it would be premature to decide on the exact form of international tribunal to be established. It was obviously desirable that the claims of stateless individuals should be referred to some sort of commission, but joint commissions might be established to operate in the territory of each State party to the convention; such joint commissions might include one member from the State in whose territory the commission was operating and a number of foreign members, whose presence would guarantee strict impartiality in the application of the terms of the convention. Other forms of tribunal were equally possible, and it might be unnecessary even to establish a commission under the auspices of the United Nations. He felt that a general article should be adopted, the detailed implementation of which could be discussed later.

52. Mr. CÓRDOVA said that it was essential that the Commission should comply with the directives of the General Assembly and the Economic and Social Council and ensure that stateless persons were given an effective right to nationality. Even if the draft convention were universally accepted by States it would be impossible to guarantee the rights conferred on individuals pursuant to it without providing some means of redress for individuals in respect of the actions of national administrations. Indeed, the convention under discussion was essentially one for which a system of enforcement was appropriate.

53. Many precedents for regarding individuals as subjects of international law had been cited. If an individual had obligations under international law, and the proceedings of the Nürnberg Tribunal showed that he had, he must equally have rights under it. He regarded the doctrinal issue of whether or not the individual had the right of access to international arbitral proceedings as decided, there being many

pertinent examples from the mixed arbitral tribunals established by the Treaty of Versailles onwards. The arbitral tribunals between Mexico and the United States of America had always adjudicated on the claims of individuals. In the cases where States had represented individuals before such tribunals, the individuals had been the parties primarily involved and the States concerned had followed their instructions both on the presentation and on the withdrawal of their claims.

54. There were elements in the suggestions made by Mr. Hsu and Mr. Lauterpacht which could be combined with his own suggestion in order to yield a formula which he thought, might command almost unanimous approval. Mr. Lauterpacht seemed to be fearful that States parties to the convention would not in practice set up a tribunal, even though its establishment were stipulated in the convention, and had suggested that in that event the United Nations itself should establish the tribunal. Mr. Hsu was concerned that stateless and helpless persons should have effective access to any tribunal that might be established. He (Mr. Córdova) accordingly suggested that the article under discussion might consist of three paragraphs, reading:

> "1. The parties agree to the creation within the framework of the United Nations of a jurisdiction to decide on controversial questions with regard to the interpretation of the terms of this convention and to the determination as to the nationality of the individuals envisaged in its articles.
>
> "2. [Paragraph unchanged from the previous proposal made by Mr. Córdova].
>
> "3. The General Assembly of the United Nations shall establish the tribunal and indicate its rules of procedure."

55. In that way the principle of establishing a jurisdiction or system of enforcement, whether it were called a tribunal, a commission or by any other name, would be accepted by States parties to the convention. Individuals would have access to it; and its establishment would be the responsibility of the United Nations.

56. The CHAIRMAN, speaking as a member of the Commission, said that the discussion had been fruitful and instructive. For his part, he supported, in general, those members of the Commission who had opposed the inclusion of arbitration clauses in draft conventions. On the other hand, he fully admitted, following Mr. Spiropoulos' reasoning, that the present convention was essentially one in which an arbitration clause was useful; for it was concerned rather with the regulation of the relationship between individuals and States than with that of the relationships between States. He had no theoretical objection to the recognition of individuals as the subjects of international law, yet he hesitated to support the proposed article because the Commission should, above all, be practical, as Mr. Amado had rightly said. No one would benefit if the convention remained unratified. In order to avoid such a failure as had, for example, befallen the 1907 Convention on Prize Jurisdiction,[6] it was necessary, as Mr. Kozhevnikov had said, not to be too suspicious. The impression had been given that the convention would be useless without some system of enforcement; but honest governments which made a practice of abiding by their undertakings were not unknown, and the acceptance of obligations under the convention would already be a considerable step forward. A system of enforcement might be theoretically desirable; but he expected that it would be difficult enough to secure universal acceptance for the convention even without the article on arbitration.

57. A perfectionist convention which remained a dead letter would do little good. Before a system of enforcement was considered, the practical results of the convention should be seen.

58. He could sympathize with the suggestion that an article on arbitration be included in the draft Convention on the Elimination of Future Statelessness; but both Mr. Amado and himself hoped that a large number of States would accede to the draft Convention on the Reduction of Future Statelessness. He suggested that if an article on arbitration was to be included in the latter, the Commission might follow the example of the draft conventions on human rights, and make its acceptance optional.

59. Mr. Hsu's proposal for the establishment of a United Nations commission to act on behalf of stateless persons might perhaps be acceptable in the form in which it was first made. But he (Mr. François) thought it difficult to accept it coupled with the article on arbitration.

60. Mr. LAUTERPACHT said that Mr. Amado's doubts appeared mainly to relate to matters of procedure. Mr. Amado had said that, if it could be demonstrated that the machinery of arbitration could be made to work without the necessity for a *compromis* and without any obvious difficulties, his attitude to the article on arbitration would not be so negative as it had been so far. He (Mr. Lauterpacht) had little to add to the descriptions already given by Mr. Alfaro and Mr. Sandström of the practical work of international arbitral tribunals. Many thousands of individuals had brought actions in their own names before the mixed arbitral tribunals established after the first World War. Not the slightest procedural difficulty had been experienced.

61. Nevertheless, it was undeniably a costly matter for individuals to appear before an international tribunal. Mr. Hsu's proposal should, therefore, be welcomed, as under it a United Nations body or agency would undertake what counsel would do for richer complainants.

62. The paragraph suggested by Mr. Hsu should be inserted as the third paragraph of the article, and his

[6] Convention relative to the creation of an International Prize Court, in J. B. Scott, *The Hague Peace Conferences of 1899 and 1907*, vol. II (Baltimore, Johns Hopkins Press, 1909), pp. 473-505.

(Mr. Lauterpacht's) proposal might then be made the fourth paragraph. He still had an open mind as to which particular form of words would be best; indeed, he felt that the suggested commission should be established by the Economic and Social Council rather than by the General Assembly.

63. The doctrinal issues still remained. They were: first, whether the individual could be regarded as a subject of international law; and secondly, whether nationality was a matter for the exclusive jurisdiction of States. They were, in relation to the particular issue now before the Commission, of an absolutely theoretical nature. That did not mean that they could be ignored.

64. The former issue was hardly open to question. It had been dealt with, indirectly but decisively, in the opinion of the International Court in the *Injuries* Case,[7] when the Court clearly rejected the view that only States could be subjects of international law. The Nürnberg Tribunal had also concerned itself with it — in the same sense. In his view, any persons on whom international law conferred rights and obligations must be regarded as the subject of international law; and there was nothing in positive international law to prevent the granting of such rights to individuals.

65. Regarding the second issue, he observed that Mr. Spiropoulos was inclined to agree with Mr. Kozhevnikov. Yet the Hague Convention of 1930 had dealt with statelessness in very much the same way, in some matters, as the Commission was dealing with it, and there had been no suggestion at that time that nationality was an exclusively domestic concern of States. Indeed, in its advisory opinion in the Tunis and Morocco case which had been mentioned by Mr. Scelle, the International Court had said that it was a relative matter whether or not anything was in the domestic jurisdiction of a State. In principle, of course, everything was within the domestic jurisdiction of a State, unless international law prescribed some limit. He was sorry that Mr. Spiropoulos had felt himself misunderstood, but he (Mr. Lauterpacht) thought that that was only to be expected if one agreed with Mr. Kozhevnikov and Mr. Scelle at the same time.

66. Addressing himself to what he described as the attitude of pessimism on the part of some members regarding the acceptance of the convention by States, he said that he could not attach much importance to purely subjective expressions of opinion. Some States would regard it as their duty and privilege to accept the convention; others would do so for the simple reason that their legislation had already adopted the main principles of the convention. It was true, as Mr. François had said, that the 1907 Convention on Prize Jurisdiction had not been ratified by the United Kingdom; but that was not because of theoretical objections to the right of individuals to make claims under it, but for different and more weighty reasons.

67. It was legitimate to feel concern lest the inclusion of an article on arbitration should diminish the likelihood of the acceptance of the convention by some States who would otherwise be inclined to accept it. He himself felt no such concern. For his part, he considered that States otherwise prepared to accept the convention would not be deterred from so doing by the presence of a clause designed to ensure its implementation. Evidently, disputes might arise not only between individuals and States but also between States themselves. Again, every signatory would have a legitimate interest in the convention being implemented by the other signatories. Further, it had been stated in the preamble that statelessness was frequently productive of friction between States. An arbitral tribunal was an obvious means of reducing that friction.

68. He attributed good faith to governments to the fullest extent, being of the opinion that they would accept an article on arbitration if they wanted to give effect to the terms of the convention, and if they were not afraid of having their good faith tested.

69. Mr. HSU suggested certain modifications in the wording of his proposal, which would then read:

> "1. An agency under the auspices of the United Nations shall be established to act on behalf of stateless persons in disputes arising from the application of the provisions of this Convention.
>
> "2. The parties further agree to submit such disputes to arbitration unless they are not otherwise settled."

70. Mr. SPIROPOULOS said that he did not wish to prolong the discussion of theoretical questions.

71. In the convention, the Commission was proposing that certain persons should be given certain rights. In considering the draft conventions proposed by the Special Rapporteur, matters of substance had been discussed, but points of procedure had not previously been raised. Arbitration was essentially a matter of procedure; it was of great importance, but it was not related to the other problems which the Commission had considered.

72. He suggested that it would be premature to draft specific rules, though there should be a reference to the matter, either in the general report or elsewhere. If the Commission had been discussing arbitration between States, many precedents could have been referred to: but the discussion in fact turned on arbitration between individuals and States. That was much more delicate, as had been shown by discussions in the Council of Europe.

73. Many alternative systems of enforcement were possible. He had already suggested mixed tribunals sitting in the several States parties to the convention. Faris Bey el-Khouri had also suggested the establishment of national tribunals to carry out preliminary investigations. Some international commission might well be desirable, though he doubted whether a single international tribunal would be wise. The establishment

[7] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

of joint commissions in each State to settle certain disputes was a procedure which had been recommended by the Council of Europe.

74. In view of the delicacy of the matter and of the many possibilities which required considerable study, he believed that the Commisison should not go further than recommend without specification that some form of international supervision should be provided for.

75. Mr. YEPES thought that the discussion was the best that the Commission had had since its inception.

76. Although many authorities had been quoted in support of the doctrine that the individual could not be a subject of international law, several others could be quoted, and by no means unimportant ones, which supported the contrary theory. He personally had always been on the side of those who considered that the individual, as well as the State, could be the subject of international law. In his lectures at Colombian universities he had taught that one of the pillars on which modern international law rested was precisely that notion of the individual as one of the subjects — obviously not the only one — of international law. That was the doctrine which had been put into practice as early as 1907 by the five Central American Republics in the International Court of Justice which was set up at that time and which had lasted until 1917. Under the Statute of that Court, the individual had the right to summon a State before the Court even if he were not supported by his own State. It was only right that a tribute should be paid to the little Central American Republics which had never hesitated to accept the most advanced principles of international law. Consequently, if in 1953, the Commission did not accept a principle which had been recognized by American international law as long ago as 1907, it would be 50 years behind the times.

77. It was essential that the Commission be practical, and aim at the convention securing as wide acceptance as possible. He agreed, too, that the proposals made by Mr. Córdova and Mr. Hsu might be combined, but suggested that the United Nations commission proposed by Mr. Hsu should have more specific powers.

78. He pointed out that the Latin-American Republics had always favoured international arbitration; in that respect, the American Treaty on Pacific Settlement of 30 April 1948, the Treaty of Bogotá,[8] was comprehensive. It included for example, an article in which States undertook to abstain from the threat of war or other form of coercion; another article made compulsory the referral to the International Court of disputes not otherwise settled. The Treaty of Bogotá also regulated in a scientific manner the problem of the field of competence reserved to the State since, contrary to article 2, paragraph 7, of the United Nations Charter, it did not grant the State discretion to decide by itself whether or not a question fell within a reserved field. Article VII of the same Treaty directly concerned the question the Commission was at present dealing with. By the terms of that article, recourse to an international tribunal — an arbitral tribunal, for instance, or the Hague Court — was not permitted unless the parties had already exhausted every recourse provided for by the domestic legislation of the State against which action was being taken. That rule of the exhaustion of all recourse against the competent local authorities was another of those principles of American international law which ought to be taken into account if members wished the American republics to accept the Convention they were at present engaged in drafting. In his opinion, stateless persons also should be compelled to exhaust all legal means at their disposal in the States concerned before being permitted to have recourse to an arbitral tribunal or to the United Nations Commission proposed by Mr. Hsu.

79. He therefore proposed an additional paragraph, to read as follows:

"No proceedings may take place before the tribunal established by this Convention until the persons concerned have exhausted the remedial procedure of the competent local courts of the State in question".

The meeting rose at 12.55 p.m.

[8] Pan American Union, *Law and Treaty Series*, No. 24, p. 21.

224th MEETING

Monday, 27 July 1953, at 2.45 p.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris

Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS (*continued*)

Article on the interpretation and implementation of the Conventions [Article 10] (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the additional article, relating to the settlement of disputes, which it was proposed should be inserted in the draft Convention on the Elimination of Future Statelessness, and pointed out that it had before it revised proposals submitted by Mr. Córdova[1] and Mr. Hsu[2] and an amendment to them both submitted by Mr. Yepes.[3]

2. Mr. YEPES said that he had already explained his amendment at length at the close of the previous meeting. He feared that failure to adopt it would be sufficient to prevent not only the Latin-American States, but also many others, for example the Arab States, from acceding to the Convention. He had submitted his amendment in a constructive spirit and with a view to facilitating ratification of the convention by a greater number of States. It was a fact that the rule of the exhaustion of remedies from the local authorities before appealing to an international tribunal in the case of claims against a State was an essential principle of American international law, and, because that principle was identified with one of the great legal systems of the world, the Commission ought not to disregard it.

3. Mr. CÓRDOVA (Special Rapporteur) said that it was generally recognized that the remedial procedure of the competent local courts should be exhausted before diplomatic representations were made, but that it was quite a different matter to lay down that the remedial procedure of the competent local courts should be exhausted before a dispute between a State and an individual was submitted to arbitration.

4. Mr. LAUTERPACHT felt, on the other hand, that what Mr. Yepes proposed was fully in accordance with the normal rule, so much so indeed that Mr. Yepes' amendment might be thought to go without saying. If it was thought desirable, however, the point could be made clear in the report.

5. Mr. HSU agreed that Mr. Yepes' amendment was unnecessary, particularly in connexion with the text which he (Mr. Hsu) proposed, in view of the words "unless they are otherwise settled". The agency which he proposed would naturally avoid submitting a dispute to arbitration until it had exhausted all other means of settling it.

6. Mr. ALFARO supported Mr. Yepes' amendment, not only because it stated a recognized principle of international law but also because it would prevent the arbitral tribunal from being overwhelmed with cases. The Commission must assume that national courts would apply the convention, since, once ratified, it would be part of the national law; they might, however, sometimes misinterpret it, with resultant creation of statelessness, and in such cases the individual must be able to seek justice at the bar of a special international tribunal. Such cases, however, would be exceptional.

7. Mr. CÓRDOVA agreed that the principle stated in Mr. Yepes' amendment applied indirectly to ordinary arbitration; the arbitration which the Commission was envisaging, however, was a very special kind of arbitration, between an individual and the State. The competent local courts of a State whose administrative authorities had deliberately denied an individual its nationality would be bound to uphold such action, and the result of Mr. Yepes' amendment, therefore, would be to deprive the individual of nationality for much longer than was necessary.

8. Mr. SCELLE agreed. One of the main purposes of the special procedure which the Commission was considering was to avoid the long delay which normal arbitration procedure entailed; Mr. Yepes' amendment would have precisely the opposite effect.

9. Mr. SPIROPOULOS felt that the question of the admissibility of appeals, together with all other details of the arbitral tribunal's procedure, could be left for decision by the parties themselves, when they came to set up the arbitral tribunal.

10. Mr. LIANG (Secretary to the Commission) suggested that the Commission's attitude to Mr. Yepes' amendment must depend upon whether it intended the convention to be translated into municipal law, in which case the national courts would be bound to apply its provisions, or whether it did not intend it to be so translated, in which case the responsibility of States would remain international in character. It would certainly be illogical to insert Mr. Yepes' amendment in the text merely because the rule which it stated was applicable to arbitral procedure, since the great majority of disputes which arose from the Convention would be between a State and an individual and would therefore not be subject to the ordinary rules of arbitral procedure. The Commission should therefore decide whether it wished to forbid direct access to an international tribunal until all the possibilities of remedial action by the local courts had been exhausted, as proposed by Mr. Yepes, or whether it wished to leave the possibility of such action out of account, as suggested by Mr. Córdova. Either method was feasible. He recalled, for example, that the arbitrator in the case of the claim of Finnish shipowners against Great Britain in respect of

[1] See *supra*, 223rd meeting, para. 54.

[2] *Ibid.*, paras. 4 and 44.

[3] *Ibid.*, para. 79.

the use of certain Finnish vessels during the war[4] had found that the *compromis* itself had excluded remedies in the local courts; in other cases it had been agreed that, because such remedies were not available, or for some other reason, the rule that remedies in the local courts should first be sought need not apply.

11. Faris Bey el-KHOURI said that, in his view, there was no need for an international tribunal. If such a body was to be set up, however, Mr. Yepes' amendment would have considerable practical advantages. It would enable all the relevant facts to be ascertained and put on record before a case came to the tribunal, and would thus save the latter's time. On the other hand, as he had already pointed out, it was extremely doubtful whether States would agree that decisions of their domestic courts could be over-ridden by an international body.

12. Mr. CÓRDOVA asked what was meant by the "competent local courts of the State in question", since more than one State might be "in question".

13. Mr. YEPES thought that it was obvious that a stateless person could claim only one nationality at a time.

14. Mr. LAUTERPACHT said that since certain doubts had been expressed about Mr. Yepes' amendment, he felt obliged to repeat that, in his view, its only defect was that it was obvious and that what it stated was indisputable, whether the claimant was an individual or a State. An individual who did not succeed in establishing a claim before a lower court was always free to seek to establish it before a higher court, and so on to the highest available instance.

15. As an argument against Mr. Yepes' proposal, Mr. Córdova had said that the competent local courts would be bound to uphold an executive decision. Besides the rule stated by Mr. Yepes' however, there was another, which also went without saying and which stipulated that it was unnecessary to exhaust the remedial procedure of the competent local courts if there was no remedy to exhaust; for example, there would be no point in appealing and, therefore, no prior need to appeal, to the local courts against action taken by the executive where such action had been taken in pursuance of binding laws contrary to the convention.

16. Mr. SANDSTRÖM said that certainly a negative decision by the authorities of the State concerned must precede appeal to any international tribunal, but that it was a quite different thing to say that the remedial procedure of the competent local courts must be "exhausted". He agreed with Mr. Spiropoulos that detailed questions of the tribunal's competence and procedure should be left until the time came to set it up. He also agreed with what Mr. Spiropoulos had said at the previous meeting, that the Commission should not prejudge the form of the body to be set up. For that reason, and also because he thought it desirable to distinguish between the two types of case with which the proposed body would have to deal, he proposed that the additional article be amended to read as follows:

"The Contracting Parties shall provide for appeal to an international organ against decisions taken by their authorities with regard to disputes concerning the application of this convention.

"This appeals procedure shall be open to the States Parties to the Convention as well as to individuals whom the wrongful application of its provisions, or of those of the national legislation of such States, might render stateless.

"The appeals body shall also have the power to decide on disputes between States Parties to the Convention with regard to the interpretation of the Convention."

17. Mr. SCELLE felt that the rule which Mr. Yepes proposed be inserted in the convention was quite inappropriate; for it was really no more than a question of courtesy as between States. What the stateless person wanted was a nationality; he might consider that he had a claim to one of two or three; if his claim was rejected by the first State to which he applied, he would apply to the second; and if that also rejected it, he would apply to the third. Under Mr. Yepes' proposal he would have to exhaust the remedial procedures of the competent local courts in all three States before appealing to the arbitral tribunal. In France, for one, it would take four or five years to "exhaust the remedial procedure of the competent local courts". Mr. Yepes' amendment was therefore clearly inconsistent with the Commission's desire to provide an expeditious procedure for the settlement of disputes. There was, however, no reason why the Commission should not leave the whole matter over for decision by the parties, as Mr. Spiropoulos had suggested.

18. Mr. ALFARO said that in his previous remarks he had stressed the practical arguments in favour of Mr. Yepes' proposal. Indeed, it was most desirable that it should be made abundantly clear that an individual who was denied a nationality by an ignorant or arbitrary official could seek redress in the courts of his own country without having to appeal to a distant tribunal. If the Commission really wished to make the individual's rights effective, it should make their exercise and defence as easy as possible.

19. There was, however, another argument in favour of Mr. Yepes' proposal. The principle which it stated was one to which great importance was attached, particularly in the Latin-American countries, where it had been the custom in the past for foreign governments to espouse claims of their nationals at once without previous exhaustion of local remedies.

20. The CHAIRMAN pointed out that stateless persons enjoyed none of the reciprocal facilities which most aliens enjoyed for free legal action. If Mr. Yepes' amendment were adopted, therefore, they would have to bear all the expense of the remedial procedure in the local courts.

[4] *Reports of International Arbitral Awards*, Vol. III (United Nations publication, Sales No.: 1949.V.2) pp. 1479-1550.

21. Mr. YEPES said that he would have no objection to stipulating that the expense incurred by recourse to the remedial procedure of the competent local courts should not fall upon the claimaint. He would point out, however, that it would cost the stateless person much less to appeal to the local courts than to an international tribunal.

22. In order to meet the objections which certain members of the Commission had raised to his amendment, it might be better to speak of "authorities" rather than "courts".

23. The rule which his amendment reaffirmed was primarily an assertion of the impartiality and independence of local courts, an assertion provoked by the mistrust with which such courts, in a number of American States, had been regarded by certain European countries during the second half of the nineteenth century.

24. He again warned the Commission that if his amendment were not adopted, the convention was bound to be a failure. The Convention on Arbitration signed at Washington in 1929 by all the American States had also lacked a proviso that all remedies from the competent local authorities should be exhausted before recourse was had to arbitration, and for that reason nearly all the Latin American States had felt unable to ratify it except subject to express reservations, with the consequence that the treaty had been foredoomed to failure.

25. Mr. KOZHEVNIKOV pointed out that the Commission had not yet taken a decision concerning the etablishment of an international tribunal. It was now proposed, on the one hand, that the individual should have access to such a tribunal without first going through the national courts, on the grounds that that procedure would be more expeditious; and, on the other hand, that the individual should first have to seek redress in the local courts. For reasons which it was unnecessary for him to repeat he could not accept the former proposal; while Mr. Yepes' amendment was preferable to the extent that it did not entirely disregard the sovereignty of States. In the long run, however, it also provided for an international tribunal and as such a tribunal was contrary to his conception of statelessness as a matter solely within the competence of States, he was unable to support Mr. Yepes' amendment either.

26. Mr. SCELLE said that what Mr. Yepes' amendment amounted to, and what he was unable to accept, was that a case should not be submitted to the international tribunal until it was *res judicata* in municipal law. He wished to submit the following text, which was similar in purpose to Mr. Sandström's:

> "An appeal to the international organs provided for by this Convention may be made as soon as it appears that a decision taken by national authorities may render one or more individuals stateless."

27. Mr. CÓRDOVA felt that it would be exceedingly difficult for the Commission to vote on all the various proposals which had been submitted, and suggested that they should be referred to the Drafting Committee once the Commission had voted on the following three questions of principle: first, whether the convention should provide that an agency under the auspices of the United Nations should be established to act on behalf of stateless persons in disputes arising from the application of the provisions of the convention; secondly, whether it should provide that an international tribunal should be established with jurisdiction to decide all disputes arising out of the convention, whether between States or between States and individuals; and thirdly, whether it should provide that the remedial procedure of the competent local authorities should be exhausted before a dispute could be referred to such a tribunal. Once those questions had been decided it would be an easy matter for the Drafting Committee to prepare a text for submission to the Commission for approval.

28. Mr. KOZHEVNIKOV supported Mr. Córdova's suggestion.

29. The CHAIRMAN also felt that the procedure suggested by Mr. Córdova was the most sensible one. He would, however, put the third question of principle to the vote before the second, as he thought that some members of the Commission would be unable to vote in favour of the second unless the third was adopted.

30. He therefore first put to the vote the question whether the Convention should provide that an agency under the auspices of the United Nations should be established to act on behalf of stateless persons in disputes arising from the application of the provisions of the Convention.

That question was decided in the affirmative by 8 votes to 2, with 3 abstentions.

31. Mr. SANDSTRÖM explained that he had abstained because he considered that it was desirable to avoid setting up new organs unless and until the need for them was proved. He would have preferred the question to be simply referred to in the report.

32. Mr. SPIROPOULOS explained that he had abstained because he felt that discussion of all such questions of detail was premature.

33. Mr. KOZHEVNIKOV explained that he had voted against the suggestion because he was opposed to it in principle.

34. The CHAIRMAN then put to the vote the question whether the Commission wished to insert in the convention a provision to the effect that the remedial procedure of the competent local authorities should be exhausted before a case was submitted to any international tribunal established in pursuance of the convention.

That question was decided in the negative by 6 votes to 4, with 3 abstentions.

35. Mr. LAUTERPACHT said that, as the Commission had been voting only on the question whether such a provision should be included in the convention, he saw no reason why any member of the Commission who

considered that an international tribunal should be set up only if cases could not be referred to it until the remedial procedure of the competent local authorities had been exhausted should feel obliged to vote against an international tribunal.

36. Mr. CÓRDOVA agreed.

37. Faris Bey el-KHOURI said that he had voted in favour of insertion of the provision in the convention since he considered that the international arbitral tribunal represented an extraordinary procedure which should not be resorted to until the ordinary procedure had been exhausted.

38. Mr. KOZHEVNIKOV explained that he had voted against the inclusion of such a provision for reasons which he had already stated.

39. Mr. ZOUREK explained that he had abstained because, although he accepted the principle that the remedial procedure of the competent local authorities should be exhausted before recourse was had to any other procedure, he was altogether opposed to the establishment of the suggested tribunal.

40. Mr. SPIROPOULOS said that he had voted against such a provision because he believed that any consideration of the question was premature.

41. The CHAIRMAN put to the vote the question whether the convention should provide that an international tribunal should be established with jurisdiction to decide all disputes arising out of the convention, whether between States or between States and individuals.

That question was decided in the affirmative by 8 votes to 3, with 2 abstentions.

42. Mr. YEPES said that he had voted against such a provision because he considered that an international tribunal should be set up only if cases could not be referred to it until the remedial procedure of the competent local authorities had been exhausted.

43. Mr. AMADO said that he had voted in favour of the provision because he thought it was obvious that the Parties would stipulate that the remedial procedure of the competent local authorities should first be exhausted, even if no such stipulation were laid down in the convention.

44. Mr. ALFARO pointed out that, as Mr. Lauterpacht had rightly said, the Commission had not voted against the principle that the remedial procedure of the competent local authorities should first be exhausted, but only against the insertion of that principle in the text. It might, however, be useful to point out clearly in the comment that those provisions of the convention relating to the establishment of an international tribunal did not prejudice the individual's right to seek such local remedies as were provided for by the law of the State whose nationality he claimed.

45. Mr. AMADO said that, whether or not there was a convention, the local courts would do what they could to resolve all difficulties and to apply the appropriate national law.

46. Mr. LAUTERPACHT said that he had suggested[5] the addition of a fourth paragraph to the text proposed by Mr. Córdova, according to which if, after the lapse of a certain period, the parties to the convention had not in fact established the arbitral tribunal and other agencies, they would be established by the General Assembly or the Economic and Social Council. A similar procedure had been adopted by the Commission in its recommendations on fisheries.

47. Mr. AMADO said that Mr. Lauterpacht's proposal went too far; if States refused to act on the Commission's proposal concerning arbitration, the General Assembly would be able to oblige them to accept it.

48. Mr. LAUTERPACHT said that he had no objection to the matter being dealt with in the Commission's general report.

49. Mr. CÓRDOVA did not agree with Mr. Amado. If Mr. Lauterpacht's suggestion were accepted, any resulting action taken by the General Assembly would be based on the convention, which States were free to accept or reject. The Commission was thus not proposing arrangements that would enable States to be forced into a course of action of which they disapproved, but was rather ensuring that the will of the majority of States that accepted the convention should not be frustrated by an obstructive minority.

50. Mr. LIANG (Secretary to the Commission) pointed out that certain constitutional difficulties would result from Mr. Lauterpacht's suggestion, for it would not be possible for the Economic and Social Council to assume the obligations suggested merely as the result of a wish expressed by the Parties to the convention that an arbitral tribunal or other organ be established. The situation was different from that on which the relevant part of the draft on arbitral procedure was based; for there it was postulated that an agreement to establish an arbitral tribunal already existed, and the President of the International Court of Justice was authorized to act in certain specific circumstances. It would be possible, however, to include in the convention in contrast to the somewhat peremptory provisions suggested by Mr. Lauterpacht, an article under which the question of the establishment of an arbitral tribunal might be submitted to the General Assembly or the Economic and Social Council for consideration.

51. Mr. LAUTERPACHT explained that his intention was to take account of the possibility of failure by the Parties to discharge their legal obligation to establish an arbitral tribunal. He agreed that the constitutional difficulties mentioned by the Secretary needed further investigation, but doubted whether there were any.

52. The CHAIRMAN said that it seemed to him that the best thing would be for the Commission to consider Mr. Alfaro's and Mr. Lauterpacht's suggestions,

[5] See *supra*, 223rd meeting, para. 19.

which by then would have been circulated, when it considered the draft of the additional article as revised by the Drafting Committee.[6]

It was so agreed.

Additional article (Article 4)

53. The CHAIRMAN said that the Commission had now to consider an additional article proposed by the Special Rapporteur for inclusion in the draft Convention on the Elimination of Future Statelessness. The draft Convention on the Reduction of Future Statelessness contained, in article V, a provision which took account of the possibility of a child being born on the territory of a State not party to the convention, and consequently unable to benefit from the provisions of article I of that convention; that article read as follows:

"If a child does not acquire at birth any nationality either *jure soli* or *jure sanguinis*, it will acquire the nationality of one of its parents. In this case the nationality of the father shall prevail over that of the mother."

54. To meet the same difficulty in the case of the other convention, the Special Rapporteur had proposed an additional article reading:

"If article 1 does not apply to a person, he will acquire the nationality of the contracting state where one of his parents was born. In this case priority should be given to the contracting state where the father was born."

55. He suggested that, if the Commission was generally agreed that such a provision should be inserted, its precise form could be left to the Drafting Committee.

56. Mr. CÓRDOVA said that article V of the draft Convention on the Reduction of Future Statelessness was an extension of the principle of *jus sanguinis*. The article he was now proposing for inclusion in the draft Convention on the Elimination of Future Statelessness, on the other hand, was an extension of *jus soli*; but it was designed to meet the same need as had been provided for by article V of the draft Convention on the Reduction of Future Statelessness.

It was agreed by 6 votes to 1, with 2 abstentions, that an article be included in the draft Convention on the Elimination of Future Statelessness similar in purpose to article V of the draft Convention on the Reduction of Future Statelessness.

DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*resumed from the 223rd meeting*)

Preamble

57. The CHAIRMAN invited the Commission to consider the preamble to the draft Convention on the Reduction of Future Statelessness.

58. Mr. CÓRDOVA had no specific changes to suggest in the preamble, which should, however, be collated with the amended text of the convention itself.

59. Mr. SANDSTRÖM suggested as the preamble the text adopted at the 219th meeting for the draft Convention on the Elimination of Future Statelessness.[7] However, the final clause, which read:

"Whereas it is desirable to eliminate statelessness by international agreement"

would have to be amended to read somewhat as follows:

"Whereas it is desirable to reduce statelessness by international agreement so far as possible".

60. Mr. SPIROPOULOS agreed with Mr. Sandström, but would prefer the clause in question to read simply:

"Whereas it is desirable to reduce statelessness by international agreement."

61. Mr. CÓRDOVA said that, although the convention under discussion was concerned with the reduction of future statelessness, the Commission nevertheless still maintained as its ideal the elimination of future statelessness, an end to the attainment of which the reduction of statelessness was one means. It was in point, therefore, to repeat, unchanged, the wording of the preamble to the draft convention on the elimination of future statelessness.

62. Mr. YEPES would prefer the inclusion of the phrase "so far as possible".

63. Mr. SPIROPOULOS thought that, linguistically speaking, the phrase "...to eliminate...so far as possible" was not particularly elegant.

64. Mr. AMADO said that the elimination of future statelessness was the Commission's high hope; the phrase "as far as possible" was a mere colloquialism.

65. Mr. CÓRDOVA thought that no one would contest the assertion that it was desirable to eliminate statelessness, even though the assumption on which the convention was based was that its partial elimination or reduction was all that it would in practice be possible to achieve.

66. The CHAIRMAN, speaking as a member of the Commission, suggested that the Drafting Committee might consider an article reading substantially as follows:

"Whereas it is desirable to reduce statelessness by international agreement so far as its total elimination is not possible."

67. Mr. KOZHEVNIKOV asked that a vote be taken on the Chairman's suggestion. His opinion of the suggested preamble was identical with his opinion of the preamble to the draft Convention on the Elimination of Future Statelessness.

68. Mr. ZOUREK too said that his objections to the

[6] See *infra*, 231st meeting, para. 84.

[7] See *supra*, 219th meeting, paras. 1-41.

suggested preamble were identical with his objections to the preamble to the draft Convention on the Elimination of Future Statelessness.

The Chairman's suggestion was adopted by 10 votes to 2, with 1 abstention.

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS

Titles

69. The CHAIRMAN invited the Commission to consider the titles of the two draft conventions. The issue had been deferred earlier when the suggestion had been made that the phrase "the elimination of future statelessness" covered more than the abolition of the legal causes of statelessness, which was all that the Commission had been concerned with.

70. Mr. YEPES said that he had previously raised the matter for fear lest an impression be created that the convention was concerned with the total abolition of statelessness. He now believed that the title adequately described the contents, and he therefore urged its adoption.

71. Mr. SPIROPOULOS agreed that the word "elimination" should be kept; but as elimination could only result from future action, the qualifying word "future" was supererogatory.

72. Mr. LAUTERPACHT agreed with Mr. Spiropoulos; as the convention had no retrospective effect, the word "future" was redundant. For the same reason, persons who were stateless when the convention entered into force would remain stateless; hence the word "elimination" was more satisfactory than the possible alternative "suppression". Further, as the word "on" was little more than descriptive, a better title might be "Convention *for* the Elimination of Future Statelessness", the word "for" reflecting a declared objective.

73. Mr. CÓRDOVA recalled that the word "future" had been used throughout the Commission's work on the subject. Yet because the suggested title tended to give the impression that the convention was concerned with the elimination of all causes of statelessness, the Commission's general report ought to bring out the consideration that the major causes of statelessness were political rather than juridical. Indeed, the general report might even give a full account of the reasons why the Commission had not felt able to deal with the political issues involved.

74. Mr. ALFARO agreed that the use of the words "elimination" and "reduction" in the respective titles of the two conventions would make evident the essential difference between them.

75. Mr. SCELLE agreed that the word "future" should be dropped.

76. Mr. KOZHEVNIKOV said that as to the use of the word "future", he agreed that the convention could not have retrospective effect. Pursuant to the convention, States would take measures to prevent statelessness arising in future. The word "future" should therefore stand.

77. Mr. YEPES agreed with Mr. Lauterpacht's suggestion that the preposition "for" should be used instead of "on". The word "future" should be deleted, since in the circumstances in which the convention would be applied it was meaningless.

78. Mr. SPIROPOULOS agreed that the effects of the convention would be limited to the future.

79. Mr. ZOUREK said that, unless the title contained the word "future", it would arouse unjustified expectations.

80. Mr. LAUTERPACHT suggested that the Drafting Committee might consider the exact terms of the title.

81. Mr. YEPES opposed that suggestion, as the retention or deletion of the word "future" raised a matter of principle.

82. Mr. SCELLE said that in his understanding the convention would apply to all cases of statelessness: past, present and future.

83. The CHAIRMAN, referring to the wording of article 1 of the draft Convention on the Elimination of Future Statelessness, said that it was clear that that article related only to persons born after the convention came into force.

84. Mr. ZOUREK pointed out that it was a well-established principle of international law that a convention could not affect a situation existing at the time of its coming into force.

85. Mr. SCELLE said that in that case the title should read "Convention on the Maintenance of Statelessness".

86. Mr. LIANG (Secretary to the Commission) said that the Special Rapporteur and his predecessor[8] had considered both present and future statelessness. It seemed to him reasonable to take the view that once the conventions had entered into force article 1, for example, would apply to all persons. He agreed, however, that though the English text of the title was clear, the French text was ambiguous.[9] The matter should not be left in doubt; the mere omission of any word from the title would augment rather than allay doubt.

87. Mr. SANDSTRÖM said that if the Commission had intended the convention to have retrospective effect, nearly all the articles would have been drafted differently. Article 1, for example, might have started "If no nationality has been acquired at birth...".

88. Mr. LAUTERPACHT said that it was absurd to maintain that an effect of the convention could be that, for example, persons deprived of their nationality by

[8] Mr. Manley O. Hudson.

[9] The French text read as follows: "*Projet de convention sur la suppression de l'apatridie dans l'avenir*".

way of penalty would reacquire their lost nationality. Normally, legislation governing nationality never had retrospective effect; indeed, when it had been desired to ensure that the British Nationality Act of 1948 would enable married women who had lost their nationality on marriage to an alien to regain it if they so wished, the retrospective effect had had specifically to be provided for. Nevertheless, he found the inclusion of the word "future" in the title slightly pedantic, and felt that the matter could best be dealt with by an appropriate passage in the Commission's general report.

89. Mr. KOZHEVNIKOV said that the Special Rapporteur had been instructed to deal only with the elimination of future statelessness; and in the light of the Commission's discussion the elimination of the word "future" from the title could only lead to ambiguity. Mr. Scelle, for example, might then have sound ground for his broad interpretation of the effect of the convention. He emphasized that the convention would not affect the situation of persons who were stateless when it came into force; it would only ensure that no new cases of statelessness should arise. In his view, the title was not a mere technicality; the Special Rapporteur's original suggestion was more accurate than any subsequent proposal.

90. Mr. CÓRDOVA said that the issue which had arisen was basic to the problem the Commission had been discussing for several weeks. In his report on nationality including statelessness (A/CN.4/64), he had made it clear that he had been prevented from making any recommendations for the elimination of existing statelessness, and that he deplored that limitation. He quoted parts of paragraphs 20 and 21 from his report, and said that he thought it was well understood that no article in the draft convention was concerned with the elimination of existing statelessness.

91. For his part, he would be happy to have the terms of the convention apply to all cases of statelessness existing at the time when it came into force. But if that were intended, it would have to be stated categorically.

92. Mr. ALFARO expressed sympathy with Mr. Scelle's intentions and said that he would personally be ready at any time to sign a convention whose object was the elimination of existing statelessness. Nevertheless, any interpretation of the convention already drafted that gave a retrospective sense to its terms was barred by its very words: in nearly every clause the future tense of the operative verbs had been used.

93. Mr. SPIROPOULOS said that the issue, in spite of its fundamental importance, had been raised as a matter of drafting. The instructions that had been given to the Special Rapporteur were clear, and the English text of the title was clear; the convention could only apply to future cases of statelessness. It had never been the intention of the Commission at any time during its work on the convention that the provisions of the latter should apply to existing cases. Further, as Mr. Lauterpacht had said, nationality laws were never retrospective in effect.

94. The applicability of the convention should follow the normal rules of international law. Any suggestion of retrospective effect would be absurd, and cause complete confusion in, for example, the articles referring to deprivation of nationality as a penalty and to change of nationality as a result of change in personal status; it would only make acceptance of the convention by States even more difficult than it was already.

95. Mr. SANDSTRÖM said that he was in entire agreement with Mr. Spiropoulos.

The meeting rose at 6.5 p.m.

225th MEETING

Tuesday, 28 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Titles (continued)

1. The CHAIRMAN said that he wished to comment briefly on the discussion which had taken place at the previous meeting. Mr. Córdova had stressed in his report that the two draft conventions which he had prepared referred only to future cases of statelessness, but had also said that in his view the Commission should do something to help the very large numbers who were already stateless. Mr. Córdova had expressed the same view when introducing his report; he had "urged the Commission to reconsider its decision to leave existing

cases of statelessness out of account".[1] Finally, after the general debate on his report, he had said, referring to the comments which had been made on the absence from it of references to existing statelessness, that "he was the first to deplore an omission which was due to the Commission's own decision... He was perfectly willing that the Commission should reverse its decision, but if the problem of existing statelessness was to be tackled, he would like to know in good time what the Commission expected of him."[2]

2. There could therefore be no doubt that the two draft conventions had been prepared and considered with sole reference to future cases of statelessness. There was, however, another entirely distinct question, namely, whether the Commission wished to take any separate action in favour of existing cases of statelessness. He agreed that that question would have to be discussed once the Commission had disposed of the question out of which the whole discussion had arisen, namely, that of the title of the Conventions.

3. Mr. SCELLE admitted that what the Chairman had said was perfectly correct, and agreed that he himself had been mistaken in maintaining the contrary. Through error or forgetfulness he had formed the impression that the conventions would apply to existing cases of statelessness as well as to future cases. He now agreed that that was not so, and that the word "future" must be included in the title. Indeed, to be perfectly accurate the title might well read "Convention for the Elimination of Certain Cases of Statelessness in the Indefinite Future".

4. Mr. YEPES paid tribute to Mr. Scelle's courageous *mea culpa*, but feared that he could not associate himself with it. If the convention did not apply to existing cases of statelessness, it would not be worth signing. He had acted in perfect good faith in protesting against the inclusion of the word "future" in the title, since it had been agreed that the present title was provisional, and since, in any case, it was the substance of the articles that mattered, not the title. During consideration of the articles he had spoken, made proposals and voted on the assumption that they applied to existing cases of statelessness. Moreover, the argument which had been advanced against many of the proposed provisions was that they would involve nationality being conferred on millions of persons who were at present stateless, and that that was something which the States in question could not accept. In his view it was essential that something be done to succour the millions of people who were at present deprived of the protection of which possession of a nationality would assure them.

5. Mr. Spiropoulos had suggested that if the Commission made the convention applicable to existing cases of statelessness, it would make its acceptance much more difficult, as it would violate the principle that laws were not retrospective. However, that principle, which was humanitarian at root, was applicable to criminal law but not to international law. The principle that criminal law was not retrospective was founded on the rule *nulla poena sine lege*, a rule which, though stated in Latin, had been unknown in ancient Rome. But even in criminal law, the non-retrospective principle was not always observed; for example, when a severe penalty was replaced by a more lenient one, the latter was imposed even for offences which were committed before its introduction. The rule of non-retrospectiveness, in fact, was an exceptional rule applicable only where the law in question violated an existing right. Such was clearly not the case with the convention.

6. Mr. Lauterpacht had maintained that it would be absurd if the convention resulted in a person who had been legally deprived of his nationality re-acquiring it. He (Mr. Yepes) could not agree. There would be one stateless person the less, and the Commission would not have been guilty of condoning action taken by States in violation of a fundamental human right.

7. The Nürnberg principles, which the Commission had accepted, after a lengthy discussion, as valid international law, were the typical example of a retrospective law, and he recalled that Mr. Spiropoulos, who was now opposing the convention's being given retrospective effect, had at that time been one of the most ardent supporters of the retrospective principle. Again the Universal Declaration of Human Rights did not state that certain rights should be enjoyed by persons born after its adoption; it stated that they should be enjoyed by all from the day of its adoption. Moreover, when the Rights of Man were proclaimed in 1789, did anyone pretend that that noble declaration should only apply to persons born after its approval?

8. Several members of the Commission had expressed the view that the convention represented an ideal, and that in practice no State would be able to ratify it. If that was their view, they should have the courage of their convictions and not be deterred by the bogy of non-retrospectiveness from making the convention the ideal instrument they believed it to be. The convention had also been described as a remedy which, if universally applied, would deliver mankind from the scourge of statelessness. Could anyone imagine a medical body discovering an efficacious cure for cancer and at the same time insisting that it should be reserved for future cancer cases and not used for existing sufferers. That would be senseless.

9. Mr. LIANG (Secretary to the Commission) with reference to the title of the convention, said that there was no doubt, having regard to what had gone before, that the word "future" had been inserted deliberately. When the Economic and Social Council and the *Ad hoc* Committee on Statelessness had considered the whole problem, their discussions had largely hinged about existing statelessness; and when the question had been referred to the International Law Commission, it had been understood that the Commission could deal with existing statelessness as well as with future statelessness. It was on that basis that Judge Manley O. Hudson, then Special Rapporteur, had been instructed to report. In

[1] See *supra*, 211th meeting, para. 10.

[2] *Ibid.*, para. 49.

his report (A/CN.4/50), Mr. Hudson had distinguished clearly between the two, and the Commission had, in his view wisely, concentrated its attention on future statelessness, on the ground that the elimination of existing statelessness was mainly a matter for political arrangement. The title of a convention should surely correspond to its subject matter, and there was no doubt that the question which the Commission had been examining during the past fortnight had been that of the elimination of future cases of statelessness or, to put the matter differently, the elimination of the legal origins of statelessness.

10. With regard to the suggestion that the convention should be made retrospective, he drew attention to the wording adopted for articles 2 and 4, where it was said that "A foundling, so long as its place of birth is unknown, shall be presumed to have been born in the territory of the Party in which it is found" and that "Birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies". That "presumption" and that "deeming" must necessarily be subsequent to the convention's entry into force.

11. Mr. HSU said that he had not taken part in the discussion, since he believed that it was based on a misunderstanding of the word "elimination". Elimination could be either instantaneous or gradual.

12. There was no doubt that in its resolution 319 B-III (XI) the Economic and Social Council had had existing statelessness in mind, since the whole question would never have come before the Council had it not been for the large number of existing cases. If the Commission had felt that it was impossible to eliminate statelessness by legal means, it should have so informed the Council. The majority of its members, however, had not held that view, and further study of the question had accordingly been entrusted to the Special Rapporteur. The Special Rapporteur had in due course reported to the effect that statelessness could not be eliminated by legal means, but only reduced. His report, however, had failed to convince some members of the Commission, and it was for that reason that Mr. Hudson's successor as Special Rapporteur had been instructed to prepare two conventions, one for the elimination and the other for the reduction of statelessness. Now that the Commission had considered the two conventions, however, the differences between them were seen to be slight. Even the first would not "eliminate" statelessness, if that word were used in its strict sense; it was by no means certain that the additional article which had been proposed by the Special Rapporteur at the previous meeting[3] would close all the gaps in respect of statelessness arising at birth, and the article on transfers of territory also was far from watertight. The difference between the two conventions, then, was only one of degree, and of small degree at that. There was therefore no reason why the Commission should not submit a single convention instead of two.

13. With regard to the question whether that convention should apply to existing cases of statelessness, he felt that it was the Commission's duty to carry out its instructions, which were perfectly clear. Provided the text it submitted was likely to be acceptable to those States which were the most advanced in the matter, it need not concern itself unduly with the question of its general acceptability.

14. Mr. AMADO said that, although he had not made a special study of the problem of statelessness, he had read the Special Rapporteur's report. He had therefore been surprised to hear statements made at the present and at the previous meetings which should have been made at the time when Mr. Córdova's report had first been introduced, when there had been an opportunity of calling into question the very foundations on which it was built. Now, after lengthy discussion, the Commission had adopted provisions of remarkable boldness, so much so, indeed, as to have sometimes alarmed those members who, like himself, felt it necessary to keep a firm hold on realities; such members, however, had gone as far as possible along the path which the enthusiasts had wished to tread. If the whole question was thrown open again at that late hour, the Commission would be unable to give the Economic and Social Council the help for which it had asked.

15. Mr. CÓRDOVA felt that the Chairman had made it perfectly clear that the conventions had all along been intended to "dry up the sources of statelessness" to use an expression found in the "Study of Statelessness".[4] If the title did not clearly show that the conventions did not apply to existing cases of statelessness, the whole juridical world would be confused, just as the Commission had been confused, despite the fortnight it had already spent discussing the matter.

16. There was no doubt that the conventions could be modified fairly easily so as to make them apply to existing cases of statelessness, due to conflict of nationality laws or penalties imposed on individuals, and in that connexion the question of retrospective effect would not arise. The vast majority of existing cases of statelessness, however, were due to a cause which was not covered by the convention, namely, mass deprivation of nationality. For such mass deprivation did not spring from legal sources at all, but had political origins. He therefore suggested that, in order that the subject matter of the convention should be perfectly clear the title should be changed to "Convention for the Elimination of Future Cases of Statelessness", and that in its report the Commission should refer to the question of existing statelessness somewhat along the following lines:

> "The Commission is mindful of the fact that the two Conventions on Elimination and Reduction of Statelessness which it has elaborated in no way mean that it has finished its task with regard to this question. Both conventions only envisage future cases of statelessness and do not refer to the thousands of stateless persons who now exist and who constitute

[3] See *supra*, 224th meeting, para. 54.

[4] United Nations publication, Sales No.: 1949.XIV.2.

a pressing and painful problem. This problem could not unfortunately be taken up by the Commission at the present session, due to lack of sufficient time to deal with the many important aspects which existing statelessness presents from the juridical as well as from the political viewpoints.

"Therefore, in presenting the two drafts it has prepared, the Commission wishes to state that it intends to continue working on this most delicate aspect of its work at its 1954 session, in order eventually to submit its conclusions in the hope that they may contribute to the final solution of the dreadful situation of thousands of innocent persons, whose only hope of redress lies in the organs of the United Nations."

17. Mr. SANDSTRÖM felt that it was premature to discuss the title before finally establishing what the convention was to contain. However, on the assumption that its scope was not to be extended beyond the limits so far agreed, he supported the suggestion that it should be entitled "Convention for the Elimination of Future Cases of Statelessness".

18. It would certainly be quite possible to make that convention apply to existing cases of statelessness, and to do so would have the advantage that it would enable States to realize just what was entailed by the elimination of existing statelessness. On the other hand, it would be very unwise to modify the second draft convention, on the reduction of statelessness, in the same way, since, whatever had been said to the contrary, that would mean giving it retrospective effect. Mr. Yepes had overlooked the fact that nationality laws were not penal laws, although the word "penalty" was used in connexion with them. If the Commission made the draft Convention on the Reduction of Future Statelessness apply to existing cases, it would effectively destroy any hope of its ratification. By attempting too much, it would achieve nothing.

19. Many analogies had been cited in an effort to show that the conventions should cover cases of existing statelessness. To be of value, however, an analogy must be valid, and many of those which had been adduced were not.

20. Mr. LAUTERPACHT said that it was unavoidable that the discussion should have ranged beyond the question of the title. With regard to that question, he still considered that the correct and proper title was "Convention for the Elimination of Statelessness" which neither said nor implied that it was a convention for the immediate elimination of all statelessness past and future. The fact remained that statelessness would in due course be eliminated in the countries which signed the convention. With regard to the suggestion, made for the first time during the present discussion, that the Commission should give the convention retrospective effect, he pointed out that there was no reason in law why it should not do so; the only difficulty was that it would thereby make it immeasurably more difficult for States to accept the convention. Moreover, the difference between the two conventions was not such as to justify their being treated differently in that respect.

21. Even if the Convention for the Elimination of Statelessness were universally adopted, however, many thousands of people born stateless before it entered into force might well remain stateless all their lives. If the Commission ruled out the possibility of giving retrospective effect to the convention, there was, he suggested, another legal principle which would dispense the Commission from having to accept that situation, intolerable from the humanitarian point of view. The conventions could be supplemented by a provision reading somewhat along the following lines:

"The parties shall confer their nationality on stateless persons who have had their habitual residence in their territory for a period of not less than 12 years and who desire to acquire their nationality. In the case of a stateless person who was previously a national of the State in question, the period of habitual residence shall be reduced to 6 years."

22. He realized that it was perhaps too late for the Commission to consider his suggestion at the present session. Even as they stood, however, the conventions which it had drafted were by no means worthless, as had been suggested; they represented an achievement whose value should not be under-rated.

23. Faris Bey el-KHOURI pointed out that, if the provisions of the first draft convention were faithfully applied, statelessness would in due course be eliminated in so far, but only in so far, as concerned the contracting Parties. Even if the convention would not eliminate statelessness throughout the world, it would considerably improve the situation, provided that new wars did not create new hordes of stateless refugees.

24. In the contracting States, the existing cases of statelessness would gradually disappear, as they died off. That was indeed a solution, but it was hardly consistent with the principles which ought to inspire the work of an organ of the United Nations. He considered therefore that the Commission should devote one meeting at least to discussing what could be done for the existing cases of statelessness, other than simply leaving them to die in the course of nature.

25. It did not seem practical or even just to extend the provisions of the Convention to them. On the one hand, that would make it impossible for many States to accept the Convention. On the other, existing stateless persons had usually been forcibly expelled from their homes and it did not seem right automatically to confer another nationality upon them and so destroy the hopes which they still cherished of returning home.

26. Mr. KOZHEVNIKOV had never doubted that both conventions were concerned only with future statelessness. The titles used in the Special Rapporteur's report (A/CN.4/64) were therefore appropriate.

27. He could not share the satisfaction of several members with the draft conventions. They were in no sense ideal conventions; indeed, in some respects they

flatly contradicted certain fundamental principles of international law. Many States would be reluctant to accede to them, for, in the first place, they increased the possibility of interference in the domestic affairs of States; that was a threat to international relations. Secondly, there was the undesirable possibility that cases of dual nationality might be created by their application. And, thirdly, as Faris Bey el-Khouri had said, the application of certain provisions of the conventions, resulting in persons automatically acquiring a nationality, might not be in the interests of those persons themselves, who might well be prevented from returning to the countries to which they were attached by the links of culture and origin. That curious result had been obtained in spite of the fact that the Commission had neglected the interests of States and expressly emphasized the apparent interests of individuals.

28. In addition to the unsatisfactory nature of the conventions, they suffered from the disadvantage that many of their provisions did not even reflect the opinion of a substantial majority of the Commission. Article 1 of the draft Convention on the Elimination of Future Statelessness had been adopted by 7 votes to 2 with 5 abstentions; article 2 had been changed by 7 votes to 6 with 1 abstention; and article 4 had been adopted by 6 votes to 3 with 5 abstentions. And in the Convention on the Reduction of Future Statelessness, article VII had been adopted by only 5 votes to 4 with 4 abstentions.

29. Mr. ALFARO said that, although the subject formally under discussion was just the titles of the two conventions, the Commission had in fact been discussing the desirability of extending the benefits of the conventions to existing cases of statelessness. He considered that it was technically impossible so to apply the conventions, for the Commission had decided at its fourth session that it would confine itself to preparing conventions relating to future statelessness. It was open to the Commission to decide to consider the vast and complex problem of existing statelessness; but a new, separate convention would be necessary, as many provisions of the conventions under discussion would be inapplicable. He therefore urged the Commission to vote on the titles of the two draft conventions, and then to take up the matter of existing statelessness if it so wished.

30. The CHAIRMAN asked whether it was possible to vote on the titles to be given to the conventions before the Commission had finally decided what they should contain. It was evident that the clarification of the issue in which the discussion had resulted had enabled the great majority of members of the Commission to come to the conclusion that the conventions that had been prepared were inapplicable, without revision, to the problem of existing statelessness. The question therefore arose whether the Commission should consider existing statelessness during the present session. Mr. Hsu had formally proposed that it should do so, in the following words:

> "The Special Rapporteur is requested to prepare a redraft of the Convention on the Reduction of Future Statelessness so that it might apply both to present and to future statelessness, and to bring the draft before the Commission during its fifth session".

31. Only two and a half weeks remained of the present session, and during that time the General Rapporteur's report had to be approved. It was possible that the Commission might be able to complete that task in the time still left to it, but members had recently been particularly loquacious and he therefore concluded that it was most improbable that the Commission would have time to undertake the work suggested by Mr. Hsu.

32. Mr. Córdova, on the other hand, had made the commendable suggestion that the General Rapporteur should mention in his report that the Commission had produced two conventions on the elimination and reduction of statelessness, that it did not consider its work on statelessness completed, and that it accordingly intended to study the matter further at a later session. He (the Chairman) therefore hoped that the Commission would leave the conventions as they stood, agreeing that they applied only to future statelessness; that it would adopt appropriate titles; and that it would in principle adopt Mr. Córdova's suggestion.

33. Mr. HSU explained that he had submitted his suggestion as a basis for discussion, after being assured by Mr. Córdova that the latter would have time to go into the matter. Existing statelessness was an urgent problem, for the solution of which the whole world was waiting. The Commission's work on statelessness had been largely exploratory, but had brought it to a position where it could, with very little extra effort, draft provisions that would crown its work with the logical conclusion that would make it of interest to the world rather than to lawyers alone. He urged the Commission, therefore, to adjourn the discussion on statelessness for, say, one week and to ask the Special Rapporteur to study the matter of existing statelessness in that time, perhaps with the assistance of a small sub-committee, and to report in due course.

34. Faris Bey el-KHOURI reminded the Commission that he had already suggested that the question of what action should be taken on existing statelessness should be discussed at a meeting specially reserved for the purpose.

35. Mr. SPIROPOULOS sympathized with Mr. Hsu in his sense of urgency in the face of a critical problem. The Commission should, however, be practical. It had taken two years to elaborate two conventions; any general discussion of existing statelessness would probably last at least two weeks, for it was a complicated problem that was essentially of a political nature. He concluded, therefore, that it would be impossible to treat it adequately at the present session, though it might well be placed on the agenda for the sixth session; indeed, a special discussion such as Faris Bey el-Khouri had suggested might assist the Special Rapporteur in the drafting of a third convention. Mr. Hsu's proposal was, however, over-optimistic, and would only result in loss of time.

36. Mr. CÓRDOVA recalled his suggestion that the

General Rapporteur might mention the matter of existing statelessness in his report, in order to enable it to be taken up at the sixth session. Mr. Hsu had asked him (Mr. Córdova) whether he might be able to prepare a tentative draft for discussion at the present session. He was willing to try to draft, for example, a transitional article for insertion in the Convention on the Elimination of Future Statelessness, to the effect that governments might apply the terms of that convention to existing cases of statelessness if they so wished.

37. The difficulty of leaving the matter until the sixth session was that, in view of the impending elections to it, it was not known what the Commission's membership would be at the sixth session, and no one could be appointed Special Rapporteur for Statelessness.

38. Mr. SANDSTRÖM said that much very thorough research would be required before the Commission could adequately consider the problem of existing statelessness. Amendment of the two conventions already completed, with the object of making them applicable to existing cases would not be sufficient, for the remedy for existing statelessness would in all probability turn out to be quite different from that required to eliminate future statelessness. He considered, therefore, that the Commission should abandon any intention of reaching a final conclusion on existing statelessness at the present session; that would not prevent it from deciding that the subject might figure in its programme of future work.

39. Mr. HSU said that he had proposed that the draft Convention on the Reduction of Future Statelessness be redrafted, in order to avert the disturbing effects of a technical and highly controversial discussion in the Commission. In spite of Mr. Spiropoulos' statement that the problem of existing statelessness was primarily political, he (Mr. Hsu) affirmed that the Commission must confine itself severely to legal matters, leaving politics to the politicians. The problem was, however, both pressing and practical; on humanitarian grounds alone, action upon it should not be delayed for another twelve months. Indeed, the Commission might be well-advised to defer less urgent matters until the sixth session, and to concentrate immediately on existing statelessness.

40. Mr. ZOUREK said that there was no doubt in his mind that the conventions under discussion related solely to future statelessness. He was concerned, however, to learn that the Commission was now discussing the possibility of drafting yet another convention before the two on which it was at present working had been given their final form.

41. At its fourth session, the Commission had taken a formal decision that the conventions to be drafted should not be concerned with existing statelessness. The Special Rapporteur had faithfully respected that decision; nor had any member of the Commission suggested any change in the ultimate objective at any time during the general or detailed discussions on the drafts.

42. It would be impossible to decide at the present session on measures to be taken with regard to existing statelessness, for even were the Special Rapporteur to succeed in producing a draft, members would have no time to study or discuss it. He therefore hoped that the Commission would finish what it had started, before embarking on anything new.

43. The CHAIRMAN pointed out that Mr. Hsu's proposal envisaged the modification of the draft convention on the reduction of future statelessness. Technically, therefore, that convention could not be completed until the matter under discussion had been disposed of.

44. Mr. YEPES was in favour of eliminating statelessness, and would vote for anything likely to contribute thereto. Consequently, he fully supported the suggestions made by the Special Rapporteur and by the General Rapporteur for modifying the draft conventions on the elimination and reduction of future statelessness in order to make them applicable to cases of existing statelessness.

45. It might be objected that the Commission was not competent to deal with existing statelessness; if that were indeed the case, the Commission should tell the General Assembly so.

46. Mr. SPIROPOULOS agreed that the problem of existing statelessness was important. He felt, however, that a question of method was involved, and that the two draft conventions should be left as they were.

47. He agreed, too, that existing statelessness raised urgent problems. But if the Commission was realistic, it must see that the mere adoption of a convention would have little effect; the Convention on Prevention and Punishment of the Crime of Genocide was a case in point.

48. Whether a new convention, or only a transitional article in one of the present conventions, was adopted, there should be a special discussion and a formal decision by the Commission, to ensure that problems arising out of existing statelessness were not confused with the avoidance of future statelessness. There was, in any case, no object in taking precipitate action, for the General Assembly and governments would have to consider the proposals, and that would take a long time.

49. Among the matters that would have to be discussed was whether it would be equitable to confer nationality on stateless persons to their possible detriment, and without the right of option.

50. Mr. KOZHEVNIKOV took up a matter which Mr. Spiropoulos had mentioned in passing. The results of the Commission's deliberations were to be submitted to governments. It would therefore be more profitable if the Commission were to discuss the problems arising from existing statelessness after it had had the benefit of the comments of governments on the draft conventions for the elimination and reduction of future statelessness.

51. It would surely be frivolous for the Commission to consider making hasty changes to the existing draft

conventions or hurriedly to draft additional provisions. The matter could only be dealt with after due and thorough preparation.

52. Mr. LAUTERPACHT dissociated himself from the defeatism displayed by Mr. Kozhevnikov and Mr. Spiropoulos. He doubted whether Mr. Spiropoulos was really convinced of the futility of conventions in general. In any event, the value of the Commission's work was to some extent independent of the acceptance or entry into force of conventions; for the intrinsic merit of drafts produced by the Commission would have some lasting effect.

53. In his capacity as General Rapporteur, he said that he had understood that the Commission was to allow one week for the discussion of each of the three parts of its general report, and that it was also to discuss the programme of work for and the time and place of its next session. The Commission was accordingly in arrear. He therefore proposed, first, that further discussion on the titles of the two draft conventions be deferred until the discussion of the relevant part of the general report; secondly, that the discussion on the relationship between the two conventions should be similarly deferred; and thirdly, that the Special Rapporteur, in consultation with Mr. Hsu and others, should in the meantime make a preliminary study of the juridical methods which might be used to reduce or eliminate existing statelessness. If the Commission was able to complete its other work in good time, that preliminary study could be briefly considered at the present session; if not, it could be expanded for fuller discussion at the sixth session.

54. Mr. SANDSTRÖM said that the Commission had in general considered that it would be enough for it to suggest arrangements by which stateless persons might acquire a nationality; but, as Faris Bey el-Khouri and Mr. Spiropoulos had said, it was not clear that stateless persons would necessarily agree. The first disadvantage from which a stateless person suffered was that he was unable to choose his country of residence; there had, for example, been many cases of *refoulement* after the first world war. Secondly, stateless persons commonly lacked permission to work; but that was a disability from which most aliens suffered. Thirdly, stateless persons required special travel documents. He thought that stateless persons in general wished to acquire the nationality of the country in which they resided; that was not necessarily the country in which they had been born, the nationality of which they might well not wish to acquire. Those considerations led him to the conclusion that any consideration of measures to eliminate or reduce existing statelessness must be prefaced by a realistic rather than an abstract study of the wishes and interests of stateless persons themselves. Indeed, the elimination or reduction of existing statelessness would primarily result from naturalization, which was a matter for statesmen rather than for lawyers. He thought that the Commission should agree that it was not competent to consider that matter, and that its work on statelessness should be thereby limited.

55. Mr. SCELLE said that the Commission had been discussing in the first place whether the conventions that had been drafted could be given retrospective effect — and he had come to the conclusion that they could not — and secondly, whether it could do something to alleviate and improve the lot of those already stateless.

56. It seemed to him that the consensus of opinion was that neither convention could be given retrospective effect; the Commission should therefore adopt a resolution to that effect. He felt that it might be possible, by suitably modifying it, to make one of the conventions applicable to the problem of existing statelessness; if that were to be done, there should be a clear decision to that effect.

57. If the Commission failed to do anything about existing statelessness it would be laying itself open to the charge that it was neglecting the humanitarian aspects of its work by undue concentration on its strictly legal aspects. Yet it was evident that existing statelessness raised urgent problems, and the Commission should not, in his view, decline the Special Rapporteur's offer to study the connexion between the conventions so far drafted and the wider, immediate problem.

58. The CHAIRMAN said that he thought that almost every member of the Commission agreed that, as drafted, the two conventions did not apply to existing cases of statelessness. That apparent agreement should be confirmed by a vote.

59. The second question before the Commission was whether the Special Rapporteur should be asked to draw up a further report on existing statelessness, to be discussed at the present session if the Commission had time.

It was decided by 11 votes to 1, with 1 abstention, that the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness did not apply to existing statelessness.

60. Mr. YEPES explained that he had voted against the proposition that the two conventions were not concerned with existing statelessness because he thought that the Convention on the Elimination of Future Statelessness could and should be applied to existing cases of stateless persons.

61. Mr. HSU explained that he had abstained because, although the proposition was in his view theoretically correct, it appeared futile when viewed in the light of common sense.

62. Mr. ZOUREK said that his vote in favour of the proposition should not be construed as a vote in favour of the conventions as a whole.

63. In the light of the decision the Commission had just taken, he suggested that agreement could now be reached on the titles of the conventions.

64. Mr. LAUTERPACHT said that in his view a decision on the titles of the conventions was not urgent.

65. Mr. KOZHEVNIKOV explained that he had voted in favour of the proposition because he was convinced

that the conventions did not relate to existing statelessness; his vote did not, however, mean that he approved them.

66. Mr. ALFARO said that, although he had voted in favour of the proposition, he considered that it was still open to the Commission to add an article to either convention with the object of enabling existing statelessness to be reduced.

67. Mr. SCELLE agreed with Mr. Zourek that the time had now come for the Commission to vote on the titles to be given to the two conventions. He formally proposed that the titles used in the Special Rapporteur's draft be adopted.

68. Mr. LAUTERPACHT said that if the Commission accepted Mr. Scelle's proposal it would be stopped from accepting later the proposal that he (Mr. Lauterpacht) had made concerning the further study of existing statelessness.

69. Mr. SCELLE thought that any result that might spring from the Special Rapporteur's study of existing statelessness could be comprehended in the title proposed.

70. Mr. SANDSTRÖM approved the suggestion that the Special Rapporteur should make a study of existing statelessness, but said that if an article was to be added to one of the conventions already drafted it would be better to postpone the decision on the title to be given to that convention.

71. Mr. KOZHEVNIKOV asked whether the Commission had before it any proposal that the titles of the conventions should be other than those contained in the draft; if not, was there anything to be put to the vote?

72. The CHAIRMAN said that there was no suggestion before the Commission that the titles should be modified. The vote, therefore, was merely on their adoption.

It was decided by 6 votes to 4, with 3 abstentions, that the two conventions that had been drafted should be entitled "Convention on the Elimination of Future Statelessness" and "Convention on the Reduction of Future Statelessness" respectively.

73. The CHAIRMAN said that the Commission should decide whether or not to ask the Special Rapporteur to make an immediate study of the elimination or reduction of existing statelessness with a view to the presentation of a report for discussion at the present session if time allowed.

74. Mr. KOZHEVNIKOV asked the Special Rapporteur whether he did not agree that it would be advantageous to draw up a report on existing statelessness only after the receipt of the comments of governments on the two conventions that the Commission had just drafted.

75. Mr. CÓRDOVA was sure that any discussion of a preliminary report would be protracted. He felt that the urgency of the matter was such, however, that he should make an effort to meet the request.

It was decided by 9 votes to none, with 4 abstentions, to ask the Special Rapporteur to study the elimination or reduction of existing statelessness and to submit a report for discussion at the present session, time permitting.[5]

The meeting rose at 1.5 p.m.

226th MEETING

Wednesday, 29 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45)*

1. The CHAIRMAN, inviting discussion of the chapter on arbitral procedure in its draft report covering the work of its fifth session, congratulated the General Rapporteur on having provided an accurate account of the Commission's discussions which was at the same time a scientific work of great value.

2. Mr. YEPES suggested that the report be read paragraph by paragraph.

3. Mr. LAUTERPACHT wondered whether time would permit of that procedure.

4. Mr. SANDSTRÖM thought there was no need to read the report aloud. It was an excellent piece of work, on which he would have few comments.

[5] See *infra*, 237th meeting, para. 90.

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

5. Mr. ZOUREK suggested that the Commission might follow the same procedure as it had adopted during its consideration of its draft report on its fourth session.

6. Mr. LAUTERPACHT reminded the Commission that the introductory report to the draft on Arbitral Procedure presented by Mr. Scelle and himself at the fourth session had been adopted without the reading or discussion of individual paragraphs.

7. Mr. LIANG (Secretary to the Commission) said that it was not the practice of the Committees of the General Assembly to have their reports read aloud.

8. Mr. KOZHEVNIKOV suggested that it might be advisable to have some of the more controversial parts, rather than the whole report, read aloud.

9. He wondered whether the Commission had not exceeded its terms of reference in its discussions and decisions on arbitral procedure. The Commission was entrusted primarily with the codification of international law; its work on arbitral procedure had gone much further than that. The Commission's competence should be discussed before its report was transmitted to the General Assembly.

It was agreed by 4 votes to 3, with 4 abstentions, that the introductory section of the chapter on arbitral procedure be read aloud, paragraph by paragraph.

10. Mr. KOZHEVNIKOV said that it was evident that Mr. Lauterpacht had spent much time and taken much trouble in the preparation of an interesting report. The task of the Commission was, however, the codification of existing law; that meant, in the present instance, the systematization and confirmation of existing law and practice on arbitral procedure. The draft under discussion indicated, however, that the Commission had been more concerned with what some members regarded as the development of international law rather than with its codification. He maintained that the Commission had thereby exceeded its terms of reference.

11. Mr. ALFARO disagreed with Mr. Kozhevnikov. The Commission could not, at that stage of its work, discuss whether or not it had exceeded its terms of reference. The object of the report was to provide an account of what the Commission had done, and a summary of its significance and purpose. It was open to Members of the Commission to draw attention to any lack of harmony between the draft report and the text of the final draft on Arbitral Procedure, but the substantive discussion should not be reopened.

12. Faris Bey el-KHOURI, referring to the mention in paragraph 1 of section I that the Commission had at its first session "selected arbitral procedure as one of the topics of codification of international law", suggested that a sentence be inserted to the effect that, although the Commission had so decided, it had found it desirable to suggest certain new rules in the field of arbitral procedure; for that was, in fact, what the Commission had done.

13. Mr. HSU drew a distinction between the re-statement of international law and its codification, in the sense in which the Commission used the latter word. The former was essentially the work of scientific experts and would be more appropriate for a research institute than for the Commission. The latter involved recommendations for the filling of gaps in the law, where they were found. He felt that the Commission was competent to make recommendations for the completion of the law.

14. He considered that, under the guidance of Mr. Scelle, the Commission had done a good job. Certain departures from and additions to existing law had been shown to be necessary, and the Commission had not exceeded its terms of reference. Indeed, it would have laid itself open to criticism had it acted otherwise. It should be remembered that the Commission was not the final authority: its task was only to make appropriate recommendations.

15. Mr. SCELLE pointed out that the law was an organic entity, and that its codification was more than a mere recording of past and present practice.

16. The CHAIRMAN supported Mr. Alfaro. The General Rapporteur's task had been to describe what the Commission had done. It was not now open to the Commission to discuss whether or not it had exceeded its competence, though members were at liberty to suggest additions to, or deletions from, the draft report.

17. Mr. SANDSTRÖM, too, agreed that Mr. Kozhevnikov's suggestion that the Commission had exceeded its competence came too late. There was, however, a possible — and justifiable — misunderstanding of the word "codification".

18. Mr. ZOUREK said that the very detailed draft report was a true expression of the General Rapporteur's great experience. He could not, however, agree with the basic assumption underlying it, for some of the articles in the final draft on Arbitral Procedure were not concerned with arbitral procedure *stricto sensu* but with other aspects of international arbitration. Evidently the General Rapporteur was aware of that fact, since he had commented in section I on the wider connotation of the term "arbitral procedure" as it was used in the title of the final draft.

19. He agreed with Mr. Kozhevnikov that the Commission had exceeded its terms of reference. On the other hand, he thought that the suggestion that the Secretariat might draft a model code of rules of arbitral procedure in the more limited and technical sense of the term was useful.

20. The concept of arbitral procedure on which the draft report was based differed from the generally accepted notion. The General Rapporteur's action in making a distinction between the formulation of desirable developments in the field of arbitral procedure and the codification of existing law was open to question, for although that method told in favour of the theses of the majority of the Commission, it caused the inadequacies of the final draft to be overlooked.

21. As an example, he referred to the traditional view

that international arbitration rested on the free will and consent of the parties to choose whichever method of arbitration and arbitrators they wished. The final draft, however, would make it possible for the President of the International Court of Justice to appoint arbitrators; in such circumstances it was evident that the liberty of action of the parties no longer existed.

22. Again, the General Rapporteur had assumed that international arbitration was similar to arbitration procedures under municipal law. In fact, however, since arbitration in any State was dependent on the local courts, there was an essential difference, which was not averted by the Commission's recognition that the International Court of Justice could intervene in procedural matters when the parties were unable to reach agreement. Further, the statement in paragraph 20 of the draft report that an obligation freely undertaken was no derogation from sovereignty was very questionable, for if two States could, in full exercise of their sovereignty agree on the conclusion of a *compromis* they were surely equally competent to bring their undertaking to an end. Again, according to existing international law, two States accepting a recommendation of the United Nations that they should submit a difference to arbitration were free to agree on the exact procedure to be adopted. If the final draft on Arbitral Procedure were chosen, the two States concerned would not be free in the matter but would be forced to follow the procedure laid down. Their sovereignty would thereby be considerably affected.

23. Mr. YEPES said that the object of the discussion was to decide whether the report faithfully reflected the Commission's deliberations. In his view, the answer was clearly in the affirmative. The report confined itself to recalling what the Commission had done and said, and set forth the Commission's aims and results clearly and scientifically. It was irrelevant that some members disagreed, as indeed he did himself, with certain of the articles in the final draft.

24. Mr. KOZHEVNIKOV thought it very desirable in the last stages of the Commission's work for members to summarize their attitudes on the substance of the matters contained in the draft report.

25. In the case of its work on arbitral procedure, he was still convinced that the Commission had exceeded its terms of reference. He agreed that codification involved more than mere transcription; but it was none the less no more than a systematization of existing law and practice. Article 2 of the final draft on Arbitral Procedure was a case in point. It was a fundamental principle of international arbitration that States should be free to arrange arbitration in accordance with their joint will. The final draft, however, would permit a State to be brought before the International Court of Justice against its will. A situation could arise in which, although only one of the parties affected alleged that a dispute existed, that party might, by appeal to the International Court, drag the other party unwillingly into the dispute. The General Rapporteur had stated in paragraph 19 of his draft report that one of the Commission's aims was to safeguard the principle of good faith, but it was possible that the party lacking good faith would be the one to allege that a dispute existed. Thus the final draft could be a source of international conflict, as it quite clearly permitted violations of national sovereignty.

26. Many of the Commission's decisions on arbitral procedure had been taken by very small majorities. That, perhaps, did not much matter; but it was important to recognize, with all respect to the General Rapporteur and while admiring his conscientious work, that the draft report was not objective. Clearly, the Rapporteur had been unduly influenced by certain views expressed in the Commission, for the report gave insufficient weight to the opposite point of view. The report should have maintained a judicious balance between the two schools of thought; as it was, it was tendentious.

27. Mr. SCELLE, speaking as Special Rapporteur on arbitral procedure, warmly congratulated the General Rapporteur on his draft report, which was realistic and objective.

28. The CHAIRMAN then invited discussion on the draft report paragraph by paragraph.

*Paragraph 1 (9)**

29. Mr. KOZHEVNIKOV said that the statement that the Commission had "selected arbitral procedure as one of the topics of codification of international law" clearly supported his contention that the Commission had exceeded its terms of reference.

30. Faris Bey el-KHOURI said that the draft report gave a complete and correct account of the Commission's discussions. He withdrew his earlier suggestion that paragraph 1 should contain a mention of the fact that the Commission had considered it to be desirable to include in the final draft certain formulations of desirable developments in the field of arbitral procedure.

31. Mr. LAUTERPACHT thanked the Chairman, the Special Rapporteur and the Secretariat for the assistance they had given him in preparing the draft report. He proposed that the comments of governments on the "Draft on Arbitral Procedure", adopted by the Commission at its fourth session, should be annexed to the report under discussion.

Paragraph 1 was approved by 9 votes to none, with 2 abstentions.

Paragraph 2 (10)

Paragraph 2 was approved without comment.

Paragraph 3 (11)

32. Mr. KOZHEVNIKOV, referring to the statement that the comments of governments had been of great value, said that a number of governments had expressed themselves against the very principles of the "Draft on

* The number within parentheses indicates the paragraph number in the "Report" of the Commission.

Arbitral Procedure". That disapproval should surely be mentioned.

33. Mr. LAUTERPACHT thought that to describe the views of individual governments in paragraph 3 would overload the introductory section of the report. Mr. Kozhevnikov's point might be met by printing the comments of governments *in extenso* as an annex to the report. He reminded the Commission that the only critical observations received, and they had not been entirely negative, had been those from the Belgian Government.[1]

34. He was particularly anxious to draw attention to the usefulness of the comments submitted by governments. The Commission might attach importance to expressing a formal view to that effect, in order to encourage governments to comment on any future drafts the Commission might submit to them. On the other hand, he regarded the absence of governmental comments as a great handicap, and suggested that mention should be made in chapter V of the report of the desirability of increased co-operation between governments and the Commission in that respect.

35. Mr. LIANG (Secretary to the Commission) drew attention to General Assembly resolution 593 (VI), entitled "Control and Limitation of Documentation". The comments of governments on the "Draft on Arbitral Procedure" had already been mimeographed and circulated to all concerned by the Secretariat. Whether or not they were to be printed was, of course, a matter for the Commission; but if it decided that they should be, a paragraph ought to be inserted in the report requesting the Secretariat to take the necessary steps to append the comments as an annex. That was particularly important if the same arrangement was to be followed in the case of other topics dealt with by the Commission.

36. He had the previous day received a letter from the Government of Uruguay, to which were attached the comments of the Faculty of Law and Social Sciences of the University of Montevideo, and those of the Uruguayan Institute of International Law, on the "Draft on Arbitral Procedure".[2] He doubted whether the Commission would have time to consider those comments at its present session, but he suggested that it might be stated in paragraph 3 that a communication had been received from the Uruguayan Ministry of Foreign Affairs, which on account of its lateness, it had not been possible to take into consideration.

37. Mr. ALFARO supposed that the reference to paragraph 22 of the report, at the end of paragraph 3, should read "paragraph 21". It would not, he thought, be practical to set forth *seriatim* the changes that had been made in the "Draft on Arbitral Procedure" at the instance of various governments. Any interested student would, however, be able to compare the "Draft on Arbitral Procedure", the comments of governments, the summary records of the fifth session, and the "Final Draft on Arbitral Procedure" and judge the great usefulness of the comments.

38. Mr. LAUTERPACHT said that he was prepared to draft a passage of a general character advocating the desirability of annexing the comments of governments to the report.

39. However, the letter from the Government of Uruguay could not, in his view, be mentioned in the report; as the report was a record of certain discussions, and the letter from Montevideo had only been received after their termination.

40. Mr. SCELLE asked whether the comments in question had been officially transmitted by the Government of Uruguay.

41. Mr. LIANG (Secretary to the Commission) confirmed that they had been so transmitted, although they were not necessarily those of the Uruguayan Government itself.

42. The CHAIRMAN said that receipt of the communication might be mentioned in a footnote.

43. Mr. YEPES agreed with the Chairman's suggestion. He also agreed with Mr. Lauterpacht that governments' comments on the "Draft on Arbitral Procedure" should be annexed to the Commission's report. He therefore suggested the insertion of a sentence in paragraph 3 reading: "Those comments will be found in the annex to this report".

44. Mr. LAUTERPACHT agreed with Mr. Yepes' suggestion.

45. Mr. KOZHEVNIKOV said that the comments forwarded by the Government of Uruguay did not necessarily represent that government's views, nor were they even necessarily supported by it.

46. In his previous remarks he had drawn attention to the fact that appreciation of the comments of governments had been expressed; but that inadequate attention had been paid to those comments which expressed fundamental disagreement with the basis of the "Draft on Arbitral Procedure".

It was agreed by 8 votes to none, with 5 abstentions, to insert in paragraph 3 a sentence reading: "Those comments will be found in the annex to this report."

The text of paragraph 3, as amended, was approved by 8 votes to none, with 3 abstentions.

Paragraph 4 (12)

47. Mr. KOZHEVNIKOV felt that it was not correct to say that the Commission had considered the final draft "in the light of" the comments of governments, or that it had adopted "a number of substantial changes".

48. Mr. LAUTERPACHT and Mr. SCELLE said that in their view the changes which had been made were "substantial".

[1] See Annex I of the "Report" of the Commission (A/2456) in vol. II of the present publication.

[2] *Ibid.*

49. Mr. ZOUREK shared Mr. Kozhevnikov's views and proposed the deletion of the word "substantial".

50. Mr. KOZHEVNIKOV proposed that in addition the words "in the light of" should be replaced by the words "taking partly into account".

51. Mr. SCELLE was unable to accept either proposal. The Commission had considered the final draft in the light of all the comments, but that did not mean that it had been obliged to accept them all. The word "partly" implied unjustified criticism of the Commission.

Mr. Zourek's proposal was rejected by 8 votes to 3, with 1 abstention.

Mr. Kozhevnikov's proposal was rejected by 9 votes to 2, with 1 abstention.

Paragraph 4 was approved by 9 votes to 2, with 1 abstention.

Paragraph 5 (13)

52. Mr. LIANG (Secretary to the Commission) said that in connexion with paragraph 5, he wished to clarify a remark which he had made at a previous meeting,[3] and which had been referred to by Mr. Kozhevnikov. It was true that he had said that the commentary was not objective in the sense that a treatise or monograph on international law was objective. The commentary was frankly based upon the text prepared by the Commission. It was objective, however, in so far as the Secretariat had not consciously omitted arguments in favour of the opinion contrary to that which the Commission had expressed, or references to existing practice where that diverged from what the Commission proposed. Mr. Kozhevnikov had asked why no reference had been made to unfavourable comments by governments. One reason was that very few comments had been received at the time the commentary had been prepared; but the Secretariat had also felt that it was unnecessary and inappropriate, in a commentary which was intended to state practice and scientific views, to refer to *ad hoc* comments by governments, which would in any case be available in another form.

53. The Secretariat had endeavoured to carry out the Commission's instructions to prepare a commentary in accordance with the provisions of article 20 of the Commission's Statute, where it was stated that commentaries should contain:

"(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

"(*b*) Conclusions relevant to:

"(i) The extent of agreement on each point in the practice of States and in doctrine;

"(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution."

[3] See *supra*, 194th meeting, para. 89.

54. It was a matter of opinion whether the commentary prepared by the Secretariat fully complied with article 20; the Secretariat itself did not claim that it met all the requirements stipulated in that article. The time at its disposal had not been ample. It had, however, worked on the basis of the text approved by the Commission, and had been in communication with Mr. Scelle, the Special Rapporteur, whose advice it had followed wherever possible. As Mr. Lauterpacht said in his draft report, the text should now be revised and supplemented by reference to the changes which had been made during the present session and in the light of the Secretariat's own further studies. For obvious reasons, however, it was difficult for the Secretariat to make a "critical" examination of the available practice, jurisprudence and doctrine, and the words "and critical", in the last sentence of the paragraph under discussion, might therefore be deleted.

55. Replying to a question by Mr. KOZHEVNIKOV, Mr. LAUTERPACHT said that in his view the present report, together with the commentary which the Secretariat had prepared, revised and supplemented as he had suggested, did constitute a commentary conforming with the provisions of article 20 of the Statute.

56. The CHAIRMAN agreed.

57. Mr. LAUTERPACHT said that by "critical examination" he had meant no more than "analytical examination", which term might indeed be used in order to avoid any misunderstanding. He also suggested that the correct translation of what he meant by "a valuable contribution" was not "*une contribution utile*" but "*une contribution précieuse*".

Mr. Lauterpacht's suggestions were adopted.

58. Mr. KOZHEVNIKOV felt that, in view of what the Secretary himself had said, it was going too far to say that the commentary prepared by the Secretariat was "a valuable contribution to the study and the application of the law of arbitral procedure", or that "such commentaries... may in themselves constitute a contribution of considerable practical and scientific value to the application and the study of international law". He also enquired what exactly was meant by the words "the commentary should be published".

59. Mr. LIANG (Secretary to the Commission) suggested that the words "by the Secretariat" should be inserted at that point in order that it should be quite clear that the Commission was making a recommendation to that effect; otherwise it might be difficult to arrange for publication.

60. Mr. HSU pointed out that, by requesting the Secretariat to publish the commentary on its final draft on Arbitral Procedure, the Commission would be conferring an entirely new function upon it; and it was clearly intended that that function should be a continuing one, since the commentary was only designed as the first in a series. The Commission had therefore to decide whether it was justifiable to ask the General Assembly to make available the additional funds which

would be required, for he feared that the Commission had given insufficient consideration to the consequences of the decision which it had taken at the previous session. If, as he considered, that decision had been a mistaken one, the Commission should frankly admit the fact before it got further embroiled.

61. The CHAIRMAN suggested that further discussion of the draft chapter on Arbitral Procedure be deferred until the Commission had considered the urgent question of the date and place of its next session.

It was so agreed.

Date and place of next session

(resumed from the 189th meeting)

62. The CHAIRMAN recalled that at the 189th meeting the Commission had decided that it would hold its next session in Geneva for a period of approximately eight weeks, beginning in the third week of August 1954. In doing so, it had taken into account General Assembly resolution 694 (VII), which provided that "the International Law Commission would meet in Geneva only when its sessions could be held there without overlapping with the summer session of the Economic and Social Council". In the note bringing that resolution to its attention (A/CN.4/74), the Headquarters Secretariat had added that, according to a conference pattern recommended by the General Assembly, "the International Law Commission could, if it decided to meet in Geneva, hold a yearly session there, lasting eight weeks beginning with the third week in August".

63. Since the Commission's decision, however, the following teleprinter message had been received from United Nations Headquarters:

> "After discussion with Secretary-General point out the following:
>
> "1. 1954 budget estimates provide funds for ILC meeting at Headquarters. ILC meeting in Geneva would necessitate additional appropriation of approximately dollars 25,000 for eight weeks' session for temporary assistance and travel and subsistence of three HQ staff.
>
> "2. In view of wording of article 12 of ILC Statute and stress laid by Advisory and Fifth Committees on economy would consider it advisable that next ILC session take place in New York. Foresee difficulties obtaining supplemental appropriations as in previous years.
>
> "3. HQ able to service ILC in 1954 in May, June, July and early August.
>
> "4. If session held in Geneva in August it would overlap with General Assembly and not only ILC report could not be submitted to General Assembly session of same year but also Secretariat would be confronted with difficulty assigning adequate staff.
>
> Lall, Stavropoulos".

64. He would deal point by point with the three objections raised to the Commission's decision; first, that it would entail additional financial appropriations; secondly, that the Commission's report would not be ready for the General Assembly; and thirdly, that it would be difficult to assign adequate staff for the session if it overlapped the session of the General Assembly.

65. He did not think the objections of a financial nature need detain the Commission long. The Secretariat's estimate of the additional expense which a session in Geneva entailed was open to question, but that was beside the point. The General Assembly had agreed that the necessary expenditure could be incurred, since the only proviso which it had made about holding the Commission's sessions in Geneva was that they should not overlap the summer sessions of the Economic and Social Council.

66. The second objection was more important, but was not decisive. If a year were allowed to elapse before the Commission's report was considered by the General Assembly, that would at least have the advantage of enabling governments to digest it.

67. The third objection, however, was in his view decisive. He feared that the Commission had failed to take sufficiently into account the fact that if its session began in the third week of August and lasted approximately eight weeks, it would overlap the General Assembly by approximately one month, and that for that month not only would the Sixth Committee of the General Assembly be deprived of the services of Mr. Liang and the other members of the Secretariat who accompanied him to Geneva, but those members of the Commission who regularly attended the General Assembly would also be unable to do so.

68. What were the alternatives? The Commission could meet in Geneva during May and June, in which case it would not overlap with the Economic and Social Council; but it was almost impossible for those of its members who were university professors to get leave of absence during May. Alternatively, it could meet in New York, and the Secretariat had indicated that services could be made available for the Commission in May, June, July and early August; the Commission had already on a number of occasions, however, stated its objections to meeting in New York during July and August, and the same objections applied to a session there in May and June as to one in Geneva. The Commission could, of course, also say that, despite the terms of General Assembly resolution 694 (VII) it wished to meet in Geneva during June and July, even though it thereby overlapped with the Economic and Social Council; but in that case it was unlikely that the necessary additional funds would be made available. He wondered, therefore, whether it would not be possible to seek some compromise with the Economic and Social Council, whereby the Council's summer session opened somewhat later, in the second half of July or at the beginning of August. Six weeks were usually set aside for the Council's summer session, but it appeared that in the case of the present session the Council would exhaust its agenda in less than six weeks. If its session opened at the end of July or the beginning of August,

there would, therefore, be sufficient time for it to complete its work and for its report to be prepared in time for the General Assembly.

69. Mr. LIANG (Secretary to the Commission) feared that the summer session of the Economic and Social Council could not be put back any later than the dates at present fixed for it. In any case, the Council was one of the principal organs of the United Nations, and its wishes had therefore to be respected in establishing the pattern of conferences. It was obviously the intention of the Special Pattern of Conferences that the International Law Commission should adjust the dates for its session to those chosen by the Council.

70. As the Chairman had said, there might be some advantage in allowing a year to elapse between the Commission's adoption of its report and their consideration by the General Assembly. Experience had shown, however, that, except in a few cases where the General Assembly had decided that it was inappropriate to do so, it had wished to take up and discuss the Commission's reports as soon as they appeared. For example, the chapters of the report of the International Law Commission covering the work of its third session dealing with reservations to multilateral conventions and the definition of aggression had, among others, been considered by the General Assembly during the same year. Moreover, if a year elapsed between the time when the Commission considered a question and the time when its conclusions were discussed by the General Assembly, that lapse of time might cause the General Assembly to lose interest in the work of the Commission.

71. As the representative of the Secretary-General, it was his duty, however, to draw attention to certain other considerations in favour of holding the next session in New York. The Commission had held its first session in New York, but had held the four subsequent sessions in Geneva. For a number of reasons it seemed particularly desirable that its next session, when its membership would have been renewed, should again be held at United Nations Headquarters. The Commission needed the interest and support of the experts in international law and also of the general public, and it seemed high time that the experts and public of North America should be given another opportunity of seeing the Commission at work. From the Commission's own point of view it would seem to be appropriate to renew closer contact with the Headquarters of the organization of which it formed a part. It was, he supposed, mainly with that consideration in mind that the authors of the Commission's statute had provided in article 12 that it should, in principle, sit at the Headquarters of the United Nations.

72. The CHAIRMAN asked whether the Secretary considered the objections to a session beginning in August well-founded and, if so, why it was that they had not been made before the Commission took its decision.

73. Mr. LIANG (Secretary to the Commission) said that in his view the objections were decisive. He thought that at the time when the Commission had taken its decision it might have had in mind the possibility that the date of the General Assembly sessions would be changed to the spring, in which case the objections possibly would not apply. But that was a matter which had not been decided by the General Assembly and therefore could not be made the basis of a decision.

74. Mr. CÓRDOVA said that the Commission's sole concern was to carry out its task to the best of its ability, and experience had shown that that was impossible in New York. The logical way of overcoming the practical difficulties which had arisen would be to advance the date of the session. If that were done, those members who were also university professors would find it very difficult to attend the early part of the session, but whatever date was chosen would create difficulties for some members, and in view of their interest in the Commission's work, it was possible that the universities might be willing to grant the two or three members concerned leave of absence before the end of the academic year. If not, the Commission could arrange its agenda in such a way as to take up first those questions with which the absent members were not specially concerned.

75. Mr. SPIROPOULOS thought that all members of the Commission agreed that its sessions should be held at Geneva. They were also bound to agree that there were insuperable objections to the sessions overlapping the General Assembly; in that connexion he agreed with the Secretary that it was essential, in view of the rapidity with which developments were now apt to occur, that the Commission's reports should be submitted to the General Assembly the same year as they were written. One solution might be to make the sessions shorter; the present one had been particularly long. If the Commission met in mid-May and arranged its agenda as Mr. Córdova suggested, it would have six weeks for its work before the Economic and Social Council opened, or seven if the Council could be persuaded to postpone its session for a week.

76. Mr. ALFARO pointed out that the Secretariat now stated that a session in Geneva would entail an additional appropriation of approximately $25,000, whereas previously the Commission had always been given to understand that the sum involved was $11,000 to $12,000. It was true that article 12 of the Commission's Statute stated that the Commission should sit at Headquarters, but it added that it should have the right to hold meetings elsewhere after consultation with the Secretary-General. When the Special Committee on Programme of Conferences had been preparing the long-term pattern of conferences for Headquarters and Geneva, he as the Commission's Chairman at that time, had sent the Secretary a memorandum to present to that Committee, setting out the Commission's reasons for wishing to hold its session in Geneva. That memorandum, dated 9 December 1952, had read as follows:

> "The International Law Commission held its second session in Geneva during the summer of 1950 pursuant to a decision taken by the Commission at

the end of its first session, held in New York in the spring of 1949.

"When the question of deciding the date and place of the third session came up in 1950 there was some discussion with regard to the place, and the opinion of the great majority of the members of the Commission was that the third session, or rather all sessions of the Commission, should be held in Geneva. The only reason taken into account for holding the meetings in New York was the information given by the Office of the Secretary-General that holding the meetings in Geneva caused an extra expenditure of some ten or twelve thousand dollars in transportation of personnel and material. In favour of Geneva it was maintained that the quiet atmosphere of the city was more propitious to the kind of work the members of the Commission have to perform; that the meetings were held far away from the disturbing agitation of political debates in the General Assembly and in the First Committee; that library facilities at the European Office of the United Nations, with material gathered and organized since the days of the League of Nations, had proved to be unsurpassed; that inasmuch as it was necessary to hold the meetings during the summer, consideration should be given to the fact that climatic conditions in New York at that time were exacting to the point of interfering with the health and working capacity of the members of the Commission, whereas climatic conditions in Geneva were quite healthy and agreeable; and finally, that any added expenditure caused by meeting in Geneva would be fully compensated by more fruitful labours and more satisfactory results.

"It could be seen during this discussion that no member of the Commission had any objection against holding the meetings in Geneva, while on the other hand some members did object to New York, in terms which showed that holding the meetings at Headquarters would certainly lead to absences which would seriously affect the work of the Commission. Two or three members stated that they would not object to the meetings being held in New York, but that they were satisfied if the majority decided to hold them in Geneva. Finally, at the fourth session, when the matter was first discussed two or three members abstained from voting one way or the other, but at the meeting at which the question was finally decided, they voted in favour of Geneva and no vote was cast in favour of New York. It may thus be averred that the unanimous view of the members of the Commission today is that all meetings of the Commission should be held in the city of Geneva."

77. That statement had arrived in New York too late for presentation to the Committee, but the Secretary had previously submitted similar observations in response to a request by the Committee.

78. As, in the Commission's view, those reasons were still valid, the only question now was that of adjusting the date of the session so that it did not overlap with the Economic and Social Council.

79. Mr. SANDSTRÖM said that, although he realized that he might well not be re-elected, he felt it his duty to draw attention to the particular difficulty with which he was faced. He had to attend the meetings of the Board of Governors of the League of Red Cross Societies. In 1954 the meeting would take place in Oslo, and it had been suggested that it should be held in June. At his request, in order to avoid clashing with the start of the International Law Commission's session, the date of the Oslo meeting had been brought forward to the last ten days of May. If, after all, the session of the International Law Commission began in mid-May, and not at the beginning of June, he would therefore be unable to attend during the first fortnight.

80. Mr. SCELLE said that the Commission had a duty to consult the Secretary-General on the place of its sessions, but that it was for it itself to decide. The Commission had taken a decision to which the Secretary-General now raised objections. Some of those objections were perhaps valid, although the estimate of the additional financial implications of the Commission's decision was, to put it mildly, open to question. The Commission could, if it wished, change its decision, and from his point of view it would be more convenient if the session began at the end of May. The length of the session could perhaps be cut. Once taken, however, the new decision must stand.

81. Mr. KOZHEVNIKOV pointed out that the whole question was complicated by the fact that the Commission did not know who would be the members, or what would be their views, in a year's time. He personally was still in favour of sessions in Geneva, but at the same time he would not have any objections to meeting in New York if the Commission so decided.

82. Mr. AMADO wondered whether, in comparing the cost of sessions in Geneva and New York, Headquarters had taken into account the travel expenses of the Commission's members as well as those of its Secretariat.

83. Faris Bey el-KHOURI said that he understood the only objection to the Commission's session overlapping with that of the Economic and Social Council was that it necessitated the engagement of a few temporary staff. That was surely a small matter when viewed in the light of the Commission's clearly expressed opinion as to how it could most effectively perform the tasks for which it had been established.

The meeting rose at 1.5 p.m.

227th MEETING

Thursday, 30 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Date and place of next session (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion on the date and place of its next session.

2. Mr. LAUTERPACHT explained his personal position. The University term at Cambridge did not finish until about 10 June, and if he was re-elected to the Commission he would therefore be unable to come to Geneva before 1 June at the very earliest. As the question affected him personally, he had refrained from speaking at the previous meeting. However, so long as he was a member of the Commission, he had a share in the work of the Commission as a whole and a measure of responsibility for it. It was indefensible to deprive any member of the Commission of the opportunity to participate fully in the work of the Commission. He was not the only member of the Commission who would be unable to attend earlier than 1 June, and it was clearly most undesirable, from the Commission's point of view, that some of its members should not arrive until the work was under way. It was equally undesirable to fix a date which, if followed generally, would make it impossible for members actively engaged in the teaching of international law to attend all the meetings of the Commission.

3. The objections to the Commission meeting between the beginning of June and the end of August were of a financial and administrative character, and he did not think that decisive importance could or should be attached to them. The General Assembly had elected the members of the Commission to fulfil an important duty in conformity with the United Nations Charter, and it must be left to them to decide the manner in which they could nost efficiently discharge it, subject only to compelling and obvious reasons of economy. It would be improper for the Commission to abdicate its responsibilities in that respect.

4. The message received from United Nations Headquarters referred to an eight-weeks' session. In his view, that would be quite inadequate. The Commission was already seriously in arrears; it had only touched the fringes of the report on the régime of the high seas, which had been before it for two years; the question of the régime of the territorial sea it had dealt with only sketchily; the fact that it might complete its work on statelessness did not mean that it had exhausted the whole subject of nationality; and the law of treaties was sufficient in itself to provide work for two or three sessions of eight weeks' duration. In addition, it had only considered four of the fourteen subjects which it had selected at its first session for codification. He therefore considered it imperative that sessions should last eleven weeks, like the present one. It was only because the present session had lasted eleven weeks that the Commission had been able to produce results which would show the General Assembly its potentialities.

5. Mr. SANDSTRÖM agreed that the fact that the members of the Commission had been invited, in their capacity as experts in international law, to render the United Nations certain assistance did not make them employees of the United Nations. Every effort should therefore be made to meet their wishes so far as possible. He did not, of course, claim that the Commission should have priority over all other United Nations organs, but it should at least be considered as of equal standing with the Economic and Social Council.

6. He supported the suggestion that an attempt should be made to persuade the Council to postpone its session by a week or two.

7. Mr. YEPES agreed with Mr. Lauterpacht that the Commission should not show undue concern for financial considerations. He also agreed that a short session would not suffice for its work. Indeed, having proposed that it should be in permanent session, it could hardly now agree to the length of its sessions being reduced.

8. Mr. SCELLE agreed that the Commission would be going back on its former attitude if it now tamely accepted what had been called "rump" sessions. He also agreed that the responsibility for deciding the date and place of its next session could rest with no one but the Commission itself. He could see no valid objections to the Commission and the Council sitting concurrently, as indeed they were doing at the present. Neither interfered with the other's work, and the temporary staff who had been engaged were perfectly satisfactory.

9. Mr. SPIROPOULOS agreed that in theory it would be desirable for the Commission to meet for so long as Mr. Lauterpacht had suggested, but in the circumstances he felt that, unless it wished to go to New York, it had no choice but to reduce the length of its sessions. The present session had been abnormally long. If the length of the Commission's session were reduced and the opening date of the Economic and Social Council's session postponed, even by a week, as he still thought might be possible, the overlapping would be slight and the additional expenditure incurred would be much less than the 25,000 dollars suggested by the Secretariat.

10. Mr. LIANG (Secretary to the Commission) pointed out that it was the Commission itself which had decided tentatively that its next session should last for approximately eight weeks, possibly because it had not wished to overlap too long with the General Assembly. From his own experience, he feared that eight weeks might not be sufficient.

11. He agreed that the Commission was an independent body to the extent that its consideration of questions of substance was concerned. However, from the place which it occupied in the United Nations hierarchy, it was clear that it was subject to the General Assembly in questions of administration and finance, just as on the national level any body of experts was subject in questions of administration and finance to the body which had established it. Nor could it be denied that the General Assembly had so far been generous to the Commission in administrative and financial matters; it might have insisted that the Commission meet at Headquarters, in accordance with article 12 of its Statute; if it had not done so, it was probably because it realized that the only time when the Commission could conveniently meet was in the summer, and because it accepted the Commission's argument that conditions in New York in the summer were not conducive to maximum efficiency.

12. If, as seemed to be the case, the Commission still wished to meet in Geneva, he suggested that it could only convene at a time well ahead of 1 June in order that any overlapping with the Economic and Social Council might be avoided. It had been argued that certain members would be unable to attend before 1 June; but in 1951 the Commission had met in May, and, however much absences were to be regretted, they were sometimes unavoidable; for example, one member of the Commission had been unable to attend the closing weeks of the present session. He hoped, however, that the Commission would see its way to holding its next session in New York.

13. Mr. HSU felt that it was very undesirable to shorten the session further, and equally undesirable to fix its date in such a way that either university professors or members of delegations to the General Assembly would be unable to attend the whole of it. The only objection to holding the session in Geneva from the beginning of June to the middle of August was that it would run concurrently with the Economic and Social Council, and thereby entail additional expenditure. That objection could easily be overcome, however, if a few influential governments could be persuaded that the extra money would be well spent. Alternatively, the Commission might consider the possibility of dividing its annual session into two, sitting for six weeks in Geneva during the summer and for four to six weeks in New York after the close of the General Assembly.

14. Mr. CÓRDOVA said that, in the circumstances, the wisest course would perhaps be to meet in mid-May as the Secretary had suggested, and devote the first fortnight to discussing some question for which the absence of those members who were detained elsewhere, however regrettable, would not be an insuperable obstacle, for example, the régime of the high seas.

15. Mr. ZOUREK said that although he had no objections in principle to the Commission's sessions being held in New York, he agreed that working conditions made Geneva preferable in summer. With regard to the date, he felt that the Commission should put personal considerations aside and be guided solely by objective considerations, particularly in view of the fact that its membership in 1954 would be different. He also thought that it should try so far as possible to fit in with the programme which had been approved for other United Nations bodies.

16. Mr. LAUTERPACHT said that he was just as interested in the régime of the high seas as in the law of treaties, and that he had the same general responsibility for one subject as for any other. Some absences were unavoidable, but it seemed quite unreasonable to decide that the session should begin at a date when it was already known that at least three members would be unable to attend. For he understood that besides himself and Mr. Sandström, Mr. Pal would also be unable to come to Geneva before the beginning of June. He (Mr. Lauterpacht) would support any proposal to the effect that the Commission should meet in Geneva for ten to eleven weeks, starting at the beginning of June, and that it should be left to the Chairman to work out the necessary arrangements with the Secretariat.

17. Mr. SPIROPOULOS pointed out that such a decision would flatly contradict the terms of General Assembly resolution 694 (VII). In the event of conflict between the Commission and the General Assembly, it was possible that the General Assembly might yield, but it was much more likely that it would not, in which case it would have no choice but to fix the date of the Commission's session with no further reference to the wishes of its members.

18. Mr. LIANG (Secretary to the Commission) pointed out that article 12 of the Statute stated that if the Commission wished to sit elsewhere than at United Nations Headquarters, it should first consult the Secretary-General. It was therefore the Secretariat's duty to offer its advice to the Commission.

19. Each time that the Commission decided to meet in Geneva, the additional expenditure incurred had to be budgeted for in a supplementary budget which was prepared by the Secretary-General and submitted first to the Advisory Committee on Administrative and Budgetary Questions, and then to the Fifth Committee of the General Assembly. Except for the first year, when Judge Manley O. Hudson, then Chairman of the Commission, had appeared before the Advisory Committee to justify the Commission's decision, that task had fallen to himself. It was for the Advisory Committee first to approve the additional appropriation, though it had sometimes reduced the Secretary-General's estimate. The Fifth Committee had then to approve it, and that was done, though sometimes by a small majority. It had again fallen to him and to other members of the Secre-

tariat to explain to the Fifth Committee why the Commission did not wish to meet in New York, as was stipulated in its Statute. He had explained, *inter alia,* that if the Commission sat in New York during the summer, it seemed likely that several of its members would not attend, and that if it sat there at any other time several others would be unable to attend owing to their other occupations. He must frankly state, however, that those explanations were not always favourably received. In those circumstances, it would seem prudent for the Commission to adopt a somewhat more conciliatory attitude. On the present occasion, moreover, it could be argued that it was for the new members of the Commission, to be elected by the General Assembly, to decide whether they wished the next session to be held anywhere else than at Headquarters.

20. He did not of course intend to criticize the decision of the Commission that it should decide upon the time and place of its next session on the principle of the continuity of its functions.

21. Mr. AMADO said that he could confirm all that the Secretary had said, and that he wished to take the opportunity of paying tribute to the zeal with which the Secretariat had defended the Commission's decisions before the General Assembly. It was not always easy for the Secretariat to do so. Nor was it easy for those members of the Commission who were also members of delegations to the General Assembly to convince their colleagues on the Fifth Committee of the reasons for the Commission's decisions. The absence of any member of the Commission for any part of a session, however short, was deeply regrettable, but the Commission must face the fact that the final decision did not rest with it, but with bodies which did not perhaps attach the same importance to its work as it did itself.

22. The CHAIRMAN, summing up the discussion, suggested that the Commission should reply along the following lines to the teleprinter message received from the Headquarters Secretariat:

23. That for the reasons given in Mr. Alfaro's memorandum,[1] it did not consider it conducive to efficiency in its work to meet in New York; that it had doubts about the figure of 25,000 dollars mentioned by the Headquarters Secretariat, but did not intend to embark on discussions on that point; that although the decision which it had taken at its 189th meeting was in accordance with the terms of General Assembly resolution 694 (VII), it recognized that certain of the objections now raised to that decision were well-founded; that it was therefore prepared to convene on Monday 17 May (or on Monday 31 May) in order that overlapping with the Economic and Social Council should be kept to the minimum; but that, in view of the fact that the minimum length of the session should be eight weeks, a certain amount of overlapping would result, although it could of course be avoided (or reduced) if arrangements could be made for the Council's session to be postponed for one or two weeks.

[1] See *supra*, 226th meeting, para. 76.

24. If his suggestion was acceptable, the only question which remained to be decided was whether the Commission agreed to meet in Geneva on Monday 17 May 1954.

It was agreed by 11 votes to none, with 2 abstentions, to meet in Geneva on Monday 17 May 1954.

25. Mr. LAUTERPACHT explained that, as it affected him personally, he had abstained from voting; he would otherwise have voted against the session's being convened on 17 May, since that would prevent the attendance of university teachers of international law who were unable to get leave of absence.

26. In other respects he could accept the Chairman's suggestion, except that he considered eight weeks was insufficient, for the reasons he had explained at the outset of the meeting.

27. Mr. SPIROPOULOS, seconded by Mr. ALFARO, proposed that the Commission state that provision should be made for a session lasting ten weeks.

Mr. Spiropoulos' proposal was adopted by 10 votes to 3.

Proposal by Mr. Yepes for an exchange of views on the law of treaties

28. Mr. YEPES recalled that he had often urged that priority should be given to the law of treaties, but the Commission had not yet had an opportunity of discussing it or the interesting report on it which Mr. Lauterpacht had presented (A/CN.4/63). He therefore proposed that one or two meetings at the present session should be devoted to a general exchange of views, which could then be summarized in the Commission's report. The legal world was waiting to know where the Commission stood on what was perhaps the fundamental problem of international law. He was not one of those who regarded international treaties, in other words the will of the State, as the supreme source of all international law, but he did feel that the Commission ought to give some priority to the study of the law of treaties, even if only because of the overriding importance attached to the subject by a whole school of international law.

29. The CHAIRMAN pointed out that, unless the Commission's consideration of its report was greatly accelerated, it would be unable to complete its work in time, unless it met on Saturdays. If one or two meetings were to be devoted to another subject, it would certainly have to meet on at least one or two afternoons in addition. Before it agreed to do so, it should consider whether it would in fact be of such value to devote so short a time to a general exchange of views on a report and on a subject whose importance no one could deny. It would be particularly interesting to hear Mr. Lauterpacht's view on that question.

30. Mr. YEPES said that he would phrase the question differently. Did Mr. Lauterpacht think it would be useful for him to hear the views of the other members of the Commission on his report?

31. Mr. LAUTERPACHT said that that would certainly be of the greatest value to him, but that the question was whether it was physically possible for all the members of the Commission who had views on the subject to express them on all the articles of his draft. If the discussion were limited to one or two meetings, he feared that not more than three or four members would have an opportunity of doing so.

32. Mr. AMADO felt that the comments which could be made at one or two meetings would be so general as to be of little use.

33. Mr. KOZHEVNIKOV said that the subject of the law of treaties was of great importance and required very careful study. It would be unwise to deal with it hastily or superficially, but an exchange of views on the fundamental principles underlying Mr. Lauterpacht's report would be useful if there were time. It was, however, too early to decide that question.

34. Mr. SPIROPOULOS shared the doubts expressed about Mr. Yepes' proposal.

35. Mr. YEPES withdrew his proposal, but suggested instead that the members of the Commission should be invited, if they so wished, to submit their views on the subject in writing to the Special Rapporteur, and that any such memoranda should be reproduced and distributed as Commission documents.

36. Mr. LAUTERPACHT said that it would be of great value to him to have such written memoranda from members of the Commission.

37. Mr. AMADO and Mr. SPIROPOULOS said that they could see no objections to Mr. Yepes' suggestion, although there was no reason why members should not submit memoranda on any subject and at any time, without being invited to do so.

38. Mr. KOZHEVNIKOV also felt that no decision by the Commission was required. Members were always free to submit memoranda, although memoranda could not have the same value as a live exchange of views.

39. Mr. YEPES said that he would not press his suggestion but that he hoped that the General Rapporteur would indicate in his report that the law of treaties would be given priority at the next session.

40. Mr. LAUTERPACHT said that he felt it right to refer in the general report on the present session to the discussion which had just taken place.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 226th meeting*)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) * (*resumed from the 226th meeting*)

41. The CHAIRMAN invited members to continue their consideration of the draft chapter on arbitral procedure, taking up paragraph 5.

Paragraph 5 (13) **

42. Mr. YEPES proposed that paragraph 5 be amended to read:

> "The Commission was greatly aided in its work during the fifth session by the detailed commentary prepared by the Secretariat in accordance with a decision taken at the fourth session by reference to article 20 of the Statute. In the opinion of the Commission, that commentary, which contains an account and analysis of the existing practice in the matter of arbitral procedure and of available jurisprudence and doctrine, constitutes a valuable contribution to the study and the application of the law on arbitral procedure. After being revised and supplemented by the Secretariat in the light of the decisions taken by the Commission at its fifth session, the commentary should be published as a Commission document and sent to the General Assembly with the final draft on arbitral procedure."

43. The object of his amendment was to simplify the paragraph, which, as drafted, was too long and raised irrelevant issues — for example, the suggestion that there ought to be a series of commentaries prepared by the Scretariat to accompany any final drafts the Commission might present to the General Assembly. The Commission would realise from his suggestion that the Secretariat's commentary on the draft on Arbitral Procedure (A/CN.4/L.40) should be published as a conference document after appropriate revision, that he regarded it as of the greatest value. The original wording of paragraph 5, however, was open to the misinterpretation that the Commission bore full responsibility for the contents of the Secretariat's commentary.[2]

44. Mr. LAUTERPACHT said that he would not insist on his suggestion that commentaries prepared by the Secretariat should accompany all drafts submitted by the Commission to the General Assembly. He proposed, therefore, that the third sentence of paragraph 5 beginning: "Such commentaries, based on a systematic and critical examination...", be deleted, and that the

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[2] Paragraph 5 read as follows:

[First two sentences unchanged]

"...

"The Commission considers that, after the Secretariat has had the opportunity to revise and supplement the commentary by reference to the changes which occurred in the course of the fifth session and also in the light of any further study by the Secretariat itself, the commentary should be published as the first of the series of commentaries which, in the opinion of the Commission, ought to accompany or follow the final drafts presented by the Commission to the General Assembly. Such commentaries, based on a systematic and critical examination of the available practice, jurisprudence and doctrine may in themselves constitute a contribution, of considerable practical and scientific value, to the application and the study of international law."

second sentence of paragraph 5 be amended by the substitution of the words "by it" for the words: "as the first of the series of commentaries...", to the end of the sentence.

45. He was opposed to the suggestion that the Secretariat's commentary should accompany the final draft on Arbitral Procedure to the General Assembly. For one thing, the Secretariat ought to be allowed all the time it required for further studying and revising it. There was also the possibility that, if the commentary accompanied the final draft, some might think that the Commission bore responsibility for the substance of the commentary.

46. Mr. YEPES reminded the Commission that it had first been suggested two months previously that the Secretariat's commentary might be submitted to the General Assembly at the same time as the final draft. The Secretary had even said that the commentary could be revised and completed in time for that to be done, and he (Mr. Yepes) believed that it was, in fact, ready. If that was so, there was no reason why its publication should be further delayed.

47. Mr. LIANG (Secretary to the Commission) regretted that the Secretariat's commentary was not yet finished, for the Secretariat evidently could not give it final form until the Commission had formally adopted the text of the final draft on Arbitral Procedure. Moreover, the revision of the commentary would call for the more ample resources that were available at Headquarters particularly if, as had been suggested, additional matter was to be incorporated in it. The commentary would be available in due course.

48. Mr. YEPES agreed that the Secretariat should have time to revise the commentary. If, however, it were ready in time for consideration by the General Assembly at its eighth session, it should be presented simultaneously with the final draft of Arbitral Procedure.

49. Mr. SCELLE said that the object of the Secretariat's commentary was to summarize the situation with regard to arbitral procedure, and he, as Special Rapporteur, had greatly benefited from it. The historical and doctrinal analysis existed already in the current version of the Secretariat's commentary (A/CN.4/L.40), and not much new material need be added. It seemed to him that the Commission's needs would be met if Mr. Lauterpacht could see his way to accepting Mr. Yepes' amendment, with the deletion from the last sentence of the phrase "as a Commission document".

50. Mr. KOZHEVNIKOV said that, by the terms of article 20 of its Statute, the Commission was required to submit its comments with any final texts it might present to the General Assembly. The questions therefore arose: was the Secretariat's commentary to be considered as an official product of the Commission, and was the Commission itself to be responsible for its revision? For, although the Commission had not discussed the Secretariat's commentary, and though Mr. Lauterpacht had indeed said that the Commission could not assume responsibility for its substance, the wording of paragraph 5 permitted the conclusion to be drawn that the Commission in effect adopted the commentary as its own.

51. The CHAIRMAN pointed out that the amendment suggested by Mr. Scelle to Mr. Yepes' substitute text for paragraph 5 would make it clear that the Commission had no responsibility for the substance of the commentary.

52. Mr. LAUTERPACHT said that that could be made even clearer, and Mr. Kozhevnikov's apprehension, perhaps, allayed by the deletion from the last sentence of Mr. Yepes' text of the phrase "and sent to the General Assembly with the final draft on Arbitral Procedure", in addition to the deletion already suggested by Mr. Scelle. Paragraph 5 would then simply acknowledge the assistance the Commission had derived from the commentary.

53. Mr. KOZHEVNIKOV was grateful for the Chairman's and Mr. Lauterpacht's elucidations. He pointed out, however, that the second sentence of the text proposed by Mr. Yepes contained the words "In the opinion of the Commission that commentary... constitutes a valuable contribution to the study... of the law on arbitral procedure." As the Commission had not discussed the commentary, it could form no opinion on it.

54. Mr. LIANG (Secretary to the Commission) said that the Secretariat did not expect that the commentary should be identified with the Commission in the sense that the Commission would be understood as having approved its substance. The Commission had, however, asked for it to be made, and was thus closely associated with its preparation. The Secretariat's work entitled: "Study of Statelessness" (E/1112)[3] was, perhaps, analogous, in that it had been prepared and published at the request of the Economic and Social Council; nevertheless, the Council could not be held responsible for its content. Similarly, the commentary on the final draft on Arbitral Procedure would be published by the Secretariat, and the responsibility of the Commission would not be engaged.

55. Mr. CÓRDOVA agreed with Mr. Kozhevnikov that the Commission had taken no formal decision on the usefulness of the commentary. Surely, however, all members acknowledged that the commentary had been helpful to them in their work; and a statement to that effect was the only way of publicly recognizing the Secretariat's assistance.

56. Mr. ZOUREK recalled that in his draft report Mr. Lauterpacht had suggested the inauguration of the publication of a series of commentaries. He had subsequently withdrawn the suggestion as a general proposal, maintaining, however, that the particular commentary under consideration should be published. The Commission was thus invited to pronounce on the value of a document which it had not discussed. He feared that the Commission would be unable to adopt a positive attitude in the matter, for the commentary

[3] United Nations publication, Sales No.: 1949.XIV.2.

was written entirely from the point of view of the majority of the Commission, and was therefore at variance with the principle of article 20 of the Commission's Statute. Instead of being drafted in support of the controversial majority view of the nature of arbitral procedure, the commentary would have presented the case in better perspective had it explained first the classical doctrine of arbitral procedure, then that the majority of the Commission thought that that doctrine did not meet present needs, and, finally, that some members had disagreed. In that way, both sides of the argument would have been given.

57. Was it the intention that the commentary should be published in its existing general form? Would it not be preferable, besides conforming more closely with article 20 of the Commission's Statute, if the Commission were itself to prepare a commentary designed to ensure that the General Assembly was fully instructed about the different doctrines on arbitral procedure? He agreed that it would be pointless to publish the commentary after the General Assembly had taken its decision on the final draft on Arbitral Procedure.

58. Faris Bey el-KHOURI thought that it was the Commission's duty to ensure that the final draft on Arbitral Procedure was presented to the General Assembly in such a way as to make it readily acceptable. The Secretariat's commentary would, in his view, help governments to come to the right conclusions. He had found nothing in the commentary in the least injurious to the Commission's prestige, and nowhere was there any mention of the Commission's having approved its substance. It would, perhaps, have been preferable had the Secretariat been able to publish the commentary without a specific request from the Commission, but the Secretary had explained why that was not possible, and he (Faris Bey el-Khouri) therefore agreed that there should be an appropriate instruction in the general report.

59. Mr. LAUTERPACHT thought that the Commission could now come to a decision, and pointed out that Mr. Yepes' text was substantially similar to the original, except for the final clauses about publication of the commentary as a Commission document and its simultaneous transmittal with the final draft on Arbitral Procedure to the General Assembly.

60. Mr. YEPES attached great importance to simultaneous transmittal to the General Assembly, and thought that the object of the commentary was to inform the General Assembly about the issues raised by the final draft on Arbitral Procedure. He was, however, willing to delete from his text the phrase "as a Commission document".

61. Mr. CÓRDOVA thought that it could be assumed that the Secretariat would forward the commentary to the General Assembly as soon as the necessary revision had been completed.

It was decided by 9 votes to 1, with 2 abstentions, to delete from the text proposed by Mr. Yepes the phrase "and sent to the General Assembly with the final draft on arbitral procedure".

Mr. Yepes' text for paragraph 5, as amended, was approved by 7 votes to 3, with 2 abstentions.

62. As approved, paragraph 5 read:

"The Commission was greatly aided in its work during the fifth session by the detailed commentary prepared by the Secretariat in accordance with a decision taken at the fourth session by reference to article 20 of the Statute. In the opinion of the Commission that commentary, which contains an account and analysis of the existing practice in the matter of arbitral procedure and of available jurisprudence and doctrine, constitutes a valuable contribution to the study and the application of the law on arbitral procedure. After being revised and supplemented by the Secretariat in the light of the decisions taken by the Commission at its fifth session, the commentary should be published by the Secretariat".

Paragraph 6 (14)

63. The CHAIRMAN invited discussion on paragraph 6.

64. Mr. AMADO noted that in paragraph 6, as elsewhere in the report, the words "final draft" were used to describe the regulations that the Commission had drawn up on arbitral procedure. It was, however, possible that further drafts might be prepared. He accordingly wondered whether the word "final" should not be deleted *passim*.

65. The last sentence of the paragraph, which read: "It may be a matter for consideration whether the commentary... should not contain as an annex a model code of rules...", was phrased, as it were, as a question to the Commission. In that form it was hardly appropriate in the Commission's report on its own work. He wondered, indeed, whether the point should be raised at all in the report.

66. Mr. LIANG (Secretary to the Commission) agreed that there was no need to call the regulations as drafted the "final draft". He considered therefore that the word "final" should be deleted from the title which might then read: "Draft code of arbitral procedure." When it was necessary to distinguish the final draft from previous drafts the term "final draft" could be used without initial capitals.

67. In paragraph 6, reference was made to the wider sense of the term "arbitral procedure", which was defined as including "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties". That phrase, to his mind, described the purpose of the draft, and was therefore unsatisfactory as a definition of the term "arbitral procedure"; he would prefer a phrase reading: "provisions relating to arbitration engagements in general".

68. When the Commission had discussed the matter earlier, no conclusion had been reached on whether the Secretariat should annex a model code of rules on arbitral procedure to the commentary. The Secretariat itself had no strong views on the matter; but he hoped that, if the Commission intended such a code to be prepared, it would provide a clear directive.

69. Mr. Scelle said that the Commission had taken the view that arbitral procedure must include all those provisions which would make certain that arbitration was carried out effectively; hence, it transcended the mere rules of procedure adopted by or before the arbitral tribunal itself. He wondered whether the mention in the last sentences of paragraph 6, of detailed rules of procedure and the suggestion that a model code of such rules be prepared, implied that Mr. Lauterpacht thought that the Committee should have adopted a narrower interpretation of the term "arbitral procedure".

70. Moreover, as the report purported to be an account of the Commission's work, it should not contain suggestions for future action. In any event, the preparation of a model code of rules of arbitral procedure, in the narrower sense of the term, was essentially a substantive issue that the Commission itself should deal with, if necessary in a supplementary report. The last part of the paragraph, from the sentence beginning: "Such detailed rules of procedure are liable to vary...", should therefore be deleted.

71. Mr. LAUTERPACHT said that, to the extent that the Commission's definition of the term "arbitral procedure" differed somewhat from the connotation usually given to the term, it would be reasonable to include in the report the sentences concerning detailed rules of arbitral procedure in the narrow sense, the deletion of which Mr. Scelle had suggested.

72. It would, however, be more consonant with his (Mr. Lauterpacht's) intention if the phrase: "A model code of rules of", were replaced by the phrase: "A collection of texts on".

73. He agreed with the suggestion that the regulations drafted by the Commission should be entitled "Draft code on arbitral procedure".

74. He was unable, however, to follow the Secretary's reasoning when he suggested that the phrase descriptive of the wider sense of the term arbitral procedure, reading "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties" be amended; for, to his mind, that phrase accurately described the Commission's conception of arbitral procedure.

75. Mr. KOZHEVNIKOV agreed with Mr. Scelle that it was inappropriate to suggest that the Secretariat should draw up a model draft of rules of arbitral procedure, for that was a task proper to the Commission itself. He thought also that the regulation should be referred to as "*Draft articles on arbitral procedure*" rather than "Final draft on arbitral procedure".

76. Arbitral procedure was a term with a precise meaning; there was no question of its having a wider or a narrower sense. The "effectiveness of arbitration engagements" derived from treaties and similar agreements. The text as it stood seemed to him authoritarian, and the draft itself to have been conceived on the wrong lines.

77. The CHAIRMAN drew attention to Mr. Lauterpacht's suggestion that the Secretariat might be asked to prepare a collection of texts rather than a model code.

78. Mr. LIANG (Secretary to the Commission) reverted to his objection to the first clause describing arbitral procedure in its wider sense as including "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties". A generally accepted definition of arbitral procedure was "the body of rules and practice relating to arbitration", and a distinction was normally drawn between arbitral procedure in that sense and the procedure adopted by or before arbitral tribunals.

79. The last sentence of the paragraph reading "It may be a matter for consideration whether the commentary to be prepared by the Secretariat and referred to in paragraph 5 of this report should not contain as an annex a model code of rules of arbitral procedure in the sense referred to above" was inadequate, as it failed to state who was to consider the matter.

80. The CHAIRMAN asked the General Rapporteur to prepare a revised text of paragraph 6 for consideration at the next meeting.

The meeting rose at 1 p.m.

228th MEETING

Friday, 31 July 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

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

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

Date and place of next session

(*resumed from the 227th meeting*)

1. The CHAIRMAN reported on his conversation with the President of the Economic and Social Council who had explained that the need for preparing the documents on the results of its work in time for presentation to the

General Assembly made it impossible for the Council to postpone the opening date of its summer session. The Council Committee on the Calendar of Conferences would, however, be meeting shortly and the Secretary of the Commission would inform it of the Commission's views.

Point of order raised by Mr. Scelle on the Commission's method of work

2. Mr. SCELLE hoped that his proposal, which had been circulated, was self-explanatory. It read as follows:

> "To ensure that the discussion of the general report on the current session of the Commission, and of the articles of the draft conventions on statelessness still outstanding, is completed, it is proposed that instead of the Commission continuing the reading of the report in full, any member desirous of submitting amendments to specific passages in the report should do so in writing, the right of each member of the Commission, including the author, to speak on such amendments being limited to a single statement of not more than ten minutes' duration."

3. The Commission was so zealous in the performance of its duties that its discussions tended to range far and wide and were consequently protracted, but only two weeks remained for the session and several items on the agenda had still to be completed. In particular it was essential, if the Commission was to avoid criticism, for it to be able to present some completed work to the General Assembly. The draft on Arbitral Procedure, if the report could be finished in time, would be the first draft convention that the Commission had been able to present to the General Assembly.

4. Mr. LAUTERPACHT said that Mr. Scelle's proposal would accelerate the Commission's proceedings, but it did not go far enough. He had calculated that, if only one amendment were made to each paragraph and if only half the members of the Commission spoke for ten minutes each on each paragraph, the discussion of the chapter on arbitral procedure would take about three weeks. His own, more drastic, suggestions were that all amendments should be presented in writing, that they should, if necessary, be introduced by statements of not more than five minutes and that only the General and Special Rapporteurs should be permitted to comment. If experience showed that such measures were inadequate, he would suggest that amendments should be voted upon without discussion.

5. Mr. YEPES opposed Mr. Scelle's proposal which he regarded as self-contradictory. It was essential for the report to be read aloud; that would only take one or two minutes for each paragraph. The Commission had, in fact, decided that the report should be so read and a two-thirds majority would be required to reconsider that decision.[1] On the other hand, statements of three or four minutes were quite long enough.

6. Mr. SANDSTRÖM supported Mr. Scelle's proposal in principle, but thought the time allowed for each speaker should be not more than five minutes. He was not against a rule that all amendments should be presented in writing but pointed out that it could only begin to operate the following day. It was essential that amendments should be introduced and explained by their proposers.

7. Mr. ALFARO sympathized with Mr. Scelle's motives but considered that the requirement that all amendments be presented in writing was more likely to cause delay than expedition. He therefore suggested that Mr. Scelle's proposal be amended to read:

> "... any member desirous of submitting an amendment to any specific passage in the report should do so in writing unless it should consist of a proposal for deletion or for the changing or addition of not more than five words, the right of each member..."

In his experience it was reasonable and practical to limit the length of single statements to a maximum of five minutes.

8. Mr. KOZHEVNIKOV considered that the method so far adopted by the Commission had been fruitful. Some members, of course, thought the draft report so perfect that there was no need to discuss it. Others, however, did not take that view and should be enabled to criticize the report.

9. Mr. Scelle's proposal seemed to him inconsistent, for although its object was to enable the Commission to discuss exhaustively the material before it, it would in fact limit discussion; and though it was intended to expedite consideration of the report, its requirement that amendments should be submitted in writing would involve delay on account of the necessity of furnishing translation and so on. He agreed, however, that it was unnecessary to read each paragraph aloud.

10. Mr. SCELLE said he would gladly accept an amendment to his proposal limiting single statements to a maximum of five minutes.

11. Mr. CÓRDOVA doubted if such a limitation on statements was practical. He suggested that the Commission should have two meetings daily.

12. Mr. HSU said that in his view reading the paragraphs of the draft report aloud was not a waste of time. On the other hand, it might be desirable to limit the number of speakers to the proposer and one other speaker in favour and two speakers against each amendment, giving the Chairman the power to allow general discussion when that seemed appropriate. He agreed that members liked to have a full record of the positions they adopted, but their points of view were already summarized in the records of previous meetings.

13. Mr. SPIROPOULOS thought that the chief need was goodwill if the Commission's discussions were to be shortened. Given such goodwill the rules of procedure of the General Assembly provided all that was required. For example, rule 79 prescribed that amendments should normally be submitted in writing, but that the Chairman might permit a discussion of amendments submitted orally if he thought fit. The Commission should follow

[1] See *supra*, 226th meeting, para. 9.

that rule; but he agreed also with Mr. Scelle that a time limit of perhaps five minutes, subject to revision in the light of experience, should be imposed on speakers. As a last resort, afternoon, and, perhaps, evening, meetings might be held.

14. Mr. ZOUREK thought it necessary to go into the reasons which made its discussions on the draft report so long. At its fourth as well as its present session, the Commission had been asked to take decisions on suggestions made in the draft report on the session that had not been presented previously; it was only natural that a discussion should ensue. Indeed, generally speaking, the draft report did not in some members' opinion truly represent the discussions that had taken place and was accordingly bound to be criticized at length. He felt that if the report had given an objective account of the Commission's discussions and decisions it could have been adopted in two or three days. Indeed, if the Commission had seen fit to allow dissenting opinions to be annexed to the report, the debate on the draft report would have been considerably shortened; as it was, members who dissented from the majority view were forced into the position of having to ensure that their opinions were fully recorded in the summary records.

15. The CHAIRMAN said that the Commission had become alarmed at its slow rate of progress, as a consequence of which Mr. Scelle had proposed certain changes in procedure and Mr. Lauterpacht had proposed other, even more drastic changes. He (the Chairman) thought that the Commission's fears were exaggerated. The intention had been to allow one week for the discussion of each chapter in the Commission's draft report. Certainly the Commission was a little behind its timetable, but then it had given some time, even during the current week, to the discussion of other subjects. Also, at the beginning of any discussion it was normal for members to be perhaps over-eloquent. The Commission had another two weeks before it, and its experience was not so discouraging that in his view it was immediately necessary to adopt a more rigid procedure than that adopted during the fourth session. It was, however, open to question how far the Commission was still justified in not meeting on Saturdays at a time when there was no need to use the weekends for the study of documents.

16. It was of course possible to limit the length of statements, but it was only rarely that statements exceeded five minutes. Further, it was desirable for amendments to be presented in writing whenever possible, but a rigid rule was inappropriate. The introductory section of the chapter on arbitral procedure was the only section which it had so far been decided should be read aloud; he agreed with those members who thought that it was unnecessary to read the remainder of the report aloud.

17. He was entirely in agreement with Mr. Spiropoulos that the Commission's progress depended largely on the goodwill of its members. He did not think that that goodwill was lacking and he therefore suggested that the paragraphs in the report should not be read aloud and that members should be limited to one statement on each paragraph.

18. Mr. SCELLE said that he agreed with the Chairman's suggestion.

The Chairman's suggestion was adopted by 10 votes to none, with 2 abstentions.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 227th meeting*)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) * (*resumed from the 227th meeting*)

Paragraph 6 (14) ** (continued)

19. The CHAIRMAN, inviting a continuation of the discussion of paragraph 6, recalled that Mr. Lauterpacht had proposed the replacement of the phrase "a model draft of detailed" in the fourth sentence and the phrase "a model code of" in the last sentence by the phrase "a collection of", and that the Secretary to the Commission had suggested the replacement in the first sentence of the phrase "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties" by the phrase "provisions relating to arbitration engagements in general accepted by the parties".

20. Mr. SANDSTRÖM said that he was willing formally to propose the amendment suggested by the Secretary.

21. Mr. LAUTERPACHT said that the phrase in the draft was essential for its understanding, as the term "arbitral procedure" had never been used previously in the special sense in which the Commission had used it.

22. Mr. SANDSTRÖM thereupon withdrew his proposal.

23. Mr. ZOUREK said that the majority of the Commission had adopted a definition of the term "arbitral procedure" very much wider than the usual one; but, even if that definition were finally adopted, there were parts of the draft on Arbitral Procedure, for example in articles 16, 17 and 30, that could not be comprehended in it.

Paragraph 6 was then approved by 10 votes to 2, the phrase "this Final Draft" in the first sentence being replaced by the phrase "this draft" [2] *and the last two sentences* [3] *being modified to read:*

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* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[2] The same change was made accordingly throughout Chapter II, "the present draft" being sometimes used in preference to "this draft".

[3] The original last two sentences read as follows:

"On the other hand, it is probable that the parties may find it useful in some cases to have before them a model draft of detailed rules of arbitral procedure in the more limited and technical sense of the term. It may be a matter for consideration whether the commentary to be prepared by the Secretariat and referred to in paragraph 5 of this report should not contain as an annex a model code of rules of arbitral procedure in the sense referred to above."

"On the other hand, it is probable that the parties may find it useful in some cases to have before them a collection of rules of arbitral procedure in the more limited and technical sense of the term. The Commission considers it desirable that the commentary prepared by the Secretariat and referred to in paragraph 5 of this report should contain as an annex a collection of rules of arbitral procedure in the sense referred to above."

Paragraph 7 (15)

24. Mr. ZOUREK said that a point he had raised in the general discussion was particularly relevant to paragraph 7, namely, his objection to the analytical nature of the report which divided the articles in the draft on Arbitral Procedure into those representing a codification of existing law and those which were in the nature of a formulation, *de lege ferenda,* of what were considered to be desirable developments. Not only did the latter articles make the draft into something other than a draft on arbitral procedure — it had become more akin to a draft on international justice in general — but the report gave a particular interpretation of the draft to which in his view it was in order for members to object.

25. The CHAIRMAN, referring to the last sentence of the paragraph in which the Commission was stated to consider of the utmost importance the differentiation in its functions between the codification and the development of international law, asked whether it was always possible to make that differentiation "both in general outline and in detail", as was suggested.

26. Mr. LAUTERPACHT said that that differentiation was important to students of international law and others who followed the Commission's work. He thought, however, that the sentence in question should be qualified by the insertion of a phrase such as "as far as possible" or "as far as convenient". In the case of a recent arbitration, considerable discussion was devoted to the question whether certain solutions adopted by the Commission were *de lege lata* or *de lege ferenda.*

27. Mr. KOZHEVNIKOV pointed out that in paragraph 7 the General Rapporteur had again laid undue stress on the "progressive development of international law" as one of the Commission's functions.

28. Mr. SANDSTRÖM suggested the deletion of the last part of the last sentence of paragraph 7 "and that, with regard to each individual topic, it should state both in general outline and in detail, in what respects the Commission considers itself to be fulfilling either of these functions."

29. Mr. LAUTERPACHT agreed with that suggestion, to which no other members had raised any objection.

Paragraph 7, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 8 (16)

30. Mr. KOZHEVNIKOV again regretted that he could not agree with the suggestion that the draft on Arbitral Procedure was no more than a codification of existing law.

31. Mr. ZOUREK said that his attitude was identical.

32. Referring to the last sentence of the paragraph which stated that the free determination by the parties applied to the competence of the tribunal, the law to be applied and the procedure to be followed by the tribunal, he said that in his view that principle was basic to international arbitral procedure, but that the statement in the draft report was at variance with the draft on Arbitral Procedure itself.

33. Mr. SCELLE paid a tribute to the General Rapporteur's scientific honesty of purpose in making a distinction between the codification of the law of arbitral procedure and the development of international law. As regards the fundamentals of arbitral procedure, he had no doubt that the draft on Arbitral Procedure was a codification of existing law. The text of the draft report was thus correct.

34. Mr. LAUTERPACHT agreed that there were articles in the draft on Arbitral Procedure which limited the absolute freedom of the parties; they were, however, articles not relating to basic features of the law, in respect of which the draft was no more than a codification. He assured Mr. Zourek that he had done his best to reflect in the draft report the basic features of the draft on arbitral procedure.

Paragraph 8 was approved by 9 votes to 2, with 1 abstention.

Paragraph 9 (17)

35. The CHAIRMAN said that at the beginning of the third sentence of paragraph 9 the reference to article 2 should be changed to article 3.

36. Mr. YEPES said that, as far as he could see, the statement in the second sentence that "article 1 of the draft lays down that the obligation to arbitrate results from an undertaking voluntarily accepted..." was not accurate.

37. Mr. LAUTERPACHT pointed out that all three paragraphs of article 1 referred specifically to the undertaking to arbitrate, which was assumed to be an undertaking voluntarily entered into.

38. Mr. KOZHEVNIKOV, referring to the sentence reading "respect for the will of the parties... is an essential requirement of arbitration", said that there was an implication that that respect was maintained in the provisions of the draft on Arbitral Procedure. That, however, was untrue, as it was laid down in article 2 that a party could involve another party in an alleged dispute contrary to the latter's will.

39. Mr. LAUTERPACHT regarded it as an evident requirement of arbitration that on such matters a party might have to submit to a decision with which it did not agree. The object of the draft was, however, to safeguard the free will of *both* parties to a dispute; for if one party was in a position, for example by refusal to appoint an arbitrator, to frustrate the agreed will of

both, as demonstrated by an agreement to arbitrate, then the sovereignty or free will of the other party was violated. The essence of the draft on Arbitral Procedure was that its provisions were intended to preserve the sovereignty of *both* parties. He was sure that that was in accordance with Mr. Kozhevnikov's basic thesis.

40. Mr. KOZHEVNIKOV said that it was clearly an abuse of sovereignty and free will for a party to be able to drag another party into a dispute against its will.

41. Faris Bey el-KHOURI said that the majority of the Commission had adopted the basic principle that once an undertaking to arbitrate had been established, the parties to that undertaking lost their authority to govern the proceedings; neither party was to be permitted to obstruct or frustrate the previous undertaking. Some members of the Commission, including himself, had not agreed with that principle, considering that an arbitration should be in accordance with the free will of both parties from beginning to end.

42. The draft report accurately reflected the majority view in the Commission. He thought, however, that it had been intended that the general report should give an account of the difference of opinion and of the voting in the Commission on the various articles of the draft on Arbitral Procedure, and by that means to avoid the necessity of publishing a minority report. That intention had not been fulfilled and he would therefore abstain from voting.

43. Mr. LAUTERPACHT said that, as the draft report of the chapter on arbitral procedure did not deal with the draft on Arbitral Procedure article by article, it was not convenient to record the vote of the Commission on each article.

44. The CHAIRMAN suggested, and Faris Bey el-KHOURI agreed, that consideration of the matter should be deferred until examination of the chapter on arbitral procedure had been completed.

45. Mr. ZOUREK, referring to the first sentence of the paragraph in which it was stated that certain features of the traditional law of arbitral procedure had been preserved in the draft on Arbitral Procedure, said that those features had been so surrounded by new features, *de lege ferenda,* that their meaning had been altered. It could not be supposed, for example, that the traditional concept of the *compromis* was unaffected by the provision that the tribunal, which itself might be appointed by the International Court of Justice, might draw it up. Similarly, the traditional view that an arbitral award vitiated by excess of powers was null and void was not the same as the view expressed in paragraph 9 that "excess of such powers, when duly declared by an impartial authority to have taken place, is a cause of nullity". That sentence should be deleted.

46. Mr. LAUTERPACHT disagreed. The sentence in question expressed one of the essential features of the draft on Arbitral Procedure.

47. Mr. CÓRDOVA said that excess of powers was always a cause of nullity; but unless it had been duly declared it could have no effect on the award.

48. Mr. YEPES agreed in substance with Mr. Zourek. In his view excess of powers was a cause of nullity whether it had been declared or not. As the author of the amendment relating to excess of powers, he regarded himself as particularly qualified to interpret the article on that subject as approved by the Commission.

49. Mr. SCELLE said that Mr. Zourek had raised the objection that since some of the provisions of the draft on arbitral procedure were new developments in international law, all the other features which derived from existing law were so altered that the result of the codification was a valueless distortion. He disagreed with that view, for, as he had said previously, law was a living entity: its existence and survival depended on its development.

50. He did not understand Mr. Zourek's objection to the sentence in the draft report concerning excess of powers. It was evident that excess of powers rendered an award null, but if there was no means of judging whether there had been an excess then one party to an arbitration might have the power to frustrate the efficacy of the award.

51. Mr. SANDSTRÖM thought that the objections to the sentence on excess of powers concerned its drafting. He suggested that it might perhaps read:

> "excess of such powers is a case of nullity but it should be duly declared by an impartial authority if the award is to be set aside".

52. Mr. ZOUREK said that the implication of such a sentence was that an excess of powers agreed to be such by the two parties would not be a cause of nullity in the absence of an independent declaration.

53. Mr. CÓRDOVA pointed out that there was clearly no problem when the two parties were in agreement: the impartial authority was necessary when they were in disagreement.

54. Mr. LAUTERPACHT said that the draft would foil an attempt by one party unilaterally to set aside an award. He accepted Mr. Sandström's suggestion for a re-draft of the sentence as a basis for a text which could subsequently be agreed between them.

55. Mr. YEPES pointed out a discrepancy between the English and French texts of the sentence in question, the former reading "Excess of such powers..." and the latter reading "*L'excès de pouvoir en cette matière*". He would be satisfied with Mr. Sandström's suggested text provided that in the French version the phrase "*en cette matière*" was omitted.

It was agreed by 9 votes to none, with 2 abstentions, that a text on the lines of Mr. Sandström's suggestion should be drafted by Mr. Lauterpacht and Mr. Sandström to replace the sentence reading:

> "excess of such powers, when duly declared by an impartial authority to have taken place, is a cause of nullity".[4]

[4] However this sentence was left unchanged in the "Report".

Paragraph 9 as modified was approved by 9 votes to 2, with one abstention.

Paragraph 10 (18)

56. Mr. SANDSTRÖM felt that the last sentence, which stated that the Commission had devised machinery "calculated to prevent frustration by either party of the obligation..." contained an element of censure which was not always justified.

57. Mr. KOZHEVNIKOV said that he could not accept paragraph 10 for three reasons. It was not the case that the Commission was not "expressly departing from any established rule"; the provisions in question were not "by way of developing international law" but by way of a step backwards; and it was inappropriate to insert any such moral condemnation of governments as was implied by the words to which Mr. Sandström had referred.

58. The CHAIRMAN suggested that the words "to prevent the frustration by either party" be replaced by the words "to safeguard the effectiveness".

59. Mr. SANDSTRÖM and Mr. LAUTERPACHT accepted that suggestion.

60. Mr. KOZHEVNIKOV agreed that that suggestion was an improvement. It did not, however, entirely remove his objections to that part of the text and it did not, of course, touch upon his objections to the other parts.

Paragraph 10, as amended, was approved by 10 votes to 2.

Paragraph 11 (19)

61. Mr. SANDSTRÖM proposed that in the phrase "the obligation to settle a dispute or future disputes by arbitration may be avoided in a number of contingencies" the word "avoided", which again implied an element of censure, should be replaced by the more neutral word "frustrated".

Mr. Sandström's proposal was adopted by 8 votes to 1 with A *abstentions.*

62. Mr. KOZHEVNIKOV was in favour of deleting the whole of paragraph 11 and would vote against it. "Past experience" proved nothing and had no bearing on the Commission's draft.

63. Mr. SCELLE felt that paragraph 11 was of great importance. As he had shown in his reports, by referring to numerous cases of arbitration which had taken place or which had not taken place, past experience did show that the arbitral obligation could be frustrated in a number of contingencies. He did not see why the Commission should not say so. The wording proposed was extremely mild. Moreover the next six or seven paragraphs were dependent on paragraph 11 and if it were deleted they also would have to be deleted.

64. Mr. LAUTERPACHT agreed with the view expressed by Mr. Scelle.

65. Mr. ZOUREK agreed with Mr. Kozhevnikov that the paragraph should and could be deleted. Paragraphs 12 *et seq.* could very well follow on the last sentence of paragraph 10.

Paragraph 11, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 12 (20)

66. Mr. SANDSTRÖM proposed that the sentence reading "It must be noted that the only innovation which the draft has introduced in this connexion is that of machinery" be replaced by the following: "It must be noted that the only innovation which the draft has introduced in this connexion is that machinery has been established where it does not already exist".

67. Mr. LAUTERPACHT accepted Mr. Sandström's proposal.

Paragraph 12, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 13 (21)

68. The CHAIRMAN suggested that, in accordance with the changes made in previous paragraphs, the words "a party may be in the position to frustrate the original undertaking by failing to co-operate in the constitution of the tribunal" should be replaced by the words "a party may refuse to co-operate in the constitution of the tribunal".

69. Mr. LAUTERPACHT accepted the Chairman's suggestion.

Paragraph 13, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 14 (22)

Paragraph 14 was approved by 9 votes to 2, with 1 abstention.

Paragraph 15 (23)

70. Mr. SCELLE suggested the deletion at the end of the first sentence, as unnecessary, of the words "a failure which may be due to the obstructive attitude of one of the parties bent on avoiding its obligation".

71. Mr. LAUTERPACHT accepted that suggestion.

Paragraph 15, as amended, was approved by 9 votes to 2 with 1 abstention.

Paragraph 16 (24)

72. Mr. SANDSTRÖM proposed the addition of the words "and complete" after the word "final" in the phrase "in order to secure the effectiveness of the principal obligation to submit the dispute to a final settlement by arbitration". He also proposed that in the phrase "counterclaims arising out of the subject matter of the dispute" the words "arising out of" should be replaced by "arising directly out of", in order to bring

the wording into line with the text of the article referred to.

73. Mr. LAUTERPACHT accepted Mr. Sandström's proposals.

74. Mr. YEPES suggested that the words "the power of the Tribunal to decree provisional measures with the view to preventing situations in which the legal rights of a party cannot be fully protected or restored by an arbitral award" placed an unnecessary restriction on the tribunal's power as defined in article 17. He proposed that the same wording should be used as in the text of the article, the phrase in question being therefore replaced by the words "the power of the Tribunal to decree provisional measures to be taken for the protection of the respective interests of the parties".

75. Mr. SANDSTRÖM felt that the explanation contained in the text proposed by the General Rapporteur might be of some value for the purposes of interpretation of the article. Although the French text possibly added something, the English text expressed exactly what the Commission had had in mind.

76. Mr. LAUTERPACHT agreed. If the commentary merely reproduced the text of the draft it would be of little value.

Mr. Yepes' proposal was adopted by 4 votes to 1, with 7 abstentions.

77. Mr. ALFARO pointed out that article 23 did not refer to the time limit fixed for the duration of the tribunal but to the time limit fixed for the rendering of the award, and therefore suggested that, in the phrase "the right of the tribunal to extend, at the request of either party, the time limit of its duration", the words "of its duration" should be replaced by the words "for the rendering of the award".

78. Mr. LAUTERPACHT accepted Mr. Alfaro's suggestion, although in cases where there were to be several awards it might be the duration of the tribunal which the parties would fix.

Paragraph 16, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 17 (25)

79. Mr. SANDSTRÖM suggested that in the first sentence the words "the effectiveness of the award" should clearly be replaced by the words "the effectiveness of the undertaking to arbitrate" and that, in the last sentence but one, in accordance with the changes which had been made in previous paragraphs, the words "may provide an occasion for avoiding the legal obligation of a final settlement of a dispute through arbitration" should be replaced by the words "may render ineffective the legal obligation of a final settlement of a dispute through arbitration".

80. Mr. LAUTERPACHT accepted Mr. Sandström's suggestions.

81. Mr. YEPES pointed out that in the last sentence the reference should be to article 31 and not to 30.

82. Mr. LAUTERPACHT agreed.

Paragraph 17, as amended, was approved by 9 votes to 2, with 1 abstention.

Paragraph 18 (26)

Paragraph 18 was approved by 10 votes to 1 with 1 abstention.

Paragraph 19 (27)

Paragraph 19 was approved by 10 votes to 1 with 1 abstention.

Paragraph 20 (29)[5]

83. Mr. YEPES asked what was meant by the sentence reading "In the present final draft the Commission has sought no more than to safeguard the sovereignty of both parties bound by an obligation freely undertaken".

84. Mr. LAUTERPACHT said that that sentence did not, of course, mean that the Commission's sole aim had been to safeguard the sovereignty of both parties. He had inserted it in an effort to ensure that Mr. Kozhevnikov and Mr. Zourek would not oppose the draft, even if they could not support it. What he meant, and he thought it was a true statement of the facts, was that the Commission had gone no further than it was necessary to go to safeguard the sovereignty of *both* parties to an arbitral agreement.

85. Mr. KOZHEVNIKOV appreciated Mr. Lauterpacht's efforts to overcome the opposition to the draft of those who upheld the classical principle of the sovereignty of States, but that unfortunately they had merely resulted in casuistry. The whole draft was permeated with a concept which was quite incompatible with the principle of the sovereignty of the parties. It was true that States would be free so long as they had not undertaken to submit a dispute to arbitration, but as soon as they had done so the draft would rob them of any further freedom of action.

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[5] Paragraph 20 read as follows:

"20. For these reasons the Commission was unable to share the view, which was occasionally put forward in the course of its deliberations, that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is fully in accordance not only with legal principle but also with the sovereignty of *both* parties — as distinguished from the unilateral assertion of the sovereignty of one of the parties — that that obligation should be complied with and that it should not be avoided in reliance on procedural loopholes. In the present Final Draft the Commission has sought no more than to safeguard the sovereignty of both parties bound by an obligation freely undertaken. For that reason..." [same as in the "Report"].

86. Faris Bey el-KHOURI felt that the whole of paragraph 20 was irrelevant to the report and should be deleted.

87. Mr. CÓRDOVA felt, on the other hand, that the question of arbitration was so closely linked with that of sovereignty that it was unavoidable for the latter question to be discussed. The text proposed by the General Rapporteur could, however, with advantage be toned down.

88. Mr. SCELLE was strongly in favour of paragraph 20, which explained clearly that one of the main objects of the draft was to prevent one State from taking advantage, for its own ends, of another's willingness to submit a dispute between them to arbitration. Any agreement to arbitrate implied a limitation of sovereignty; but in international law sovereignty could be limited not only by customary law, which was not subject to the will of the States concerned, but also by conventional law, which was wholly subject to their will.

89. Mr. KOZHEVNIKOV pointed out that the Commission was getting involved in matters of substance. That being so, he was obliged to say that, although he agreed with Mr. Scelle up to a point, he could not agree with him altogether. It was true that a State's sovereignty could be limited by its free will. The draft, however, would have the effect of involving sovereign States in arbitral procedure contrary to their will; in that connexion he had already referred to article 2, which implied some sort of censure on the party which denied the existence of a dispute; in fact, it might well be the party which claimed the existence of a dispute that was at fault. The whole draft was permeated with the same unilateral approach, which he believed would make it unacceptable to many States.

90. The CHAIRMAN said that the Commission must avoid becoming entangled in discussions of substance. The only question which it had so far to decide was whether the paragraph should be deleted, as Faris Bey el-Khouri had suggested.

90. Mr. SANDSTRÖM agreed with Mr. Córdova that the paragraph should be retained but that the text proposed by the General Rapporteur was too controversial in tone. It might, for example, be better, in the sentence to which Mr. Yepes had referred, to say simply that the draft was "not in contradiction with the sovereignty of both parties bound by an obligation freely undertaken".

91. Mr. LAUTERPACHT felt that there were two advantages in retaining the paragraph. In the first place it reflected the minority's views, which, owing to the Commission's decision, would otherwise not be reflected at all. In the second place it gave the Commission an opportunity of replying to those views, which would certainly be expressed in other quarters as well; it was for that reason that the paragraph was somewhat controversial in tone. If it was desired, however, he, Mr. Córdova and Mr. Sandström might be asked to submit a revised text.

92. Faris Bey el-KHOURI said that if the General Rapporteur had wished to give the minority's views, he should also have given the arguments they had advanced in favour of them. He maintained his proposal that the paragraph be deleted.

Faris Bey el-Khouri's proposal was rejected by 8 votes to 2, with 1 abstention.

93. Mr. KOZHEVNIKOV said that he had voted in favour of deleting paragraph 20, which, whatever else it was meant to do, manifestly failed to give the arguments which the minority had advanced.

94. Mr. ZOUREK said that he approved the General Rapporteur's idea of giving the views of the minority, but that the manner in which that was done was wholly inadequate. The views of the minority were baldly stated in one sentence, and the remainder of the paragraph was devoted to a series of polemical statements, which, in his view, were quite belied by the whole character of the Draft. The General Rapporteur should have merely stated the different views and left the reader to judge.

95. Mr. SCELLE suggested that the question be left over until the Commission had considered the proposal that the votes on each article should be indicated.

96. Mr. LAUTERPACHT said that he did not see how the two questions were connected, but suggested that further discussion be adjourned until he had had an opportunity of submitting a revised text with the help of Mr. Sandström and Mr. Córdova.

It was so agreed.[6]

The meeting rose at 1 p.m.

[6] See *infra*, 231st meeting, para. 54.

229th MEETING

Saturday, 1 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session *(continued)*

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) * *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the chapter on arbitral procedure in the draft report covering the work of its fifth session (A/CN.4/L.45), beginning with paragraph 21, since the General Rapporteur had not yet submitted a re-draft of paragraph 20.

Paragraph 21 (30) **

Paragraph 21 was unanimously approved.

Paragraph 22 (31)

2. Mr. KOZHEVNIKOV was unable to accept paragraph 22 because it provided that the composition of the Tribunal should be determined in certain cases by the President of the International Court of Justice. In his view, it was inadmissible that a third party should interfere in matters which concerned no one but the two parties to the dispute.

Paragraph 22 was approved by 6 votes to 2, with 2 abstentions.

Paragraph 23 (32)

3. Mr. SANDSTRÖM suggested that the sentence reading "The Tribunal, once constituted, ceases to be a mere organ of the parties" should be replaced by the words "From this moment [i.e. from the time of commencement of the proceedings] the Tribunal becomes a joint organ of the parties", which would be more in accordance with the second sentence of article 5, paragraph 2, which provided that an arbitrator could be replaced during the proceedings by agreement between the parties.

4. Mr. LAUTERPACHT said he would appreciate the Special Rapporteur's comments on Mr. Sandström's suggestion. In some respects it was correct to say that the Tribunal "ceases to be a mere organ of the parties"; for example, the Tribunal was not bound to give the effect of an award to any settlement reached between the parties, and without its consent an arbitrator could not be withdrawn once the proceedings had begun, even if the parties agreed.

5. Mr. SCELLE preferred the wording suggested by Mr. Sandström. The Tribunal did become a joint organ within the legal system established by the parties. The fact that the parties had set it up did not mean that they could not give it powers over themselves. On the other hand, he saw no point in replacing the words "once constituted", provided that it was clearly understood that they meant "once finally constituted"; for, so long as the proceedings had not begun, an arbitrator could be replaced, and the Tribunal could not be said to be "finally constituted".

6. Mr. SANDSTRÖM drew attention to paragraph 3 of article 5, where it was stated that: "The proceedings are deemed to have begun when the President, or sole arbitrator, has made the first order concerning written or oral proceedings". The President could, however, convene the Tribunal to discuss matters of procedure. The words "once constituted" or "once finally constituted" would not necessarily be accurate, therefore, in the sentence under discussion.

7. Mr. SCELLE still preferred those words, since the Commission wished to stress the institutional nature of arbitration.

8. Mr. ZOUREK said that the preceding sentence was also incorrect. It read:

> "While the draft gives full effect to the traditional principle that the parties must have the full opportunity of a free choice of arbitrators, that freedom does not extend to the right to change the composition of the Tribunal subsequent to the commencement of the proceedings".

Yet article 5 made it clear that the composition of the Tribunal could be changed at any time by agreement between the parties. He was, however, unable to accept paragraph 23 as a whole, since he was opposed to the idea of institutional arbitration, believing that it should be purely contractual.

9. Mr. YEPES, too, preferred the words "once constituted" or "once finally constituted", since in certain cases the Tribunal became a joint organ of the parties, even before proceedings began.

10. Mr. SANDSTRÖM pointed out that not only in article 5, but also in article 7, dealing with withdrawal of arbitrators, the reference was to the time the proceedings began.

11. Mr. LAUTERPACHT felt that in the form suggested by Mr. Sandström, the sentence in question would be out of place. The purpose of the sentence which he (Mr. Lauterpacht) had proposed was to explain the preceding sentence, but that might be done equally well by inserting the word "unilaterally" after the words "the right to change".

12. After further discussion, Mr. SANDSTRÖM said that, in order to cut short the discussion, which had already gone on too long on what was, after all, only a minor point, he would withdraw his suggestion and propose instead the deletion of the whole of the third sentence reading: "The Tribunal, once constituted, ceases to be a mere organ of the parties".

13. Mr. ZOUREK supported Mr. Sandström's proposal.

Mr. Sandström's proposal was adopted by 6 votes to 2, with 2 abstentions.

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* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

14. Mr. LAUTERPACHT suggested that the word "unilaterally" be inserted in the previous sentence after the words "the right to change". As he had said, that would cover the point which he had been trying to make in the sentence which had now been deleted, and would also meet Mr. Zourek's objection that the text, as it stood, was not correct.

Mr. Lauterpacht's suggestion was adopted.

Paragraph 23, as amended, was approved by 6 votes to 2, with 2 abstentions.

Paragraph 24 (33)

Paragraph 24 was approved by 8 votes to 2.

Paragraph 25 (34)

Paragraph 25 was approved by 8 votes to 2.

Paragraph 26 (35)

15. The CHAIRMAN indicated that Mr. Alfaro had proposed an amendment to paragraph 26, but had unfortunately been unable to attend the meeting.

16. Mr. LAUTERPACHT suggested that for that reason, and also because the amendment needed rather careful consideration, discussion of it should be deferred.[1]

It was so agreed.

Paragraph 27 (36)

17. Mr. LIANG (Secretary to the Commission) pointed out that the meaning of the first sentence of paragraph 27 was not quite clear.[2]

18. Mr. LAUTERPACHT agreed, and said that he would re-word the sentence.

On that understanding, paragraph 27 was approved by 9 votes to 2.

Paragraph 28 (37)

19. Mr. SANDSTRÖM pointed out that there was no contradiction between the fourth and fifth sentences. The words "This was so, although" before the words "according to paragraph 2" should therefore be deleted.

20. Mr. LAUTERPACHT agreed.

Paragraph 28, as amended, was approved by 8 votes to 2, with 1 abstention.

Paragraph 29 (38)

21. Mr. SANDSTRÖM recalled that he had been absent during the discussion on the provisions relating to nullity of the award. He wished to place on record, therefore, that he dissociated himself from the decision to make it an absolute rule that the Tribunal's failure to state the reasons for its award should be a ground for nullity. Cases might well occur where the parties agreed in advance that no reasons for the award need be stated, and it would then be inadmissible for one of the parties to cite that to invoke nullity.

22. Mr. LAUTERPACHT felt that cases where the parties agreed that no reasons need be given for the award would be very rare. In any event, a party which had agreed that no reason need be given for the award was hardly likely to challenge its validity on that very ground.

23. Mr. YEPES felt that it was essential that the reasons for the award should be stated, and pointed out that the Commission had said so categorically in article 24, paragraph 2. He asked, however, what was meant by the word "apparent" in the sentence in paragraph 29 reading:

> "After considerable discussion it decided, having regard to the paramount requirement of finality, not to amplify — subject to one apparent exception — the grounds on which the annulment of the award may be sought".

24. Mr. LAUTERPACHT said that by that word he meant that the exception was not really an exception at all, because the Tribunal's failure to state the reasons for the award had been included within the notion of "a serious departure from a fundamental rule of procedure". If the word "apparent" were deleted, the text would imply that the Tribunal's failure to state the reasons for its award did not constitute a serious departure from a fundamental rule of procedure, as he believed Mr. Yepes considered that it did.

25. Mr. SANDSTRÖM asked whether, unless provision to the contrary were made in the comment, the paragraph to which Mr. Yepes had referred did not mean that the award would, in every case, have to state the reasons on which it was based, even if the parties were prepared to agree that it did not.

26. Mr. SPIROPOULOS said that that was the case. There was, however, nothing to prevent the parties concluding a new agreement, whereby, in effect, they undertook to accept the Tribunal's findings as having the force of an award, even if they did not properly constitute an award owing to their failure to state the reasons on which they were based.

Paragraph 29 was approved by 8 votes to 2.

Paragraph 30 (39)

27. Mr. YEPES recalled that it was he who had proposed that the nullity of the *compromis* or, generally, of the undertaking to arbitrate, should be made a reason of nullity of the award. Paragraph 30 gave the arguments which had been advanced against his proposal, but he did not think that any member of the Commis-

[1] See *infra* 230th meeting, para. 1.

[2] The last part of the first sentence originally read as follows: "... article 16 modifies somewhat the powers of the Tribunal in the matter of counterclaims."

sion had in fact advanced that contained in the last sentence, reading:

"Above all it is impossible to disregard the fact that the award as rendered gives expression to the true legal position with regard to the merits of the dispute."

28. Mr. SANDSTRÖM agreed, and proposed the deletion of that sentence and of the preceding sentence, reading:

"Moreover it was felt that the participation of the party concerned in the arbitral proceeding may fairly be regarded as having cured, to a large extent, any original invalidity of the instrument which served as the basis of the arbitration."

Both arguments were so feeble as to weaken, instead of strengthening, the case which the Commission was seeking to make.

29. Faris Bey el-KHOURI felt that the whole paragraph could be deleted. What was relevant to the draft on Arbitral Procedure was what the Commission had decided to insert in it, not what it had decided to omit from it.

30. The CHAIRMAN recalled that the question dealt with in paragraph 30 had been keenly discussed. He suggested that it would therefore be a mistake to omit all mention of it from the report, which was designed to bear upon the Commission's work as well as upon the texts it submitted.

31. Mr. ZOUREK recalled that he had supported Mr. Yepes' proposal, and that the only argument which had been advanced against it during the discussions was that it was closely connected with a complicated problem which the Commission had not at that time yet discussed. His reply to that argument was that the Commission must submit a complete draft, and it was regrettable that neither that nor any of the other considerations which had been put forward in favour of Mr. Yepes' proposal was mentioned in paragraph 30.

32. Mr. CÓRDOVA agreed with the Chairman that the Commission must indicate that it had not overlooked the question dealt with in paragraph 30. Its decision not to treat the nullity of the *compromis,* or, generally, of the undertaking to arbitrate, as a reason of nullity of the award was an important one, and the arguments stated in favour of it should be as convincing and as strongly worded as possible. For example, the qualifying words: "to a large extent" might be deleted from the penultimate sentence.

33. Mr. YEPES agreed with Mr. Zourek that many arguments had been advanced in favour of his proposal, and that the only one adduced against it had been that it was closely connected with a question which it had then been the intention to deal with later in the session, when the Commission took up the law of treaties. It was for that reason that he had withdrawn his proposal, which had subsequently been reintroduced by Mr. Zourek and rejected by a narrow margin. To be exact, the decision had not been so much to reject it as to omit it from the draft for the time being.

34. Mr. SCELLE felt that the arguments advanced in paragraph 30, taken together, were sufficient reply to those advanced in favour of Mr. Yepes' proposal.

35. Mr. SPIROPOULOS agreed with Faris Bey el-Khouri that paragraph 30 could well be deleted. It would be prudent to omit any reference to the question with which it dealt until the Commission had considered it in connexion with the law of treaties.

36. Mr. LAUTERPACHT said that the Commission's report would have no value unless it were persuasive, and it would not be persuasive if it failed to mention a question with so important a bearing on the draft as that dealt with in paragraph 30. Certainly, there were difficulties inherent in that question, as was clear from the fact that whereas Mr. Sandström wished the penultimate sentence to be deleted, Mr. Córdova considered that it was too weak. He still believed that his text struck a proper balance.

37. Mr. YEPES agreed that some mention of the question should be made, but said that he would vote against the General Rapporteur's text because it did not convey exactly what had been said.

38. Mr. ZOUREK supported Mr. Sandström's proposal that the last two sentences be deleted.

39. The CHAIRMAN put to the vote the proposal that the last sentence be deleted.

The proposal was adopted by 7 votes to none, with 4 abstentions.

40. The CHAIRMAN then put to the vote the proposal that the penultimate sentence be deleted.

The proposal was adopted by 6 votes to 5.

Paragraph 30, as amended, was approved by 5 votes to 2, with 4 abstentions.

41. Mr. CÓRDOVA said that he had voted against the amended text, because it was so weak as to be worthless.

Paragraph 31 (40)

42. At Mr. ZOUREK's suggestion, with which Mr. LAUTERPACHT agreed, *it was agreed to delete the phrase "in this connexion" after the words "Reference may be made".*

Paragraph 31 was approved.

Paragraph 32 (41)

Paragraph 32 was approved by 9 votes to none, with 2 abstentions.

Paragraph 33 (42)

It was agreed that the word "undertake" in the third sentence should be replaced by the word "arbitrate".

Paragraph 33 was approved by 8 votes to 3, with 1 abstention.

Paragraph 34 (43)

Paragraph 34 was approved unanimously.

Paragraph 35 (44)

43. Mr. ZOUREK was unable to accept the distinction between an arbitral award and the principles of international law.

Paragraph 35 was adopted by 8 votes to 2, with 1 abstention.

Paragraph 36 (45)

44. At the suggestion of Mr. YEPES, supported by Mr. LAUTERPACHT, *it was agreed* that the corresponding wording of the United Nations Charter "the principal judicial organ" should be used instead of the phrase "the highest judicial organ of the United Nations", qualifying the International Court of Justice.

Paragraph 36 was approved by 9 votes to 2.

Paragraph 37 (46)

45. Mr. LIANG (Secretary to the Commission) found paragraph 37 a little difficult to understand at first reading.[3] He did not, for example, like the phrase "regularizing the situation" at the end of the first sentence, because there was nothing, to his mind, irregular in a State not being a Party to the Statute of the International Court of Justice. He therefore suggested that the first sentence might be amended to read somewhat as follows:

> "The Commission examined the question whether in those cases in which one or both parties are not parties to the Statute of the International Court of Justice, it is necessary to provide for some special procedure whereby the parties might gain access to the Court".

46. Mr. LAUTERPACHT agreed that the paragraph needed re-drafting.

47. Mr. ZOUREK said that there seemed to be no need to make special provision for States not Parties to the Statute of the International Court of Justice. Article 35 of that Statute laid down the conditions under which such States could have access to the Court.

48. The CHAIRMAN suggested that the Commission might take up the paragraph again when the Special Rapporteur had re-drafted it.

It was so agreed.[4]

Paragraph 38 (47)

49. Mr. SANDSTRÖM asked whether there was any accepted English expression equivalent to the French "*descente sur les lieux*".

50. Mr. LAUTERPACHT said that he knew of none better than "visits to the area", used in the draft report. He wondered whether the Statute of the International Court of Justice contained any equivalent phrase.

Subject to a decision by the Drafting Committee on that point,

Paragraph 38 was approved by 9 votes to none, with 2 abstentions.

Paragraph 39 (48)

51. Mr. SANDSTRÖM, referring to the fourth sentence, proposed that the words "the beginning of" should be inserted after the words "subsequent to" in the English text to make it conform with the French.

It was so agreed.

Paragraph 39 was adopted by 7 votes to 2.

Paragraph 40 (49)

Paragraph 40 was approved by 7 votes to 1, with 1 abstention.

Paragraph 41 (50)

52. Mr. ZOUREK pointed out that in paragraph 39 it was stated that, apart from certain fundamental considerations, the procedure formulated in the draft on Arbitral Procedure came into operation "only to the extent to which the parties have not adopted different provisions not inconsistent with the basic considerations as stated". Yet in paragraph 41 it was stated that some articles of the draft on Arbitral Procedure remained operative even after the two parties to the arbitration had agreed to waive them. There seemed to him to be an obvious contradiction.

53. Mr. LAUTERPACHT said that that issue had been raised frequently during the earlier discussions. The rule that, once arbitration had begun, the tribunal would have to disregard an agreement contrary to the fundamental purpose of the arbitration was of great importance. If he were to reply fully to Mr. Zourek, however, it would involve re-opening the discussion.

Paragraph 41 was approved by 7 votes to 2.

Paragraph 42 (51)

Paragraph 42 was approved by 6 votes to 2.

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[3] Original paragraph 37 read as follows:

"37. The Commission examined the question whether in those cases in which one or both parties are not parties to the Statute of the International Court of Justice it is necessary to provide for some procedure regularizing the situation. The Commission considered that the articles adopted by it on arbitral procedure were sufficient for the purpose — subject to the power of the Court to regulate, in accordance with Article 35 of its Statute, the question of costs."

[4] See *infra*, 231st meeting, para 74.

Paragraph 43 (52)

Paragraph 43 was approved by 8 votes to 2.

SECTION V. ACTION RECOMMENDED WITH REGARD TO THE FINAL DRAFT

54. Mr. KOZHEVNIKOV thought that it would be premature for the Commission to discuss what action it should recommend with regard to the final draft. It was first necessary formally to adopt the text of the final draft. He therefore formally moved that consideration of Section V be deferred.

55. Mr. LAUTERPACHT had been under the impression that the text of the final draft, as annexed to the relevant Chapter of the Commission's draft report on its fifth session, had been adopted.

56. The CHAIRMAN's recollection was that the articles had been approved individually, but that there had been no vote on the final draft as a whole.

57. Mr. SCELLE suggested that the Commission should therefore vote forthwith on the final draft as a whole.

58. The CHAIRMAN thought that, as both Mr. Alfaro and Mr. Amado were absent, it might be preferable to postpone the vote until the next meeting.

59. Mr. SPIROPOULOS agreed with the Chairman, but thought that there was no reason to defer consideration of section V. If the Commission adopted the final draft, the discussion on section V would still have to be held; if it did not adopt the final draft, then the whole of the discussion of the chapter on arbitral procedure in the Commission's draft report would have been useless.

It was agreed by 8 votes to 2, with 1 abstention, to proceed with the discussion on Section V.

Paragraph 44 (53)

Paragraph 44 was approved by 9 votes to 1, with 1 abstention.

Paragraph 45 (54)

Paragraph 45 was approved by 9 votes to 2.

Paragraph 46 (55)[5]

60. Mr. KOZHEVNIKOV pointed out that the Commission was asked to make a recommendation, and requested the General Rapporteur to explain the scope and implications of the paragraph.

61. Mr. LAUTERPACHT said that the Commission was bound to make some recommendation to the General Assembly. The sense of the paragraph was that it recommended that the General Assembly should decide between two possible courses of action.

62. Mr. KOZHEVNIKOV, referring to article 23 of the Commission's Statute, said that he thought a more appropriate recommendation would be, in the terms of paragraph 1 (*a*) of that article, that the General Assembly should " take no action, the report having already been published ; ". His reason for so thinking was that several members of the Commission considered that the final draft on Arbitral Procedure included innovations which went beyond the scope of the Commission's terms of reference. Many governments, he was sure, would object to those innovations, and it was therefore premature to recommend either that a convention be concluded or that a conference be convened.

63. Mr. LIANG (Secretary to the Commission) also referring to article 23 of the Commission's Statute, said that the procedures laid down in paragraphs 1 (*c*) and 1 (*d*) thereof were intended to operate under different circumstances. If the subject matter of a convention was expected to concern States that were not Members of the United Nations, it was appropriate that a conference be convoked to conclude the convention ; otherwise, it was more convenient, following the procedure laid down in paragraph 1 (*c*), to recommend the draft to States Members with a view to the conclusion of the convention.

64. By stating no opinion in paragraph 46 of its draft report as to which of those two courses might be appropriate in the case of the draft on Arbitral Procedure, the Commission gave the impression that it had no views on the matter. He thought, however, that the Commission ought either to make a single positive recommendation, or at least to give some guidance to the General Assembly.

65. Mr. HSU agreed that the convocation of a Conference, as provided for in paragraph 1 (*d*) of article 23 of the Commission's Statute, was particularly appropriate when issues with grave political implications had to be considered. In his view, the procedure laid down in paragraph 1 (*c*) would be more appropriate for the draft on Arbitral Procedure.

66. Mr. LAUTERPACHT considered that the choice between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*) depended on the urgency of the matter under consideration. If the matter was urgent, a conference would be preferable. The question of urgency, however, was normally a political issue, and therefore one for the General Assembly rather than the Commission. He agreed that it would be desirable to state clearly in the report why the Commission thought that the General Assembly rather than the Commission should take the decision.

[5] Original paragraph 46 read as follows :

" 46. In the opinion of the Commission the Final Draft as adopted calls for action contemplated in either (c) or (d) of article 23, that is to say, that the General Assembly should either recommend the Draft to Member States with a view to the conclusion of a convention or that it should convoke a conference invited to conclude a convention on arbitral procedure. This is the formal recommendation which the Commission now makes under articles 16 (j) and 23 of its Statute."

67. Referring to Mr. Kozhevnikov's suggestion that the Commission should recommend that the General Assembly take no action on the final draft on Arbitral Procedure, he agreed that a similar recommendation had been made in other cases, but as was made clear in paragraph 47, it was the Commission's view that the conclusion of a convention on arbitral procedure would be highly desirable. Due consideration of the final draft on Arbitral Procedure — which could be given by the General Assembly alone — was therefore an important and urgent matter concerning both the pacific settlement of international disputes and the maintenance of good faith between the nations.

68. Mr. CÓRDOVA said that the actual decision between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*) of article 23 of the Commission's Statute was one for the General Assembly, but in his view the Commission should recommend the latter course, which would at least force a full discussion of the matter. If the former course were followed, it was possible that there might be no results at all.

69. Mr. SPIROPOULOS reminded the Commission that the final draft on Arbitral Procedure would be the first text to be sent by the Commission to the General Assembly with a recommendation for action. The General Assembly might wish to take the matter up itself, and perhaps refer it to the Sixth Committee for consideration. He therefore favoured the course suggested by the General Rapporteur, namely, to leave the General Assembly with a choice of alternatives.

70. Mr. HSU felt that the Commission ought to make a practical and appropriate recommendation. If, for political reasons, the adoption of a convention on arbitral procedure was a matter of urgency, then the convocation of a conference would be the appropriate course, and the Commission should recommend it. If, on the other hand, the importance of concluding a convention rested on other considerations, there was no need for the General Assembly to do more than recommend the final draft to States Members with a view to their concluding a convention. He personally thought that the latter course, which had been followed in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, was the more normal. It would mean the General Assembly's adopting an appropriate report and opening a convention immediately for signature.

71. Mr. CÓRDOVA asked exactly what would be entailed by the General Assembly's recommending a draft to States Members with a view to their concluding a convention — the procedure laid down in paragraph 1 (*c*) of article 23 of the Statute. Did it mean simply that the draft would be sent to States Members for their consideration, or did it establish a definite procedure for opening a convention for signature? It would be pointless to recommend it if it meant only the former.

72. Mr. KOZHEVNIKOV said that in his view there was no need for the Commission to submit a specific recommendation to the General Assembly. It would be better to be more modest, and simply to state that the Commission had completed a certain task, and was handing in the results for consideration by the General Assembly.

73. Mr. YEPES said that it would appear exceedingly strange if the Commission made no recommendations about the future of a piece of work that it had needed several years to complete. He emphasized, however, that the final draft on Arbitral Procedure was in fact a draft, rather than the final text of a convention. That being so, he thought that the General Assembly should be left free to choose whichever procedure for dealing with it it thought most appropriate.

74. Mr. SPIROPOULOS pointed out that article 23 of the Commission's Statute referred to the codification of international law. He considered that its wording meant that the Commission, when sending a final draft to the General Assembly, was under an obligation to state which of the four courses listed in paragraph 1 of that article the General Assembly ought, in its view, to follow. But article 23 had not been applied before, and he therefore thought that the Commission should leave it to the General Assembly to choose between the procedure laid down in paragraph 1 (*c*) and that laid down in paragraph 1 (*d*), while at the same time stressing its view that the conclusion of a convention would be highly desirable.

75. He also pointed out that final drafts of proposals relating to the development of international law were covered by article 16 of the Commission's Statute; it was clearly obligatory on the Commission to submit its recommendations with such drafts to the General Assembly.

76. Mr. ZOUREK said that members had argued in favour of the adoption of paragraph 46 of the draft report because it was a matter of urgency that a convention on arbitral procedure should be adopted. That argument seemed unsound; for arbitration had existed for a long time without any convention, and the pacific solution of international disputes was already regulated by many other international instruments. The General Assembly, therefore, should be left to decide what action it wished to take on the final draft on Arbitral Procedure. The Commission should not do more than invite the Assembly's attention to sub-paragraphs 1 (*a*) and 1 (*b*) of Article 23 of its Statute, according to which the General Assembly might either take no action or take note of or adopt a report by resolution.

77. Mr. SCELLE was not clear about the exact purport of the four courses enumerated in paragraph 1 of article 23 of the Commission's Statute. Was the adoption of a report by resolution, the course laid down in paragraph 1 (*b*), stronger than the recommendation of a draft to States Members, the course laid down in paragraph 1 (*c*)? And was the latter course in turn stronger than that suggested in paragraph 1 (*d*), namely, the mere convocation of a conference without any recommendation or adoption of a draft? If the General

Assembly's recommendation of a draft to Members with a view to the conclusion of a convention meant that the draft must be adopted and opened for signature, then it seemed to him that the Commission ought to recommend that course to the General Assembly.

78. Mr. KOZHEVNIKOV considered that the Commission should not overestimate the importance of the work it had done. In his opinion, article 23 of the Commission's Statute was not mandatory. But in view of the difference of opinion on the matter, he thought that the Commission should first decide whether to make a recommendation or not.

79. Mr. SPIROPOULOS thought that Mr. Kozhevnikov's suggestion was very reasonable, although he disagreed with his interpretation of article 23 ; surely the enumeration of four possible courses in paragraph 1 of the article meant that a choice had to be made between them.

80. He thought that if it were merely a question of the codification of international law, nothing more would normally be desired of the General Assembly than the adoption of a report by resolution. But there were innovations in the final draft on Arbitral Procedure ; it was therefore essential that the adoption of the draft by the General Assembly should be followed by its signature by governments.

81. He supported the text of paragraph 46 of the draft report because, although it was very desirable that a convention on arbitral procedure be concluded, it was not a question of extreme urgency, on the same plane, as, for example, the conclusion of an armistice.

82. Mr. CÓRDOVA said that the Commission should first decide on what interpretation it wished to place on article 23 of its Statute.

83. Mr. YEPES said that article 22 of the Statute made it obligatory on the Commission to prepare a final draft, an explanatory report and recommendations to be submitted through the Secretary-General to the General Assembly. Mr. Spiropoulos was therefore right in saying that recommendations were obligatory.

84. Mr. KOZHEVNIKOV said that he failed to find any proof that it was mandatory on the Commission to make recommendations to the General Assembly. The meaning of article 23 was clearly that if the Commission were to make any recommendation to the General Assembly, it should choose between the four courses enumerated.

It was decided by 8 votes to 2 that the Commission should attach to its report to the General Assembly a recommendation concerning the action the latter should take on the final draft on Arbitral Procedure.

The meeting rose at 1 p.m.

230th MEETING

Monday, 3 August 1953, at 2.45 p.m.

CONTENTS

Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER II : ARBITRAL PROCEDURE (A/CN.4/L.45) * (*continued*)

Paragraph 26 (35) **
(resumed from the 229th meeting) [1]

1. The CHAIRMAN invited the Commission to take up paragraph 26, to which Mr. Alfaro had proposed an addition reading :

> " It may be observed that the only elements of a *compromis* classified as obligatory by article 9 are those enumerated in paragraphs (*a*), (*b*) and (*c*) thereof, and that among the particulars classified as optional in paragraphs (1) to (10), some are indispensable to carry on an arbitration. The reason the Commission had for not classifying such particulars as obligatory is that provision is made therefor in other articles of the draft. Thus, for instance, if the Parties should omit in the *compromis* one or more of the particulars referred to in paragraphs (1) to (7), the Tribunal would apply articles 12, 13, 23 and 25 of the draft and the arbitration could be carried out without any difficulty."

2. Mr. ALFARO recalled that article 9 of the draft on Arbitral Procedure listed a number of particulars to be specified in the *compromis*, only three of which were listed as mandatory for the parties. In order to avoid unnecessary confusion, the Commission should explain

* Mimeographed document only. Incorporated with drafting changes in the " Report " of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the " Report " of the Commission.

[1] See *supra*, 229th meeting, paras. 15-16.

that the division took into account the fact that provisions that would operate in the absence of the optional particulars appeared elsewhere in the draft. For example, it was essential that the law to be applied by the Tribunal should be specified in the *compromis*; if it were not, article 12 of the draft would operate and the law the Tribunal must apply would be determined thereby.

3. Mr. LAUTERPACHT doubted whether Mr. Alfaro's amendment was either necessary or accurate. It stated that some of the optional particulars in article 9 of the draft on Arbitral Procedure were " indispensable to carry on an arbitration ". That, he thought, was an untrue statement, as it was not indispensable to an arbitration for a *compromis* to specify, for example, the law to be applied by the tribunal, the power of the tribunal to make recommendations, the tribunal's quorum, the majority required, the time limits, or the right of members to attach dissenting opinions to the award. He agreed that the *compromis* should specify the procedure to be followed by the tribunal; but if it did not, it was clearly laid down in article 13 that the tribunal was competent to formulate its own rules.

4. Mr. ALFARO said that he did not claim that his amendment was indispensable, but that it might be useful in the sense that it would prevent other people from falling into misunderstandings similar to those certain members of the Commission had entertained. He thought that the report should demonstrate that article 9 had been carefully drafted, and that it should note in respect of the particulars mentioned as optional that if Nos. 1 and 2 did not appear in a *compromis,* then article 12 would apply; that if Nos. 3, 4 and 5 did not appear, then article 13 would apply; that if No. 6 did not appear, then article 23 would apply; and that if No. 7 did not appear, article 25 would apply. He agreed that his amendment might need redrafting.

5. Mr. YEPES recollected that in intention Mr. Alfaro's amendment was identical with certain suggestions that he (Mr. Yepes) had made during the Commission's discussion of article 9.

6. Mr. LAUTERPACHT maintained that Mr. Alfaro's amendment was inaccurate. He thought that the gist of what it said was already to be found in paragraph 33 of the draft report, where it was stated:

> " It is evident that if the Tribunal has the power, in the absence of agreement between the parties, to lay down the entire procedure, it is also enabled — and bound — to do so with regard to any particular question of procedure."

7. Mr. ALFARO did not consider that paragraph 33 of the draft report covered the points made in his amendment. He felt that any person might be just as surprised at the division made between the obligatory and the optional particulars in the *compromis* as members of the Commission had been, and that some explanation should be given.

8. Mr. HSU suggested that the general rapporteur might perhaps be able to suggest a text that would meet Mr. Alfaro's excellent intentions.

9. Mr. LAUTERPACHT suggested that an addition be made to paragraph 26, reading somewhat as follows:

> " Reference is made here to paragraph 33, which draws attention to the powers of the Tribunal to lay down any rules of procedure not included in the *compromis* ".

10. Mr. ALFARO said that that would not do. His concern was not with the powers of the Tribunal to interpret the *compromis,* but with the confused impression that article 9 would make on the reader because of the form in which it was cast.

11. Mr. SANDSTRÖM said that he had no objection in principle to Mr. Alfaro's suggestion, though the addition he had proposed certainly needed redrafting. For example, if it were agreed, following Mr. Alfaro's text, that certain particulars classified in article 9 as optional were in fact indispensable to carry on an arbitration, the reader would be even more confused, for it would not be apparent to him why those particulars had not been placed among the obligatory features of the *compromis.*

12. Mr. SCELLE recollected that he had been among those who had not been greatly enamoured of article 9. If the Tribunal was competent to make any necessary additions to an inadequate *compromis,* then all the particulars in article 9 were, in logic, on the same level, and the distinction made between those that were mandatory and those that were optional was meaningless. He considered, therefore, that the commentary on article 9 should be made as short as possible, so as not to draw embarrassing attention to the article.

13. Mr. ALFARO withdrew his amendment, as it appeared to him that it found favour neither with the Special Rapporteur nor with the General Rapporteur.

14. Mr. LAUTERPACHT thereupon withdrew his suggestion concerning an additional sentence to paragraph 26.

Paragraph 26 was approved by 9 votes to 2, with 1 abstention.

Paragraph 46 (55) (resumed from the 229th meeting)

15. Mr. LAUTERPACHT said that, in the light of the Commission's discussion at its 229th meeting,[2] he had drafted a new text for paragraph 46 reading:

> " 46. In the opinion of the Commission the draft Code as adopted calls for action, on the part of the General Assembly, contemplated in paragraph (c) of article 23 of the Statute of the Commission, namely, " to recommend the draft to Members with a view to the conclusion of a convention ". The Commission makes a formal recommendation to that effect. It is

[2] *Ibid.*, paras. 60-84.

understood that, in recommending the draft to Member States with a view to the conclusion of a convention, the General Assembly would be giving its approval to the draft Code which, after it has been completed by the addition of final clauses, would become a convention approved by the General Assembly and open to signature or accession by Members of the United Nations and, possibly, other States."

16. The draft on Arbitral Procedure would be the first final draft to be submitted to the General Assembly by the Commission. The procedure to be followed was therefore important. In his original draft he had contemplated alternative courses that the General Assembly might take. That proposal had been justly criticized, and he therefore suggested that the Commission should make up its own mind about how it wished its draft on arbitral procedure to be treated, rather than leave the decision to the General Assembly.

17. It would be unwise to suggest that the draft on Arbitral Procedure be submitted to a special conference. He agreed that the draft was important and its subject urgent, but he doubted whether it was so urgent as to justify summoning an international conference, which might, indeed, prove something of an anti-climax.

18. Mere adoption of the Commission's report by a General Assembly resolution would have no legal effect. The resolution would not be binding on States and would thus not be relevant to a matter in respect of which precise undertakings were desirable.

19. He therefore concluded that the Commission should recommend the General Assembly to commend the draft on Arbitral Procedure to States Members, with a view to its adoption as a convention. The wording of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute was, however, imprecise. Mere recommendation of the draft code would be inadequate. It must be approved in such a way as to bring the Commission's work to fruition. The draft on Arbitral Procedure should therefore be not merely approved, but also completed by the addition of the necessary final clauses, and opened for signature or accession by States Members of the United Nations and other States.

20. Mr. SANDSTRÖM said that, regardless of whether the draft it submitted was in the nature of a codification or of a development of international law, the Commission was under an obligation to make a recommendation to the General Assembly. The possible recommendations enumerated in article 23 of the Commission's Statute applied to both cases, but the precise course to be recommended depended on the nature of the draft.

21. Merely to note the report, the course which Mr. Kozhevnikov recommended, would be inconceivable. That would simply mean that the draft would be shelved. The second course suggested in article 23, namely, the adoption of a report by resolution of the General Assembly, was in his view applicable only to drafts which represented a codification of existing law in respect of which no convention was necessary, the law being already known. The commendation of the draft to States Members of the United Nations and the convocation of a conference, both courses intended to result in the signature of a new convention, were applicable to drafts containing developments of, or innovations in, international law. The Secretary had probably been justified in stating [3] that the convocation of a diplomatic conference was more appropriate for general conventions concerning many States, including States not members of the United Nations, than for conventions concerning only Member States, but it was difficult to choose between the two courses, and he (Mr. Sandström) was therefore inclined to accept the General Rapporteur's original draft.

22. Mr. SCELLE said that the essence of the development of international law was that it was a systematization of existing law. The sense of the Commission's draft report was that codification was a necessary element in the development of law, and what the Commission had done was to rearrange existing principles rather than to invent new ones.

23. If a draft submitted by the Commission to the General Assembly were truly a codification in the sense of being a record of existing law, then there would be no need for the General Assembly to discuss it; a resolution of approval at most would be necessary. But he agreed with Mr. Sandström that drafts constituting a development of international law in any sense of the word called for the conclusion of international conventions.

24. If the Commission were to recommend to the General Assembly that a special conference be called to consider the draft on Arbitral Procedure, it would in effect be recommending that its work be gone over again by that conference. A plenipotentiary conference would probably produce a different draft, which would again give rise to protracted discussions; the cause of arbitration would certainly not be thus advanced. The Commission should ask the General Assembly to approve its work in the manner which would most speedily result in the conclusion of a convention. He therefore wholeheartedly supported the General Rapporteur's new text.

25. Mr. YEPES said that article 23 of the Commission's Statute suggested alternative courses, but they were complementary and not mutually exclusive, in so far as the first course (sub-paragraph *1* (a)), by which the General Assembly would merely take note of the report, was negative, and therefore inappropriate in the case in point. Adoption of the Commission's report by resolution was certainly desirable, particularly in conjunction with the recommendation of the draft on arbitral procedure to States Members of the United Nations; but the convening of a special conference was complementary to the adoption of the report and the commendation of the draft. All three courses should

[3] *Ibid.*, paras. 63-64.

therefore be recommended to the General Assembly.

26. But even the mere adoption of the Commission's report by resolution would not be so useless as Mr. Lauterpacht feared, for that course would not preclude subsequent ratification of the draft, which, once adopted, would be of considerable theoretical and doctrinal value even if unratified.

27. He therefore suggested that paragraph 46 should read as follows:

> " In accordance with paragraph 1 (*b*) of article 23 of the Commission's Statute, the Commission decided to recommend to the General Assembly, first, that the General Assembly should adopt the draft on arbitral procedure, and secondly that the General Assembly should recommend to States Members of the United Nations that a convention on the lines of the draft be concluded whether after the calling of a special conference or not."

28. Mr. HSU supported the new text proposed by the General Rapporteur.

29. His reading of article 23 of the Statute was based on his recollection of the discussions when the Committee on the Codification of International Law had been drafting it in 1947. At that time it had at first been suggested that all drafts prepared by the Commission should be cast in the form of conventions. But some had held that conventions might in some cases be undesirable, and that a General Assembly resolution would be enough. A compromise had therefore been reached to the effect that if the draft concerned a codification of international law a resolution of the General Assembly would be sufficient, as a law thus codified must be assumed to be already binding; but that if the draft concerned a development of international law a convention would be necessary. It had, however, also been decided that if a new problem were of such political complexity that the General Assembly would not wish to deal with it alone, then it would be necessary to call a special diplomatic conference. It had been accepted that, in certain cases of codification the Commission's draft would not require anything more of the General Assembly than that it take note of it.

30. In his opinion, it followed from all those considerations that, as the draft on Arbitral Procedure included elements relating to the development of international law, a convention was necessary; but he did not think that it raised such issues as to make a special conference necessary.

31. Nevertheless, he felt some slight misgivings about the draft report. Mr. Lauterpacht had said that the provision in the draft on Arbitral Procedure for declaring an award null was a mere codification of existing law. At the same time, the provisions according to which States were obliged to honour previous undertakings to go to arbitration had been described as new law. There seemed to him to be some inconsistency in that approach, and consequently a possibility that the Commission might come to the conclusion, if it took the trouble to re-examine the draft, that none of its provisions were developments, but that all were codifications, of international laws.

32. Mr. LIANG (Secretary to the Commission) said that Mr. Spiropoulos had been correct in stating that the four alternative courses enumerated in paragraph 1 of article 23 of the Commission's Statute were mutually exclusive so far as a recommendation emanating from the Commission was concerned. [4] They were, however, cumulative in the sense that the recommendation of the draft to States Members of the United Nations with a view to the conclusion of a convention necessarily included the General Assembly's taking note of and adopting the Commission's report, although the latter action did not necessarily imply the former. Thus, if the Commission wished to suggest that the General Assembly recommend a draft with a view to the conclusion of a convention, it was not necessary for it also to suggest that the General Assembly take note of or adopt the report by resolution, for all action taken by the General Assembly entailed the adoption of a resolution.

33. When the Commission's Statute had been adopted in 1947, the General Assembly had had little experience of preparing conventions, and the possibility that a special conference might be called to conclude a convention had been suggested and approved mainly on the assumption that the General Assembly would be too busy to take the necessary action itself. It had, however, since shown itself to be both able and willing to formulate and adopt conventions. Thus, in practice there was very little difference between the General Assembly's recommending a draft to States Members with a view to the conclusion of a convention, and its calling a diplomatic conference for the purpose.

34. Consequently, the General Rapporteur's new text seemed satisfactory, particularly as it made it clear that States that were not members of the United Nations might also accede to the convention.

35. Mr. KOZHEVNIKOV was still convinced that there was nothing in the Commission's Statute that made it obligatory on the Commission to make recommendations to the General Assembly; a right was not the same thing as an obligation. Nevertheless, the Commission had decided that it would exercise its right in the present instance.

36. The question, therefore, was to decide what recommendation to make. It was clear to him that the draft on Arbitral Procedure was not so much a codification of existing law as a statement of new law. In support of that assertion he quoted paragraph 24 in chapter II of the Commission's report covering the work of its fourth session from 4 June — 8 August 1952, which read:

> " 24. Two currents of opinion were represented in the Commission. The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration,

[4] *Ibid.*, paras. 74-75.

but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking." [5]

37. It was clear that the conception described as judicial arbitration was new and not traditional, though the Special Rapporteur's eloquence had persuaded members to accept his thesis.

38. In such circumstances, it would not be right for the Commission to suggest to the General Assembly that it recommend the draft to States Members with a view to the conclusion of a convention. The draft should be reconsidered, and the views of governments, legal institutions and societies, and similar organizations sought. The Commission's work should not be evaluated solely in accordance with its authors' opinions, but in the light of those of the public and of society in general.

39. It should also be borne in mind that the draft on Arbitral Procedure had not been adopted by the Commission unanimously. Consequently, it could not even be said that all academic international lawyers were in agreement about its terms. He concluded, therefore, that the Commission could do no more than recommend to the General Assembly that it take no action in the matter.

40. Mr. ZOUREK said that it had been repeatedly stated that the submission of a recommendation to the General Assembly was obligatory in the case of the draft on Arbitral Procedure, because the latter was the first draft convention to be submitted to the General Assembly by the Commission. He reminded the Commission, however, that it had submitted a draft Code of Offences against the Peace and Security of Mankind, in respect of which no recommendation had been made.

41. He was glad to note that in the chapter on the régime of the high seas in the Commission's draft report, the General Rapporteur had suggested that the Commission should recommend that the General Assembly " take no action, the report having already been published ". In the case of the draft on Arbitral Procedure there was no urgency, as a corpus of international law on the subject already existed, and the draft would in any event come up against many objections in the General Assembly and elsewhere. The procedure suggested was hasty and unwarranted. It would be better for the Commission to await the reaction of governments, of delegations to the General Assembly and of legal circles in general. It should approve the wisdom of the suggestion made by the General Rapporteur in respect of the chapter in his draft report concerning the régime of the high seas, and follow it in the present case.

42. Mr. ALFARO said that when he had read the text proposed for paragraph 46 by the General Rapporteur in his draft report, it had been his intention to submit an amendment along the exact lines of the new text which Mr. Lauterpacht now proposed. That text he supported as it stood, for he shared the views which had been so admirably expressed by Mr. Scelle. The only proper, expeditious and fruitful course was that provided for in article 23, sub-paragraph 1 (*c*), of the Commission's Statute, namely for the General Assembly " to recommend the draft to Members with a view to the conclusion of a convention ". Any other course would be a mere waste of time.

43. Mr. SCELLE wished to add one or two arguments to those he had already put forward. The draft on Arbitral Procedure was the first text which the Commission had ever prepared in the form of a convention. If it did not recommend the General Assembly to submit it for the favourable consideration of States Members of the United Nations with a view to the conclusion of a convention, it would never make a similar recommendation in respect of any other convention which it subsequently prepared. Mr. Kozhevnikov had suggested that the Commission was placing too much confidence in its work, but it was the General Assembly which had itself placed confidence in the Commission by inserting in its Statute a provision — with the intention that it should, where appropriate, be applied — giving it the right to make the recommendation in question.

44. If a recommendation along the lines of sub-paragraph 1 (*c*) were adopted, all Members of the United Nations would have an opportunity of commenting on the draft before it was submitted for their favourable consideration with a view to the conclusion of a convention. It was therefore quite wrong to suggest that that course would deprive States of the opportunity of commenting.

45. If the Commission merely recommended the General Assembly to convoke a conference to conclude a convention, in accordance with sub-paragraph 1 (*d*) of article 23 of its Statute, it would not only be proposing a course which, as Mr. Alfaro had said, would waste much time, but it would also be indicating that it was content to play a much lesser role than the General Assembly itself had given it.

46. Mr. SPIROPOULOS felt that if the authors of the Statute, among whom were several present members of the Commission, could have foreseen the present discussion, they would have omitted article 23 altogether. They had had, he recollected, no relevant experience to guide them, and their aim had been to provide the Commission with certain general directives as to the procedure it should follow; they had certainly never meant article 23 to be analysed and dissected word by word in the way in which certain members of the Commission had done.

[5] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163). Also in *Yearbook of the International Law Commission, 1952*, vol. I.

47. The great majority of the Commission were in favour of the draft on Arbitral Procedure being made into a convention. It was the responsibility of the General Assembly to decide in what manner that could best be done and whatever recommendations the Commission made in that respect, there was no guarantee whatsoever that the General Assembly would accept them. Rather was the reverse true, as experience showed. The General Assembly was, in fact, unpredictable. For example, it had instructed the Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and to prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded to those principles. The Commission had carried out the General Assembly's instructions, and it might have been expected that its report on the subject, approved almost unanimously, would have been adopted by the General Assembly. The General Assembly, however, had done nothing of the kind; it had merely taken note of the report. The same had occurred in the case of the Commission's work on reservations to multilateral conventions. On the other hand, the Commission had abandoned the attempt to define aggression, whereupon the General Assembly had itself attempted the task. There was no point, therefore, in attempting to lay down, in anything but very general terms, the procedure to be followed, and he suggested that it was not necessary or wise to go much beyond what was said in the first sentence of article 47, namely, that, in the light of its study of the subject over a period of years, the Commission believed that a convention on arbitral procedure, on the basis provided by the draft, was highly desirable.

48. Mr. AMADO said that, in view of his experience of the General Assembly, it was natural that he should support those who had avoided undue optimism and expressed a realistic view. He felt, however, that the Commission could go further than make a recommendation to the General Assembly along the lines of subparagraph 1 (*a*) of article 23 of its Statute, as suggested by Mr. Kozhevnikov, and although he personally would have preferred a simple statement such as was contained in the first sentence of paragraph 47, he was prepared to accept a text along the lines of that now proposed by the General Rapporteur. He would merely propose that the word " formal " be deleted from the second sentence of that text together with the whole of the last sentence, since the latter went into unnecessary detail, and in any case its meaning was far from clear. How would the draft Code " become a convention approved by the General Assembly " merely by the addition of final clauses, and by whom were those clauses to be added?

49. Mr. SANDSTRÖM agreed with Mr. Spiropoulos that a very general text was all that was required, and proposed that paragraph 46 be replaced by the following text:

" The Commission decided to recommend the draft Code to the General Assembly with a view to the conclusion of a convention ".

50. Mr. YEPES felt that it was essential to refer to the relevant provisions of the Statute, since in submitting recommendations the Commission was obeying the strict instructions laid down therein.

51. Mr. SPIROPOULOS pointed out that the Commission had already approved paragraphs 44 and 45 of the draft report, in which copious references were made to the relevant provisions of the Statute. The text proposed by Mr. Sandström would follow very appropriately on paragraph 45.

52. He agreed with Mr. Amado that the last sentence of the new text submitted by the General Rapporteur was confused, and he also failed to see its precise relation to the remainder.

53. Mr. AMADO said that he could accept Mr. Sandström's proposal, but not Mr. Yepes' or the last sentence of the new text submitted by the General Rapporteur. The Commission had the right to submit recommendations to the General Assembly, but it had no right to dictate what procedure the General Assembly should follow.

54. Mr. LAUTERPACHT said that he had the same general objections to Mr. Sandström's and Mr. Spiropoulos' proposals. He saw no reason why the Commission should shirk the responsibilities laid upon it by article 22 of its Statute. That article stated clearly that "The Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly ". Article 23 indicated the different forms which those recommendations could take. He did not, however, wish to rely on that argument, or on the fact that the Commission had already decided at its previous meeting to submit its recommendations in accordance with article 23. The matter was of much greater importance. He could not understand why the Commission should now lack the courage to say what it considered the General Assembly should do with a draft which it had taken three years' work to prepare. If the Commission failed to make a positive recommendation in the present case, it would be unable to do so in any other, with adverse results for all its future work. He could not accept the argument that the alternative courses which other members urged were more " prudent " or more " realistic "; it was quite possible to hold different views as to what was the most prudent or realistic course, and in his view it would be realistic to face the fact that unless the Commission said what it wanted the General Assembly to do, the General Assembly might well do nothing.

55. As the whole question was so important, he suggested that it might be desirable to give members the opportunity of pondering it overnight before proceeding to the vote.

56. Mr. LIANG (Secretary to the Commission) suggested that it was purely a matter of policy vis-à-vis

the General Assembly whether the Commission adopted some general wording, as proposed by Mr. Sandström and Mr. Spiropoulos, or whether it adopted more detailed wording such as that contained in the last sentence of Mr. Lauterpacht's new proposal ; the results, so far as the draft code was concerned, would be the same ; the General Assembly would discuss it, probably in detail, and would take whatever further action it thought fit.

57. The last sentence of Mr. Lauterpacht's new proposal was an interpretation of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute, and it was an interpretation which was perfectly in accordance with the procedure which the General Assembly had adopted in the past. For example, article 105, paragraph 3, of the Charter provided that the General Assembly " may propose conventions to the Members of the United Nations " with a view to securing the privileges and immunities necessary for the fulfilment of the Organization's purposes ; and the General Assembly had interpreted that provision as meaning that it could itself discuss the draft Convention on Privileges and Immunities and, having discussed and approved it, throw it open for signature by States Members of the United Nations. The last sentence of the text proposed by Mr. Lauterpacht was therefore unlikely to meet an unfavourable reception in the General Assembly. He agreed, however, that it was unnecessarily involved ; moreover, it did not explicitly state that the General Assembly should consider the draft code. He accordingly suggested that it might be replaced by the following :

> " It is hoped that, after considering the draft code, the General Assembly will give it its approval and open it for signature or accession by Members of the United Nations and possibly by other States ".

58. Mr. KOZHEVNIKOV agreed with Mr. Lauterpacht that it would be preferable to defer the vote, since the question was still far from clear. The last sentence of Mr. Lauterpacht's new proposal had been rightly criticized, for it would certainly be inappropriate for the Commission to address itself to the General Assembly in such terms.

59. Mr. LAUTERPACHT said that he was all in favour of deferring the vote if that would ensure universal or nearly universal support for any text. With that end in view, he could accept the wording which Mr. Liang had suggested to replace the last sentence of the text he had proposed ; alternatively, he could agree to the deletion of that sentence, as Mr. Amado had suggested, if that course commended itself to a substantial majority. He could also accept Mr. Amado's proposal that the word " formal " be deleted from the second sentence.

60. Mr. SANDSTRÖM and Mr. SPIROPOULOS withdrew their proposals in favour of Mr. Lauterpacht's new text, as amended by the Secretary.

61. Mr. KOZHEVNIKOV requested that the vote on that text and on the alternative text submitted by Mr. Yepes be deferred until the opening of the next meeting, and that the vote should then be taken without further discussion.

It was so agreed.

The meeting rose at 6.5 p.m.

231st MEETING

Tuesday, 4 August 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER II : ARBITRAL PROCEDURE (A/CN.4/L.45) * (*continued*)

Paragraph 46 (55) ** (*continued*)

1. The CHAIRMAN said that at its 230th meeting the Commission had decided to proceed to a vote on para-

* Mimeographed document only. Incorporated with drafting changes in the " Report " of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the " Report " of the Commission.

graph 46 without further discussion.[1] Of the proposals before the Commission, the first was a text submitted by Mr. Yepes, reading as follows :

" 46. In accordance with article 23, paragraph 1 (*b*) and (*c*) of its Statute, the Commission decides to recommend to the General Assembly :

" I. To adopt, by resolution, the report on arbitral procedure and the draft convention annexed thereto ;

" II. To recommend the draft to Member States with a view to the conclusion of a convention to be signed either at the General Assembly or at a special conference called for that purpose. After adoption by the General Assembly or by such special conference, the convention would be open for signature or accession by Member States and, possibly, by other States."

2. The second was a text submitted by the General Rapporteur to replace the text he had originally proposed in his draft report. It ran :

" 46. In the opinion of the Commission the draft Code as adopted calls for action, on the part of the General Assembly, contemplated in paragraph (*c*) of article 23 of the Statute of the Commission, namely, ' to recommend the draft to Members with a view to the conclusion of a convention '. The Commission makes a recommendation to that effect. It is hoped that after considering the draft Code, the General Assembly will give it its approval and open it for signature or accession by Members of the United Nations and, possibly, other States."

3. The third proposal, made by Mr. Amado, was that the last sentence of the General Rapporteur's new text be deleted.

4. Mr. YEPES said that he would withdraw his proposal on condition that the General Rapporteur agreed to include in his text a mention of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute. In his view, sub-paragraphs (*b*), (*c*) and (*d*) of paragraph 1 of that article were not mutually exclusive ; it was therefore open to the Commission to suggest that the General Assembly might adopt all three possibilities.

5. Mr. LIANG (Secretary to the Commission) still considered that if the Commission suggested that the General Assembly should recommend the draft on arbitral procedure to States Members of the United Nations with a view to the conclusion of a convention, it was unnecessary for it at the same time to suggest that the General Assembly should adopt the report by resolution ; for if the former course were followed, the General Assembly would necessarily arrive at a decision on the draft, and its recommendation to governments could take no other form than that of a resolution.

6. Mr. SANDSTRÖM agreed with the Secretary. It was evident that if the General Assembly decided to recommend the draft to States Members it would first have to take note of it and adopt the Commission's report.

7. Mr. CÓRDOVA agreed.

8. Mr. AMADO said that it seemed to be Mr. Yepes' intention to translate article 23 of the Commission's Statute into the report without making any distinction between the alternatives enumerated in it. He (Mr. Amado) would vote against Mr. Yepes' proposal, as it seemed to him that if the Commission had any views on the procedure which should be followed by the General Assembly it ought to say what they were.

9. Mr. SPIROPOULOS pointed out that Mr. Yepes' intention was entirely met by the last sentence of the General Rapporteur's new text, which referred to the General Assembly's approving the draft on Arbitral Procedure and opening it for signature or accession.

10. Mr. YEPES thereupon withdrew his proposal.

11. Mr. SPIROPOULOS drew attention to the use in the General Rapporteur's new text of the phrase " draft Code ", referring to the draft on Arbitral Procedure. Previously, the Commission had referred to the draft on Arbitral Procedure simply as the " draft ".

12. Mr. LAUTERPACHT thought that it had been agreed to refer uniformly to the draft on Arbitral Procedure as the " draft Code ".

13. Mr. LIANG (Secretary to the Commission) confirmed that the full title was the " draft Code on Arbitral Procedure ".

14. Mr. KOZHEVNIKOV said that the word " code " had been inserted without discussion. He thought also that the operative verb in the first sentence of the General Rapporteur's new text, namely " calls for action ", was too categorical and imperative.

15. Mr. AMADO said that he understood that there had been a vote on the use of the phrase " draft Code ". For his part, he thought the term too ambitious.

16. The CHAIRMAN *ruled* that discussion of the exact title to be given to the draft on Arbitral Procedure be deferred until after the draft had been adopted as a whole.

17. Mr. ALFARO, referring to the last sentence of the General Rapporteur's new text, thought it was inappropriate for the Commission to express any hope about the action to be taken by the General Assembly. He suggested that that sentence might read :

" Should the General Assembly give its approval to the draft Code, it should be opened for signature or accession by Members of the United Nations and, possibly, other States."

18. The CHAIRMAN reminded the Commission of its previous decision not to discuss paragraph 46, but to proceed to vote on the proposals relating thereto.

Mr. Amado's proposal for the deletion of the last

[1] See *supra*, 230th meeting, para. 61.

sentence of the new text submitted by the General Rapporteur for paragraph 46 was adopted by 6 votes to 5 with 2 abstentions.

Paragraph 46, as amended, was approved by 8 votes to 2, with 3 abstentions.

19. Faris Bey el-KHOURI explained that he had voted in favour of Mr. Amado's proposal because he was opposed in principle to the Commission's making any recommendations to the General Assembly ; therefore, the fewer the better. On the other hand, he had abstained from voting on the text as amended because, although he considered that the Commission should make no recommendations, and although he personally disapproved of the text of the draft on Arbitral Procedure and therefore wished in no way to support any recommendation for positive action on it by the General Assembly, yet he had no wish to obstruct the will of the majority of the Commission by adding his vote to the minority, and thus weakening the Commission's recommendation.

20. Mr. SCELLE explained that, although not in favour of the amendment itself, he had voted for the paragraph as amended, because it was better than no paragraph at all.

21. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted in favour of the deletion of the last sentence of the General Rapporteur's text because he considered it beneath the Commission's dignity for it to express any hopes about approval of the Commission's work by the General Assembly.

Paragraph 47 (56)

22. Mr. YEPES could not understand the sentence which ran :

> " Moreover, if and when the work of the Court increases, settlement through arbitration — especially of such disputes which are of limited compass and which require speedy adjudication — will increasingly recommend itself to Governments."

23. He did not see the connexion between the work of the Court and the appreciation which governments might come to have of arbitral procedures. To his mind, it did not follow that more governments would resort to arbitration if the work of the Court increased.

24. Mr. SPIROPOULOS said that the contents of the paragraph were undeniably true ; but he doubted whether it should be included in the Commission's report, because it expressed general views on arbitration.

25. Paragraph 46 suggested that the General Assembly should recommend the draft on Arbitral Procedure to States Members with a view to their concluding a convention. Paragraph 47 only weakened that recommendation. For example, the mention of the International Court of Justice in the second sentence was of doubtful relevance ; and the reference later in the paragraph to the necessity for " maintaining the character of international arbitration as a procedure based on law " was superfluous, for to his mind arbitration could not very well be based on anything else. The paragraph contained many similar generalities which added neither to the authority of the report nor to the prestige of the Commission ; it should be deleted.

26. Mr. LIANG (Secretary to the Commission) was convinced that paragraph 47 was a necessary part of the report. A possible criticism of the draft on Arbitral Procedure was that it established a system of jurisdiction which might overlap with that of the International Court of Justice, and that there might thus be duplication between that Court and any tribunals established pursuant to the draft. The third sentence of the paragraph, to which Mr. Yepes had referred, was an excellent defence of the draft on Arbitral Procedure against that criticism, for it meant that as the work of the International Court of Justice increased it might not be able to deal expeditiously with every case brought before it. States might then prefer another procedure, of more limited scope, for settling their disputes. Thus arbitral tribunals might relieve possible pressure on the International Court of Justice, and in the circumstances envisaged, States would undoubtedly see the advantages of proceeding to arbitration along the lines suggested in the draft Code. In short, a function of arbitral tribunals was to supplement and relieve the International Court of Justice.

27. It was also important that the report should give some account of the general considerations which members of the Commission had had in mind. The spirit in which the Draft Code had been drawn up should be communicated to the General Assembly, but it would be impossible to do that if the Commission's report ended with brief clauses such as paragraphs 46 and 48, which were concerned with what were essentially procedural matters.

28. He felt, therefore, that though drafting changes might be necessary, the paragraph should be maintained substantially as it was. It would undoubtedly create a powerful impression.

29. Mr. SCELLE agreed with the Secretary, the more inasmuch as the paragraph showed that the basic considerations underlying the draft on Arbitral Procedure were the same as those which underlay the Hague Convention of 1907 for the Pacific Settlement of International Disputes, which had first established a procedure for judicial arbitration.

30. Mr. ALFARO also supported the inclusion of the paragraph in the report ; it ably expounded certain pertinent considerations. In particular, he welcomed the strong affirmation in the first sentence. Referring to the third sentence, already mentioned by other members, he said that the procedure of the International Court of Justice tended to be slow and expensive, and it might prove possible to settle cases more easily and speedily by means of the arbitral procedures provided in the draft. The paragraph thus fully vindicated the Commission's concern for the conclusion of a convention, and should be maintained.

31. Mr. KOZHEVNIKOV was inclined to agree with those members who doubted the appropriateness of the paragraph. Its thesis was that the draft on Arbitral Procedure would increase the authority of international law, and maintain the character of international arbitration; in fact, it would have precisely the opposite effect, since the draft Code was contrary to the established principles of international law.

32. Mr. LAUTERPACHT said that, as General Rapporteur, he had been faced with the alternatives of making the report as convincing as possible, or merely neutral; of providing the background to the draft that would show it in its widest perspective or of writing an uninformative and pedestrian report; and of saying that the draft was important, and why, or of saying nothing at all about it. In each case, he had taken the first-named course. He agreed with Mr. Spiropoulos that in the strict sense the paragraph was not indispensable, but none the less he thought it was useful. If he was right, there should be no objection to the statements made in the paragraph, even though some of them might appear obvious.

33. Mr. SANDSTRÖM considered that the general considerations set out in paragraph 47 had a place in the report, though he thought that they ought to appear at the beginning rather than the end. As it was, the force of the Commission's recommendations to the General Assembly, which were really the conclusions reached by the Commission, was weakened.

34. Mr. ZOUREK had several objections to paragraph 47. In the first place, it conveyed a general impression with which he was not in sympathy. In the second place, it could not fail to provoke controversy. For example, it might well be true that clarification of the law on arbitral procedure would increase the authority of international law in general; but many might consider that the draft Code prepared by the Commission would not have that effect. Again, many would disagree with the statement that international arbitration was a procedure based on law; the judicial arbitration which the draft attempted to establish had certainly not been the normal practice in the past. Further, the statement that international arbitration must be made " independent . . . of any influence of the governments bound by the obligation voluntarily undertaken " gave the completely false impression that arbitral awards had in the past been influenced by the governments concerned. There was also the reference to arbitration as being " created in the first instance by the will of the parties "; but in his view arbitration depended exclusively, and not only in the first instance, on that will.

35. For those reasons he urged that the paragraph be deleted.

36. Mr. SPIROPOULOS agreed with Mr. Sandström that the paragraph contained many good ideas which should find a place in the report. Nevertheless, some of them were already treated at length elsewhere; for example, the idea that it was desirable to maintain the autonomous nature of arbitration had been fully developed in section IV of chapter II. He agreed also that general considerations of the kind set forth in the paragraph should not follow what was in substance the Commission's final conclusion on arbitral procedure, namely, the recommendation that it addressed to the General Assembly on the way in which the latter should deal with the results of its work.

37. Mr. LIANG (Secretary to the Commission) recalled that in the Commission's report on its fourth session the chapter on arbitral procedure had opened with a paragraph similar to paragraph 47, setting forth general considerations. That, however, was not the sole logical and convincing form for a lengthy report; it often happened that a long symphony ended with a long coda. It would be difficult to transfer paragraph 47 to the beginning of the report, though it might be transferred to the beginning of section V. If that were done, paragraph 48 might also be placed elsewhere, so that the report would finish with the definite recommendation contained in paragraph 46.

38. Mr. SCELLE sympathized with the General Rapporteur; as Special Rapporteur he had also had to endure protracted discussions on matters that were in themselves of little importance.

39. In general, paragraph 47 expressed the right ideas in the right ways. There was, for example, a growing tendency to base arbitration on legal principles, and though the sentences concerning the International Court of Justice might need re-drafting, they were correct in substance.

40. But above all the report was an expression of the personality of the General Rapporteur. The Commission should give him what liberty he required in respect of taste and style.

41. Mr. LAUTERPACHT hoped that Mr. Sandström would be able to accept the Secretary's suggestion that paragraph 47 should precede the paragraph in which the Committee's recommendations were set forth, which would then become the last paragraph of the chapter on arbitral procedure. In that way, the Commission would be able to meet Mr. Sandström's major point without putting its conclusions at the beginning of the report.

42. Mr. SANDSTRÖM and Mr. SPIROPOULOS supported the Secretary's suggestion.

43. Mr. AMADO, referring to Mr. Lauterpacht's distinction between pedestrian and more imaginative reports, said that, although he usually favoured the former, he would in the present instance accept the General Rapporteur's text.

Paragraph 47 was approved by 10 votes to 2, with 1 abstention.

44. The CHAIRMAN then asked members for their views on the order of the final paragraphs.

45. Mr. LAUTERPACHT thought that paragraph 47 should come between paragraphs 45 and 46.

46. Mr. LIANG (Secretary to the Commission) pointed out that paragraphs 44 and 45 were an exegesis of the Commission's Statute and the alternative recommendations which the Committee might make; paragraph 46 presented the recommendation itself. The three paragraphs formed a unity which would be disrupted if paragraph 47, which was much more general, were placed between them. For his part, he thought that paragraph 47 ought to precede the other three paragraphs, so as to bring out the considerations that made desirable the course of action suggested in paragraphs 44 to 46.

47. Mr. CÓRDOVA suggested that paragraphs 46 and 47 should stand, but that paragraph 48 should be deleted, for it gave the impression that the Commission considered that it had not finished its work and that it should draft the final clauses itself after the General Assembly had approved the draft.

48. Paragraph 47 stated, accurately and succinctly, why the Commission thought that the draft on Arbitral Procedure should be given the standing of a convention. If that paragraph came at the end of the relevant chapter of the report it would create a deep impression on the reader, and provide an excellent bridge passage leading to the text of the draft itself.

49. Mr. HSU thought that the discussion related mainly to a matter of style which could be safely left to the General Rapporteur.

50. Mr. SANDSTRÖM agreed that the General Rapporteur should be free to arrange the paragraphs in whatever order he thought fit, in the light of the present exchange of views. For himself, he thought that paragraph 47 might even be made a separate section and placed between sections IV and V.

51. Mr. ALFARO thought that paragraph 47 should form the final paragraph of the chapter on arbitral procedure. In the first place, as the Secretary had rightly pointed out, the unity of paragraphs 44, 45 and 46 would be destroyed by the interpolation of paragraph 47. In the second place, the logical sequence in section V would be to state the Commission's recommendation and then to justify it; paragraph 47 should therefore be kept and paragraph 48 deleted.

52. Mr. AMADO likened the report to a symphony, most of the movements of which rightly ended with a big bang. He would therefore be glad to see paragraph 47 bring the first movement to its close.

53. Mr. YEPES agreed that the General Rapporteur should be free to fix the order of paragraphs, though he thought that, as the synthesis of the entire report, paragraph 47 should come last.

It was agreed that it should be left to the General Rapporteur to fix the order of the final paragraphs of the chapter on arbitral procedure in the draft report.

Paragraph 48

It was unanimously agreed that paragraph 48 should be deleted.[2]

Paragraph 20 (29) (resumed from the 228th meeting)[3]

54. The CHAIRMAN said that, after consulting the other members concerned, the General Rapporteur suggested the following text for paragraph 20:

> "For these reasons, the Commission was unable to share the view, which was occasionally put forward in the course of its deliberations, that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so, either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is not inconsistent with principles of law or with the sovereignty of *both* parties — as distinguished from the unilateral assertion of the sovereignty of one of the parties — that that obligation should be complied with and that it should not be frustrated on account of any defects in rules of procedure. For that reason the Commission was unable to share the view that the final draft departs from the traditional notion of arbitration in a manner inconsistent with the sovereignty of States inasmuch as it obliges the parties to abide by procedures adopted for the purpose of giving effect to the obligation to arbitrate. For that obligation is undertaken in the free and full exercise of sovereignty. While the free will of the parties is essential as a condition of the creation of the common obligation to arbitrate, the will of one party cannot, in the view of the Commission, be regarded as a condition of the continued validity and effectiveness of the obligation freely undertaken."

55. Mr. ZOUREK said that the re-draft was no improvement on the original text of paragraph 20, all his objections to which still held.

56. He had previously objected to the draft on Arbitral Procedure because of its incompatibility with the principle of the sovereignty of States. However, his objections were in the re-draft presented in such a way that he appeared only to favour the possibility that one party might, by unilateral action, frustrate an arbitration to the possible detriment of the other. In truth, his view was that the draft included provisions

[2] Paragraph 48 read as follows:

"48. While it is the opinion of the Commission that the conclusion of an international convention with the approval of and on the initiative of the General Assembly is the course which is most appropriate and while the Commission so formally recommends in accordance with articles 16, 22 and 23 of its Statute, it considers it unnecessary, so long as the General Assembly has not acted on that recommendation, to formulate the Final Clauses of the Convention."

[3] See *supra*, 228th meeting, paras. 82-96.

according to which in certain cases the tribunal would be able to set aside the will of both parties to the dispute.

57. The paragraph did not give a complete or correct summary of his position, which was: first, that the draft covered matters outside the scope of arbitral procedure as normally conceived; and secondly, that it included provisions contrary to existing international law. The paragraph made no mention of those arguments, but presented his position inaccurately in order to lend weight to the opposite case. Indeed, the minority view was summarized in the form of a polemic against it. He wondered whether it was in order for the report to be thus drafted when the minority had been refused the right to attach their dissenting opinion.

58. As the General Rapporteur's re-draft was utterly inadequate, he would make his own proposal for paragraph 20. It read:

> "Certain members of the Commission were of the opinion that the draft prepared by the Commission went far beyond the scope of arbitral procedure and contained substantive provisions contrary to the notion of arbitration as conceived in existing international law. They argued in particular that the draft tended to impose on Contracting States an obligation to arbitrate even where the Parties had been unable to agree on the *compromis* and where, in consequence, no definite undertaking to arbitrate had been entered into; that the draft purported in many instances to be effective where there was an absence of will by the Parties, and that by unduly extending the powers of arbitral tribunals it tended to transform those bodies into a kind of supra-national court of justice. They also pointed out that the draft, by making provisions in several places for the intervention of the International Court of Justice in arbitral procedure, was making every arbitration case subject to the supervision and jurisdiction of that Court. They stressed that the general tendency of the draft, as well as all its provisions implying the relinquishment by States of certain rights in favour of arbitral tribunals, were incompatible with the fundamental principle of State sovereignty on which international law rested."

59. The CHAIRMAN regretted that Mr. Zourek had not found it possible to present his text earlier, as it was essential that it be circulated as a document before it could be discussed. He suggested therefore that further discussion of paragraph 20 be deferred until the next day.

60. Mr. KOZHEVNIKOV said that, as he had already made clear his views on the question of principle on a number of previous occasions, he would only add that he fully shared the views just expressed by Mr. Zourek. The General Rapporteur's re-draft of paragraph 20 could not be regarded as tallying with the facts, and he would be obliged to vote against it. It implicitly criticized those who at present formed the minority in the Commission — those who defended the principle of the sovereignty of States — by asserting that the principle which they sought to defend was one of unilateral sovereignty. He must repeat that he, at least, was actuated by the desire to uphold the interests of both parties to the arbitration, and it was in fact the draft itself which was based on an entirely unilateral conception; in it, the whole arbitral procedure was regarded from the point of view of only one of the States concerned.

61. The CHAIRMAN suggested that the substantive discussion be closed, and that the voting, together with any necessary discussion of points of drafting, be deferred until the next meeting, by which time Mr. Zourek's proposal would have been circulated in writing.

The Chairman's suggestion was adopted.[4]

Title of the draft

62. The CHAIRMAN invited suggestions for the title to be given to the draft, and pointed out that the term "draft Code", which was used in the draft report, appeared nowhere in the draft itself.

63. Mr. YEPES proposed that the draft be called "Draft Statute on Arbitral Procedure". The word "Statute" was at once broader and narrower than the word "Code", which seemed to imply that the Commission had been engaged purely in a task of codification.

64. Mr. SANDSTRÖM felt that the term "Statute" could only apply to a permanent organization.

65. Replying to a question by Mr. SCELLE, Mr. LIANG (Secretary to the Commission) said that when the Commission had adopted its programme of work, no specific title had been allotted to the draft which the Commission had decided to prepare on arbitral procedure. The first time the term "draft Code" appeared was in the United Kingdom Government's comments on the text approved at the fourth session.

66. Mr. SCELLE said that in that case he would propose that the draft be called "Draft Convention on Arbitral Procedure".

67. Mr. LAUTERPACHT supported Mr. Scelle's proposal.

68. Mr. YEPES also supported Mr. Scelle's proposal, and withdrew his own in favour of it.

69. Mr. KOZHEVNIKOV pointed out that the draft was not a complete draft convention, since it still lacked essential articles. The title should reflect as closely as possible the exact nature of the draft, and he therefore proposed that it read: "Draft Articles on Arbitral Procedure".

70. Mr. LAUTERPACHT suggested that the Commission's report should explain why the draft contained no final clauses, and why it had none the less been

[4] See *infra*, 232nd meeting, para. 1.

called a draft convention. Suitable wording might be found in paragraph 48 of the chapter on arbitral procedure in his draft report.

71. Mr. ALFARO said that he would prefer the term "draft Code", which expressed exactly what the draft was. The Commission had not been asked to draft a convention, and it had not done so; it had drafted a set of rules which, it believed, might serve as the basis for a convention. If the majority of the Commission preferred the term "draft Convention", however, he would accept it.

72. The CHAIRMAN said that he would put the various proposals to the vote, in the order in which they had been submitted. He therefore put to the vote the proposal by Mr. Scelle and Mr. Lauterpacht that the draft be called the "Draft Convention on Arbitral Procedure".

That proposal was adopted by 10 votes to none, with 2 abstentions.

73. The CHAIRMAN said that that disposed automatically of the other proposals.

Paragraph 37 (46) (resumed from the 229th meeting)

74. Mr. LAUTERPACHT recalled that the text which he had originally proposed for paragraph 37 had been subjected to some criticism, and that he had agreed to submit a redraft.[5] On considering the matter, he had come to the conclusion that the text was correct so far as it went, but incomplete. It had therefore at first been his intention to propose that the following three sentences be added:

> "It is true that the second paragraph of article 35 of the Statute provides that the conditions under which the Court shall be open to other States (i.e. States not parties to the Statute) shall be laid down by the Security Council. However, this is so, in the words of that paragraph, only 'subject to the special provisions contained in treaties in force'. The relevant articles of the Code of Arbitral Procedure must be regarded as constituting the 'special provisions contained in treaties in force'."

75. When he had shown that text to the Secretary, however, the latter had said that the words "treaties in force" referred to something quite different; that was possibly the case, although at first sight they would certainly appear to cover the Convention on Arbitral Procedure as soon as it entered into force. As the matter was apparently controversial, however, he wished to submit the following alternative text for paragraph 37:

> "The Commission considered the situation arising from the fact that in some cases one or both parties may not be parties to the Statute of the International Court of Justice. With regard to cases in which the task of the Court does not amount to adjudication upon the merits of the dispute — as in the case of article 3 (2), (3) and (4), article 7 (2), article 8 (2) and (3) — the Commission believes that no difficulty arises. With regard to cases where the decision of the Court may amount to an adjudication upon the merits of the dispute — as in the case of article 28 (2), article 29 (4), article 31 (1) and article 32 — action of the Security Council would be required in conformity with article 35 (2) of the Statute of the Court. However, it is possible that such action may not be required if literal interpretation is given to the phrase of the article which lays down that such action is necessary only 'subject to the special provisions contained in treaties in force'."

76. Mr. LIANG (Secretary to the Commission) submitted that the problem of access to the International Court of Justice for States which were not parties to the Court's Statute fell solely within the province of the Court itself, and that it was both unnecessary and inappropriate for the Commission to deal with it.

77. The words "subject to the special provisions contained in treaties in force" had been taken over from the Statute of the Permanent Court of International Justice, where they formed Article 35, and related to the provisions regarding compulsory access to the Court contained in the peace treaties which had been concluded after the first World War and had come into force prior to the entry into force of the Statute of the Court. They had been inserted in the Statute of the International Court of Justice because it had been thought that by the time that Statute came into force peace treaties with the Axis Powers containing similar provisions might have been concluded. Such had not been the case, and the phrase in question was therefore a dead letter.

78. It was also debatable whether the task which the draft laid on the International Court of Justice did not "amount to adjudication upon the merits of the dispute" in all the cases mentioned by Mr. Lauterpacht in the alternative text which he had now submitted; article 8 (2), for example, referred to disqualification of a sole arbitrator, and provided that the question of disqualification should be decided by the Court on the application of either party. It therefore implied a dispute between the parties, and was therefore in a rather different category from the provisions of article 3 (2) and (3), under which the task of appointing arbitrators was entrusted not to the whole Court, but to its President.

79. Mr. LAUTERPACHT said that the question under discussion was not intrinsically of great importance, since it was unlikely that many States which were not Members of the United Nations would adhere to the Convention on Arbitral Procedure. He would have no objection to its being left to the Court to decide in each case whether it could properly be seized of a specific dispute without further action by the Security Council, but since he understood that the conditions under which States which were not parties to the Statute of the International Court of Justice could have access to it

[5] See *supra*, 229th meeting, para. 48.

had already been further defined in a resolution adopted by the Security Council on 15 October 1946, he suggested that it would be sufficient to amend the text which he had originally proposed for article 37 to read as follows:

"The Commission examined the question whether in those cases in which reference is made to the jurisdiction of the International Court of Justice and in which one or both parties are not parties to the Statute of the International Court of Justice, it is necessary to provide for some particular procedure. The Commission considered that such cases are covered by the provisions of Article 35 (2) of the Statute of the International Court of Justice, and by the resolution adopted by the Security Council on 15 October 1946 in pursuance of those provisions."

80. Mr. KOZHEVNIKOV said that the amendment of paragraph 37 had not removed the objections which he had expressed at an earlier meeting, and that he would therefore vote against it.

The text suggested by Mr. Lauterpacht was approved, as amended, by 9 votes to 2, with 1 abstention.

81. The CHAIRMAN invited the Commission to comment on the suggestion which Faris Bey el-Khouri had made at the 228th meeting, namely, that the Commission's report should give the figures of the voting on each article.[6]

82. Mr. YEPES felt, with all respect to Faris Bey el-Khouri, that that suggestion was unnecessary. Anyone who was interested in finding out what the vote had been on a particular article could do so by referring to the summary records.

83. Faris Bey el-KHOURI said that, since his suggestion did not appear to be generally acceptable, he would withdraw it.

Further discussion on the draft chapter on arbitral procedure in the Commission's report on its fifth session was adjourned until the next meeting.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 225th meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*resumed from the 225th meeting*)

Article on the interpretation and implementation of the Conventions [Article 10] (resumed from the 224th meeting)

84. The CHAIRMAN invited the Commission to resume its discussion of the proposal to add to the draft Conventions on the Elimination and the Reduction of Future Statelessness respectively an article dealing with the establishment of special international machinery for settling disputes arising out of the conventions. That discussion had been interrupted[7] to enable the Drafting Committee to submit a revised text, and the Drafting Committee now proposed the following:

"1. An agency shall be established within the framework of the United Nations to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

"2. A tribunal, to be set up by the Parties, shall be competent to decide upon complaints presented by the Agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the Convention.

"3. The Parties agree that any dispute between them concerning the interpretation or application of the Convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

"4. If, within two years of the entry into force of the convention, the tribunal referred to in paragraph 2 has not been set up by the Parties, that tribunal shall be set up by the General Assembly."

85. Mr. YEPES suggested that the words "within the framework of the United Nations" be inserted after the words "by the Parties" in paragraph 2.

86. Mr. LAUTERPACHT felt that, whereas it was quite appropriate that the agency referred to in paragraph 1, which would be of an administrative nature, should be established within the framework of the United Nations, it was by no means so certain that the tribunal referred to in paragraph 2, which would be an arbitral tribunal, should also be within the framework of the United Nations.

87. Mr. YEPES pointed out that paragraph 4 clearly stated that in certain circumstances that tribunal should be set up by the General Assembly. It therefore seemed perfectly appropriate to say that it should be set up "within the framework of the United Nations".

88. Mr. SPIROPOULOS felt that those words meant so little that it was immaterial whether they were used or not. It was not clear, however, whether the words "a tribunal, to be set up by the Parties", implied that it should be set up by the original signatories, or something else.

89. Mr. LAUTERPACHT said that he supposed that those words meant that, as soon as either Convention entered into force, the Parties to it *at that time* would be under an obligation to set up a tribunal. That was a question of detail, however, which would be regulated in the final clauses.

90. Mr. SANDSTRÖM and Mr. HSU suggested that the difficulty could be overcome if paragraph 2 were amended to read "A tribunal shall be established by

[6] See *supra*, 228th meeting, para. 42.

[7] See *supra*, 224th meeting, para. 52.

the General Assembly to decide upon..." In that case paragraph 4 could be deleted.

91. Mr. LAUTERPACHT said that, although that would deprive any States not members of the United Nations which signed the convention of any part in setting up the tribunal, he would have no objections. The General Assembly, however, might not be the appropriate body, and he would therefore prefer the phrase "A tribunal shall be established by the United Nations."

92. Mr. SCELLE felt that the Commission had no right to impose such an obligation on the General Assembly.

93. Mr. LAUTERPACHT pointed out that the Commission was imposing no such obligation. If the General Assembly approved the draft Convention and opened it for signature, that would mean that it accepted the obligations which the text placed upon it.

94. Mr. ZOUREK said that he had already stated his views on the question at previous meetings, and had no wish to reiterate them. He would only say that he thought it very doubtful whether the General Assembly was entitled to set up an organ for any purpose other than those explicitly attributed to it by the Charter.

95. Mr. SPIROPOULOS recalled that similar doubts had been raised concerning the General Assembly's right to establish an International Criminal Court. If it was agreed that those doubts were not valid in the present case, it might be most appropriate to say "A tribunal *should* be established by the General Assembly".

96. Faris Bey el-KHOURI said that he could not support the proposal that the United Nations or the General Assembly should set up a new organ within the framework of the United Nations to settle disputes arising out of one particular international treaty, especially since it was not yet known by how many States that treaty would be ratified—if, indeed, it was ratified by any. The acceptance of the Conventions would certainly not be aided by the inclusion of such a provision. The Commission should leave the whole question open, since it could be raised in the General Assembly by any government which so desired.

Further discussion of the additional article proposed by the Drafting Committee was adjourned.

The meeting rose at 1.5 p.m.

232nd MEETING

Wednesday, 5 August 1953, at 9.30 a.m.

CONTENTS

* The number within brackets corresponds to the article number in the Commission's report.

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 231st meeting*)

CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45)* (*resumed from the 231st meeting and concluded*)

*Paragraph 20 (29)*** and new text proposed by Mr. Zourek (paragraph 28) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the General Rapporteur's redraft of paragraph 20 in the chapter on arbitral procedure in its draft report on the work of the fifth session, and of the proposal which Mr. Zourek had submitted at the previous meeting.[1] He assumed that Mr. Zourek's text was intended to replace not the whole of paragraph 20, but only that part of the first sentence in which the views of the minority were expressed. Although it would be impracticable to state in the report the minority's views on every question in the draft convention on arbitral procedure, it was, in his view, proper and desirable that its views should be stated on a question of such fundamental importance as that dealt with in paragraph 20. The wording which

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] See *supra*, 231st meeting, para. 58.

Mr. Zourek had proposed for that purpose was unexceptionable, and he was personally in favour of its insertion in the text in the manner in which he had suggested.

2. Mr. AMADO was in complete agreement with what the Chairman had just said. The Commission was composed of representatives of all the legal systems of the world, and while it was unnecessary to refer in the report to all the differences of view which arose from minor divergencies between those systems, it would be useful to the General Assembly and to readers if the Commission's report clearly indicated differences of view which arose from divergencies on fundamental points. He was therefore in favour of the inclusion of the text proposed by Mr. Zourek.

3. Mr. ALFARO said that, inasmuch as paragraph 20 purported to record the views of certain members of the Commission, they should be permitted to express those views in their own words. He also was therefore in favour of the insertion of the proposed text.

4. Mr. SPIROPOULOS said that he, too, was in favour of the inclusion of the proposed text.

5. Mr. SANDSTRÖM said that he took the same view, not only for the reasons which had already been advanced, but also because article 20 of the Commission's Statute obliged it to refer to "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". He suggested, however, that the text proposed by Mr. Zourek should be made a separate paragraph, and that what Mr. Zourek really meant was not "that the draft tended to impose on Contracting States an obligation to arbitrate even where no definite undertaking to arbitrate had been entered into", but "that the draft tended to impose on Contracting States an obligation to arbitrate even where the parties could not agree upon the *compromis* and in consequence no definite undertaking to arbitrate had been entered into".

6. Mr. SCELLE said that it had been his intention to make precisely the same suggestion as Mr. Sandström had made.

7. Mr. KOZHEVNIKOV agreed that it would be better if the text proposed by Mr. Zourek were made a separate paragraph. He himself wished to suggest the insertion of the word "fundamental" before the word "rights" in the phrase "its provisions implying the relinquishment by States of certain rights in favour of arbitral tribunals".

8. Mr. YEPES warmly supported the inclusion of the text proposed by Mr. Zourek. He had always contended that the Commission's reports should faithfully reflect its debates; they had not always done so in the past, and he was glad to note that his contention was now winning more general acceptance.

9. Mr. ZOUREK agreed that his proposed text should be made a separate paragraph. He could also accept the amendments suggested by Mr. Sandström and Mr. Kozhevnikov.

10. Mr. LAUTERPACHT agreed that the text proposed by Mr. Zourek should be included in the report. That text, however, put forward two arguments: that the draft was contrary to the traditional notion of arbitration, and that it was contrary to the principle of the sovereignty of States. It was only the second of those arguments that had any bearing on paragraph 20, and he suggested, therefore, that it would be more appropriate to insert Mr. Zourek's text after paragraph 7.

11. Mr. AMADO felt that it would be preferable to indicate the divergencies of view concerning the draft convention after describing it, and not before. It was clear from the French text of article 20 of the Statute, which referred to divergencies and disagreements which "*subsistent*" ("subsist"), that it was the unresolved disagreements which the Commission was required to indicate, not those which had been apparent at the outset.

12. Mr. LIANG (Secretary to the Commission) said that he was inclined to agree with Mr. Amado that the text proposed by Mr. Zourek should not be inserted at the point which Mr. Lauterpacht had suggested, not so much for the reason given by Mr. Amado, since the Commission was happily under no obligation to submit its *reports* in conformity with the principles stated in article 20 of its Statute, but because it would destroy the whole balance of the report if the "dissenting opinion" was inserted immediately after the general introduction. Mr. Lauterpacht had made a subtle distinction between the argument that the draft convention was contrary to the traditional notion of arbitration, and the argument that it was contrary to the principle of the sovereignty of States. He (Mr. Liang) would suggest that in the eyes of Mr. Zourek those two arguments merged into one; it was because he thought the draft convention encroached on the sovereignty of States that he thought it was opposed to the traditional concept of arbitration, and *vice versa*.

13. Mr. YEPES and Mr. SPIROPOULOS agreed that it would be inappropriate to insert Mr. Zourek's text after paragraph 7.

14. Mr. LAUTERPACHT withdrew his suggestion, but proposed that if Mr. Zourek's text was inserted before paragraph 20 the first sentence of that paragraph should be amended to read as follows:

> "For reasons stated in the preceding paragraphs and in those which follow, the Commission was unable to accept these views. In particular, the Commission was unable to share the view..."

It was so agreed.

It was unanimously agreed to insert the text proposed by Mr. Zourek, as amended, before paragraph 20.

15. The CHAIRMAN asked whether Mr. Lauterpacht could agree to delete the words "as distinguished from the unilateral assertion of the sovereignty of one of the parties" from his re-draft of paragraph 20, since he did not think it would be possible to express clearly the

idea behind those words without expanding them considerably.

16. Mr. KOZHEVNIKOV supported the Chairman's suggestion.

17. Mr. LAUTERPACHT said that he would agree to the deletion of those words if it was thought that that would make for clarity.

18. Mr. ALFARO felt that the reference in the same sentence to "the sovereignty of *both* parties" was also confusing. The view which had been put forward, and which the Commission as a whole could not accept, was that the draft convention was inconsistent with the sovereignty of the State *vis-à-vis* which it was proposed that certain action should be taken in certain circumstances. He suggested that the sentence be amended to read as follows:

> "However, once a State has undertaken that obligation, it is not inconsistent with principles of law or with the sovereignty of that State that the obligation it has assumed should be complied with and not frustrated by its sole action or failure to act."

19. Mr. LIANG (Secretary to the Commission) felt that the wording suggested by Mr. Alfaro was an improvement, particularly because it avoided the use of the words "on account of any defects in rules of procedure" contained in Mr. Lauterpacht's re-draft. It was far from clear whether those words referred to previous rules of arbitral procedure or to the rules set out in the draft convention; and if the text proposed by Mr. Lauterpacht were retained, they should be replaced by the words "on account of any defects in hitherto existing rules of arbitral procedure".

20. Mr. SCELLE said that he would regret the omission of the phrase "sovereignty of *both* parties", since it emphasized the equality of the parties, which was one of the fundamental principles of traditional international law. On the other hand, he agreed with the Secretary's suggestion concerning the last few words in the sentence.

21. Mr. LAUTERPACHT said that he, too, would regret the omission of the phrase "sovereignty of *both* parties". The gist of the whole matter was that if one party claimed to set itself up as a judge in the question whether or not an obligation to arbitrate existed, it would thereby encroach on the sovereignty of the other party.

22. Mr. CÓRDOVA said that if that was what was meant, it should be explained more clearly than was done in the text.

23. Mr. LAUTERPACHT pointed out that the explanation was to be found in the words which the Chairman had suggested should be deleted.

24. Mr. ALFARO felt that the wording suggested by the Secretary implied that there were no defects in the draft convention. He hoped that that was the case, but time alone could show.

25. Mr. KOZHEVNIKOV felt that the discussion showed that it would be wiser to omit from paragraph 20 a point which had already been expressed much more clearly in many other passages of the report.

26. The CHAIRMAN asked whether, in addition to the changes which Mr. Lauterpacht himself had suggested, he could accept the suggestions that the words "as distinguished from the unilateral assertion of the sovereignty of one of the parties" be deleted, and that the words "on account of any defects in rules of procedure" be replaced by the words "on account of any defects in hitherto existing rules of arbitral procedure".

27. Mr. LAUTERPACHT said that, in order to facilitate the Commission's work, he would accept those amendments.

Paragraph 20, as amended, was approved by 10 votes to none, with 3 abstentions.

28. The CHAIRMAN noted that the Commission had completed its consideration of the individual paragraphs of the chapter on arbitral procedure in the draft report covering the work done by the Commission at its fifth session. It could now therefore vote first on the draft convention as a whole, and then on the chapter as a whole.

29. Mr. KOZHEVNIKOV recalled that at the 186th meeting he had suggested that the expression "arbitral tribunal" should be used throughout the draft.[2] He believed that the Special Rapporteur had accepted his suggestion, but the necessary changes had not been made in the text annexed to the draft report (A/CN.4/L.45).

30. Mr. LIANG (Secretary to the Commission) said that no clear decision on the matter had been taken. The question had indeed been raised, but the view had also been expressed that it was unnecessary to use the expression "arbitral tribunal" in every case, and that it was often perfectly legitimate to use the word "tribunal" alone.

31. After some discussion, during which Mr. LAUTERPACHT and Mr. SCELLE pointed out that use of the full term "arbitral tribunal" in every instance would make the English and French texts unnecessarily turgid, Mr. AMADO and Mr. SPIROPOULOS suggested that the difficulty was one of translation, and that it was possible that the Russian text might be open to misinterpretation if the full term were not used in every case.

32. Mr. ALFARO and Mr. YEPES agreed, and suggested that the Commission need not concern itself with a question which was clearly only one of translation into Russian.

33. Mr. KOZHEVNIKOV said that it was his desire to obviate any possibility of misunderstanding in the

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[2] See *supra*, 186th meeting, para. 39.

English and French texts as well as in the Russian. In exceptional cases, it might be permissible to leave out the word "arbitral", but his view was that, as a general rule, the expression "arbitral tribunal" should be used throughout. Moreover, he had the definite impression that that view had been accepted.

34. The CHAIRMAN said that as it appeared that the Commission had taken no formal decision on the matter,[3] and as Mr. Kozhevnikov pressed the point, he had no choice but to put his suggestion to the vote.

Mr. Kozhevnikov's suggestion was rejected by 8 votes to 2, with 2 abstentions.

35. The CHAIRMAN then put to the vote the draft Convention on Arbitral Procedure as a whole.

The draft Convention on Arbitral Procedure was adopted by 10 votes to 2, with 1 abstention.

36. The CHAIRMAN then put to the vote the chapter on arbitral procedure, as amended, in the Commission's draft report on its fifth session.

The chapter on arbitral procedure, as amended, was adopted by 10 votes to 2, with 1 abstention.

37. Mr. AMADO asked that, in accordance with the Commission's decision concerning the inclusion of footnotes in its report, a footnote should be added to the effect that he had voted in favour of the draft convention as a whole, but that he had voted against several of the individual provisions for reasons which he had explained during the relevant discussions.

38. Faris Bey el-KHOURI said that he considered that the autonomy of both parties should be strictly respected in the fundamental proceedings of international arbitration, particularly in defining the subject of dispute to be submitted to arbitration, and in the free choice of the arbitrators by the parties. The municipal laws of various States recognized those principles insofar as they applied to individuals, and it was unlikely that States would agree to deprive themselves of rights they recognized in the case of individuals. As a number of provisions in the draft convention denied those rights to one or both parties, he had been unable to support it.

39. Mr. KOZHEVNIKOV said that he would not repeat what he had already said on many occasions. He merely wished to state that he had voted against the draft Convention on Arbitral Procedure and against the relevant chapter of the draft report which constituted a commentary upon it, and to repeat that in his view the commentary had no legal force. He would have liked to explain his reasons for voting in that way in the report, but since the Commission's decision prevented him from doing so, he asked that the following footnote should be included:

> "Mr. Kozhevnikov said that, for reasons he had frequently given in the course of the discussion, he had voted against the final draft on Arbitral Procedure as a whole, and also against the chapter of the report accompanying the draft, which was in the nature of a commentary, and in many instances a one-sided commentary."

40. Mr. ZOUREK wished to place on record that he had voted against the draft convention as a whole and against the relevant chapter of the draft report explaining and supporting it, for reasons which he had already explained on several occasions, and particularly at the previous meeting. He, too, asked that a footnote should be inserted in the report, and would submit a text in due course.

41. Mr. HSU said that he had voted for the chapter on arbitral procedure with one misgiving. While the adoption of rules to ensure the correctness of awards was regarded in the report as codification, when it was to help the parties observe the agreement to arbitrate it was regarded as development. It seemed to him that both were of the same nature and that if one were regarded as codification or development, the other should be similarly regarded.

42. Mr. ALFARO said that he had voted in favour of the draft convention because he believed that it was a scientific work which represented a considerable step forward in international law and in ensuring the efficacy of arbitration as a civilized means of settling international disputes.

43. The CHAIRMAN said that the Commission had come to the end of its work on arbitral procedure; he congratulated the Special Rapporteur on the results which had been obtained. Although Mr. Scelle might not be entirely satisfied, he could rest in the knowledge that the Commission had followed him most of the way.

44. Mr. SCELLE said that he wished to thank all members of the Commission for the careful consideration they had given to his reports. In particular, he wished to thank the General Rapporteur for the special contribution which his commentary represented.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 231st meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*resumed from the 231st meeting*)

Article on the interpretation and implementation of the Conventions [Article 10] (resumed from the 231st meeting)

45. The CHAIRMAN invited the Commission to resume its discussion, begun at the previous meeting,[4] of the additional article proposed by the Drafting Committee for inclusion in the draft Convention on the

[3] See *Yearbook of the International Law Commission, 1952*, vol. I, 181st meeting, paras. 72-86.

[4] See *supra*, 231st meeting, paras. 84-96.

Elimination of Future Statelessness and in the draft Convention on the Reduction of Future Statelessness.

46. The proposed additional article read as follows:

"... [see *supra* 231st meeting, para. 84]..."

47. There was a considerable area of agreement on the proposed text, but certain changes had been suggested to paragraph 2, and it had also been suggested that paragraph 4 should be deleted.

48. Mr. LAUTERPACHT thought that the proposed text should stand, except that in paragraph 2 the phrase "to be set up by the parties" should be replaced by the phrase "to be set up by the United Nations".

49. Mr. YEPES thought that there was no difference between the phrase suggested by Mr. Lauterpacht and the phrase "within the framework of the United Nations", which he himself had suggested.[5]

50. Referring to paragraph 1, he observed that the agency would presumably be established at the United Nations Headquarters. In that case it would be just as far removed geographically from the stateless persons with whom it would be concerned as the tribunal, and stateless persons would have little chance of gaining personal access to it. They should therefore be enabled to apply to the tribunal direct.

51. The CHAIRMAN, speaking as a member of the Commission, pointed out that there was a big difference between the tribunal, which was to decide upon complaints, and the agency, which was to represent the interests of stateless persons before the tribunal.

52. Mr. SANDSTRÖM said that there were only two possibilities in respect of the establishment of the tribunal: either it must be established by the contracting parties, or it must be established by the United Nations.

53. Mr. CÓRDOVA, referring to Mr. Yepes' observation about physical access to the agency, pointed out that the agency would nevertheless be useful, because it would be able to defray the cost of representation of the interests of stateless persons before governments and the tribunal.

54. Mr. AMADO said that, although he was in favour of the establishment of a tribunal, he doubted whether it would in fact be set up, as the proposal was not likely to receive much support from governments.

55. Mr. SPIROPOULOS agreed with Mr. Yepes about the difficulties that a stateless person would encounter in approaching the agency; it might therefore be necessary for that institution to have local representatives wherever there were large numbers of stateless persons. For a similar reason, he had previously suggested that it might be more desirable to establish separate tribunals in each State; indeed, he shared Mr. Amado's doubts about the feasibility of establishing a central tribunal in the manner envisaged by the Drafting Committee.

[5] *Ibid.*, para. 87.

56. In his view, the Committee's task was to establish a principle, leaving the United Nations and the contracting parties the necessary latitude in its application. That was why he was in favour of a text by which the tribunal would be set up within the framework of the United Nations. That would permit of its establishment, either by the contracting parties themselves or by the General Assembly. He therefore proposed that the opening phrases of paragraphs 1 and 2 should respectively read as follows:

"1. An agency should be established within the framework of the United Nations to act...

"2. A tribunal should be established within the framework of the United Nations which should be competent to..."

57. Mr. LAUTERPACHT said that on second thought he was not entirely satisfied with paragraph 1 as it stood. The Commission was engaged on drafting a convention, and a convention necessarily involved the assumption of obligations by the contracting parties. Paragraph 1, as proposed by the Drafting Committee, and paragraph 2, were Mr. Spiropoulos' amendment adopted, would impose no obligations on the contracting parties, except conceivably — by implication — the obligations to promote the establishment of an agency and of a tribunal; for it was clear that no mutual undertaking by the contracting parties could impose any obligation on the United Nations.

58. Mr. SPIROPOULOS accordingly suggested that the opening phrases of paragraphs 1 and 2 be amended to read:

"1. The parties undertake to establish within the framework of the United Nations an agency to act...

"2. The parties undertake to establish within the framework of the United Nations a tribunal which shall be competent..."

59. Mr. LAUTERPACHT agreed.

60. Mr. YEPES said that his remarks about the difficulty which stateless persons would experience in gaining access to the agency should not be construed as meaning that he disapproved in principle of the establishment of an agency.

61. Mr. SANDSTRÖM, referring to paragraph 4, said that he had some hesitation about accepting a text that enjoined the General Assembly in imperative terms to take certain action in certain circumstances.

62. Mr. SPIROPOULOS said that that was precisely why he had suggested that the conditional mood rather than the imperative should be used for the operative verb in paragraphs 1 and 2.

63. He doubted, if the contracting parties were unwilling to establish a tribunal, whether it would serve any useful purpose for the General Assembly to set one up. Nevertheless, if it was thought that the General Assembly should concern itself with the matter, the Commission might agree to re-draft paragraph 4 somewhat as follows:

"4. If, within two years of the entry into force of the convention, the tribunal referred to in paragraph 2 has not yet been set up by the parties, the General Assembly shall take the initiative in endeavouring to set it up."

64. Mr. LAUTERPACHT said that if the Commission accepted paragraphs by which the contracting parties were to establish an agency and a tribunal, it should also allow for the eventuality of those organs not being thus set up. Paragraph 4 should therefore be retained in some form or other.

65. Mr. LIANG, Secretary to the Commission, said that he had already alluded to the problems that derived from the proposal that the General Assembly should establish the tribunal. First, the possibility should be contemplated of the parties to the convention being identical with the membership of the General Assembly; in that event, paragraph 4 would clearly become inoperative. The alternative possibility was that the parties would be different from the membership of the General Assembly; in that event, the creation of an agency or a tribunal by the General Assembly would mean the matters being placed on the agenda of the General Assembly and duly considered, the necessary budgetary provisions for the organs and so forth being made, as had, for example, been done in the case of the International Bureau for Declarations of Death. That course would not be easy, since some members of the General Assembly would *ex hypothesi* not be in favour of the convention, and *a fortiori* not in favour of establishing an agency or a tribunal. The position would thus not be on all fours with that of the International Court of Justice, whose jurisdiction transcended the sum of those States which had subscribed to its Statute. It should be borne in mind, too, that the General Assembly had to observe the terms of the Charter and its own rules of procedure: it was not the repository of residual functions that could not be carried out under the terms of international treaties.

66. Mr. SCELLE agreed. He did not see how, in practice, it would be possible to implement the provisions of paragraph 4. He reminded the Commission that the General Rapporteur had already agreed to suggestions by Mr. Spiropoulos concerning amendments to paragraphs 1 and 2 to make certain that the responsibilities of the contracting parties were engaged. In his (Mr. Scelle's) opinion, similar considerations applied to paragraph 4. It was essential that the tribunal be created by the contracting parties themselves; they could not contract an obligation on behalf of a third party — the General Assembly. Nor had they any right to do so. The Commission ought not to go farther than adopting a text for paragraph 4 reading somewhat as follows:

"4. If,... the tribunal... has not been set up by the Parties, the Parties reserve the right to bring the matter before the General Assembly."

67. Mr. KOZHEVNIKOV said that he had already explained the basic reasons which impelled him to take a negative attitude to the additional article. Over and above those reasons, the proposed text was unsuitable because of its imperative tone. He deprecated the Commission's tendency to impose obligations on the contracting parties and to demand action of the General Assembly. Paragraph 1 opened with the words "An agency *shall* be established..."; in paragraph 2, the parties were *obliged* to establish a tribunal; paragraph 3 stated that "any dispute... *shall* be submitted..."; and paragraph 4 gave a direct order to the General Assembly. There seemed to be no reason for such inappropriate imperiousness on the part of the Commission.

68. Mr. LAUTERPACHT recollected that the Commission had entrusted the Drafting Committee with the preparation of the text of an additional article because after long discussion, it had been decided that the draft conventions should contain provisions to safeguard their implementation. It followed that any provisions that were not binding on the contracting parties were alien both to the Commission's purpose and to the objects of the conventions. For that reason, the use of the conditional mood, implying the absence of definite obligations, was inadequate.

69. Referring to the difficulties that the Secretary feared might arise from a recommendation that the General Assembly be empowered to act, he pointed out that it was possible that only five or six States might become parties to the convention; they might fail to establish an agency and a tribunal either out of inadvertence, or though in agreement on the principle, as a result of disagreement on, for example, the composition of the tribunal. It seemed to him that the General Assembly would be entirely justified in establishing a body in which only a few members were interested, because it would be acting pursuant to a convention which it had discussed, approved and laid open for signature, and for which it would thus have accepted general responsibility.

70. Mr. Kozhevnikov's objections to the imposition of rigid obligations on the contracting parties were understandable, for he disapproved of the conventions as a whole. But it was in the nature of a convention that obligations be laid on the States acceding to it. Those who approved of the provisions of the conventions should not be afraid of ensuring that those provisions were fulfilled; indeed, stateless persons would have no other protection.

71. Mr. CÓRDOVA quoted from the Convention on the Declaration of Death of Missing Persons,[6] article 8 of which established an International Bureau for Declarations of Death within the framework of the United Nations, and article 15 of which provided that the establishment of that Bureau should require the approval of the General Assembly. That provided an excellent precedent for dealing with a situation brought about by the inability of the parties to reach agreement.

72. He suggested, moreover, that the conventions as a whole and the additional article in particular were incomplete, in that they made no provision for the

[6] United Nations publication, Sales No.: 1950.V.1.

determination of the date on which they would come into force, and failed to stipulate how many signatures would be required for that purpose, how many States would be responsible for the establishment of the agency and so forth.

73. Mr. SPIROPOULOS, referring to Mr. Córdova's last point, said that as the final clauses were normally added to a convention by the General Assembly itself, there was no need for the Commission to propose them.

74. He suggested that the Commission should proceed to vote forthwith on the additional article. There was substantial agreement on the text of the first three paragraphs, which he considered adequate though not ideal. To meet the various views expressed in the Commission, he would suggest alternative texts for paragraph 4, reading as follows:

"4. If, within two years of the entry into force of the convention, the agency and the tribunal referred to in paragraphs 1 and 2 have not been set up by the Parties,

"*either* [any State may draw the attention of the General Assembly to that fact],

"*or* [the two organs should be set up by the General Assembly]".

75. He himself preferred the first alternative, as he considered it entirely proper to authorize the General Assembly to look into a failure of any parties to a convention to act on a matter of wide humanitarian concern.

76. Mr. LIANG (Secretary to the Commission) thanked Mr. Córdova for drawing attention to the Convention on the Declaration of Death of Missing Persons, but pointed out that the stipulation therein that the establishment of the International Bureau should be subject to the approval of the General Assembly was a very different matter from the provision suggested in paragraph 4. He doubted whether it would be proper for the Commission to submit to the General Assembly a text obliging the General Assembly to take certain action without giving it an opportunity of considering the facts rendering that action necessary. He therefore preferred the first of the two texts suggested by Mr. Spiropoulos, according to which the General Assembly's action would be governed by its general interest in the matter of statelessness.

77. Mr. AMADO thought that the Commission could well agree to approve paragraphs 1, 2 and 3, but was surprised to see that those members who supported paragraph 4 were apparently not afraid of thereby leaving the door open to all States Members of the United Nations to participate in any discussions in the General Assembly on the establishment of the proposed agency or tribunal.

78. Mr. SPIROPOULOS said that the General Rapporteur wanted paragraph 4 to be included so as to ensure that the General Assembly would be able to establish the agency or tribunal if it was not set up pursuant to the provisions of the conventions. If the General Assembly then accepted the text of those instruments, it would *ipso facto* accept the obligations imposed by paragraph 4. The Commission should therefore either delete paragraph 4, or adopt one or other of his (Mr. Spiropoulos') alternative suggestions for the final sentence.

79. He again hoped that the Commission would adopt as wide and elastic a formula as possible, for the failure of the Contracting Parties to establish a tribunal would not necessarily mean that they had no wish to establish it, but might merely mean — as the General Rapporteur had pointed out — that they were unable to agree on details.

80. Mr. LAUTERPACHT said that the first of Mr. Spiropoulos' alternatives was meaningless, for all States had the right to bring any matter before the General Assembly, and it would not enhance the Commission's reputation to include such a provision in the conventions. Referring to the Secretary's objection that it was not proper for States that were unable to agree between themselves to saddle the General Assembly with an unwanted responsibility, he said that he agreed with Mr. Spiropoulos that it was very natural for States to ask the General Assembly to act in a matter of which it had previously approved.

81. Mr. CÓRDOVA said that it must be assumed that the General Assembly was interested in solving the problem of statelessness, for not only had the Economic and Social Council asked the Commission to take the matter up, but the Commission on Human Rights was also interested in its solution. Further, as budgetary provision would have to be made for the agency or tribunal, it might be expected that the General Assembly would be interested on that ground, too.

82. Mr. YEPES said that, although the United Nations desired ardently to solve the problem of statelessness, and although the Commission had agreed to suggest that an agency should be set up to help stateless persons seek redress, yet the matter was beset with difficulties. He could not see how the tribunal would be organized, how many States would be required to establish it, or whether its establishment would need a separate convention. There were, indeed, so many practical difficulties that, if the Commission did not wish to abandon stateless persons to the bad faith of governments, it might be better for it to charge the International Court of Justice with the supervision of the conventions.

83. Mr. SPIROPOULOS did not think that the International Court of Justice would approve of Mr. Yepes' suggestion.

84. In order to allow the Commission to vote on a clear issue, he would withdraw the first of his alternative texts, namely, that according to which any State might draw the attention of the General Assembly to the failure of the Contracting Parties to establish the agency or tribunal. The Commission would thus be able to agree on a definite text for both conventions. It was true that the inclusion of provision for the establishment

of an agency or tribunal might make their adoption more difficult; but the proposal was very defensible, as it was not unreasonable to ask the General Assembly to act, as it were, as an arbitrator.

85. Mr. ZOUREK hoped that the Commission would give due thought to the matter before deciding to insert in the conventions a text according to which the General Assembly would be obliged to establish certain institutions in the event of disagreement between the contracting parties, for such action was beyond the competence of the General Assembly, which could only act in conformity with the Charter of the United Nations, and thus was empowered only to make recommendations to States Members. It could not make good the deficiencies of contracting parties.

86. Mr. HSU said that it would do no harm to include paragraph 4, as the General Assembly would then be able to consider the whole matter. He proposed the following text for that paragraph:

"4. If, within two years of the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any one of the Parties shall have the right to request the General Assembly to set them up."

Paragraph 1 of the additional article, as amended during the discussion, was adopted by 10 votes to 2, with 1 abstention.

Paragraph 2 of the additional article, as amended during the discussion, was adopted by 9 votes to 2, with 2 abstentions.

Paragraph 3 of the additional article, as amended during the discussion, was adopted by 9 votes to 2, with 1 abstention.

Paragraph 4 of the additional article, in the form suggested by Mr. Hsu, was adopted by 4 votes to 2 with 5 abstentions.

87. Mr. SCELLE suggested that, as paragraph 4 established a form of sanction for non-compliance with the provisions laid down in paragraphs 1 and 2, it should follow those paragraphs. Paragraph 3, which was of more general concern, would then become the last paragraph.

It was so agreed.

The additional article proposed by the Drafting Committee was adopted, as a whole and as amended, by 10 votes to 2, with 1 abstention.

The meeting rose at 1.5 p.m.

233rd MEETING

Thursday, 6 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)

Relation between the two draft conventions (Paragraph 121 of the "Report")

1. The CHAIRMAN invited the Commission to discuss the relation between the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness. The General Rapporteur had presented a proposal reading as follows:

"The Commission deems it convenient, in order to clarify a situation which may otherwise give rise to misunderstanding, to indicate at this juncture in general terms the relation between the two drafts. The Commission is convinced of the desirability of eliminating or at least drastically reducing statelessness in the future. The Commission does not at present consider it necessary to recommend to Governments which of the two conventions they should adopt as the basis for their observations. However, it is of the opinion that members of the United Nations should recognize the urgency of the problem by giving consideration to both conventions and by commenting on them. It may be added that while the Convention on Elimination of Statelessness by its nature does not admit of reservations, it would be a matter for the decision of States accepting the Convention on Reduction of Statelessness to what extent reservations to that convention shall be declared admissible.

"In due course, and after receiving the comments of Governments, the Commission will consider whether and in what form it should submit to Governments final drafts of the Convention and what course of action it should recommend."

2. In the General Rapporteur's view, his proposal was a suggestion as to what might be included in the Commission's report rather than a text for detailed discussion. Further, the General Rapporteur considered that the Commission's agreement to include in its report a passage on the lines of his proposal would not *ipso facto* commit it to agreement with the terms of either one of the two conventions; indeed, the General Rapporteur's proposal was that the Commission should not vote on the conventions separately.

3. Mr. SANDSTRÖM found some difficulty in grasping the exact meaning of the General Rapporteur's proposal. There was, for example, a contradiction between the sentence running:

"The Commission does not at present consider it necessary to recommend to governments which of the two Conventions they should adopt as the basis for their observations",

and the succeeding sentence running:

"However, it is of the opinion that Members of the United Nations should recognize the urgency of the problem by giving consideration to both Conventions and by commenting on them".

4. If the intention of the first sentence was merely that the Commission did not recommend one or other of the two conventions to governments, it might perhaps be amended to read:

"The Commission does not at present consider it necessary that governments should adopt either the one or the other of the two Conventions as the basis for their observations".

5. In other respects, he agreed with the General Rapporteur's proposal.

6. Mr. LAUTERPACHT agreed that Mr. Sandström's suggestions clarified and improved the text.

7. Mr. YEPES, referring to the same sentences as Mr. Sandström, thought that the phrase "at present" in the first was vague and therefore unnecessary. Further, the French translation of the second should be amended by replacing the word "*doivent*" by the word "*devraient*", for it would be inappropriate for the Commission to phrase the opinion imperatively.

8. The CHAIRMAN asked members to confine their remarks to general principles, leaving drafting details on one side.

9. Mr. KOZHEVNIKOV, referring to the second of the two sentences to which Mr. Sandström had referred, said that the Commission ought not to express an opinion on the urgency of the problem, which was a matter for governments; the sentence should therefore be deleted. Similarly, the succeeding sentence, in which it was stated that the Convention on Elimination of Future Statelessness by its nature did not admit of reservations, should also be deleted.

10. As to the method of voting on the two conventions, he would prefer them first to be voted on separately, and then together.

11. Mr. LAUTERPACHT said that the core of his proposal was the statement that the Commission was convinced of the desirability of eliminating or at least drastically reducing statelessness. The Commission could not at present say which course — elimination or reduction — should be followed; that was a matter for governments to decide in the future. Therefore a vote on the two conventions taken together would be more appropriate.

12. It was, in his view, most important that the Commission should express an opinion on the urgency of the problem. Nevertheless, if it would enable Mr. Kozhevnikov to vote for the paragraph he (Mr. Lauterpacht) would gladly delete the sentence in question. Similarly, on the issue of the inadmissibility of reservations to the Convention on the Elimination of Statelessness, there would be no object in deleting the reference if Mr. Kozhevnikov was going to vote against the proposal in any case; for his own part, he thought that some guidance should be given to those governments which might be hesitant to accept even the Convention on the Reduction of Future Statelessness.

13. Mr. LIANG (Secretary to the Commission) said that the General Rapporteur's proposal was not so much an account of the relation between the two conventions as an appeal to governments to comment on their texts. It thus seemed superfluous, as governments were bound by the Commission's Statute to comment on them.

14. Further, he thought that the question of the admissibility of reservations to the Convention on Elimination of Statelessness was misplaced. It was a point that should certainly be made somewhere, but he would prefer to see it rather in an introductory section of the report — perhaps in the section entitled "Object and Nature of the two Conventions".

15. The second paragraph of the General Rapporteur's proposal had little obvious connexion with the relation between the two conventions; it described, rather, the steps which the Commission had taken and was proposing to take. Even as it stood, however, he questioned its accuracy, for the final drafts of the two conventions should, in conformity with the Commission's statute, be submitted to the General Assembly rather than to governments.

16. The CHAIRMAN said that the General Rapporteur wished to learn the views of members on the principles enunciated in his proposal; he would then be able to draft appropriate paragraphs and place them suitably in the relevant chapter of the draft report.

17. Mr. ALFARO was in general agreement with the substance of the proposal. However, he thought that it

might be strengthened if, in addition to the statement that the Commission was convinced of the desirability of eliminating or reducing statelessness, it was also stated that it had taken up the matter at the instance of the Economic and Social Council; the second sentence might then begin:

"The Commission, like the Economic and Social Council, is convinced of the desirability..."

18. In the fourth sentence, which urged governments to recognize the urgency of the problem, it might be more appropriate to refer to the will of governments rather than to their duty. The sentence might open:

"However, it is of the opinion that Members of the United Nations will recognize..."

19. Mr. KOZHEVNIKOV said that, although he could not express a final opinion until he had heard more of the views of his colleagues, he felt that it was not appropriate to refer to the admissibility of reservations to the Convention on the Elimination of Statelessness. It was wrong to assume that reservations to that Convention would necessarily be inadmissible. In principle, it was possible to make reservations to any convention, the right to do so being a sovereign right of any sovereign State.

20. As to the method of voting on the two conventions, he thought that as each had its own distinctive features, they should be voted upon separately.

21. Mr. SPIROPOULOS said that the General Rapporteur would undoubtedly take the opinions expressed by members of the Commission as the basis for the revision of his text.

22. As it stood, the proposal began badly, for the first sentence referred to the possibility of a misunderstanding arising. It seemed to him that no misunderstanding could possibly arise, the difference between the two conventions being evident from their titles. Again, taking the third sentence, surely it was plain that if governments were faced with two texts they would comment on both; indeed, the Commission should ask governments for their observations on a single document comprising the texts of the two conventions, for except in the unlikely event of all governments disapproving of the draft convention on the elimination of future statelessness, which would then have to be abandoned, it was probable that both conventions would ultimately be opened for signature and ratification.

23. It would be improper for the Commission to ask governments to "recognize the urgency of the problem", though governments could rightly be requested to comment on the conventions on the ground that the Commission considered the problem to be urgent. Further, the question of reservations to the Convention on the Elimination of Future Statelessness was a matter for governments. He agreed with the Secretary that the final drafts would go to the General Assembly, and the second paragraph of the proposal should therefore be amended in that sense.

24. As to the method of voting, the two conventions dealt with two different subjects, and it would therefore be normal to take a separate vote on each. But in the circumstances, it was reasonable to vote on the two texts together, leaving the final decision on which text to recommend to the General Assembly for a later session, by which time the observations of governments would have been received.

25. The CHAIRMAN said that the essence of the proposal lay in its third sentence, where it was stated that the Commission did not consider it necessary to recommend which of the two conventions should be adopted as the basis for the observations of governments. If that view prevailed, it followed that it would be impossible to vote on each convention separately, for what would happen if one of them were to be rejected?

26. Mr. CÓRDOVA said that if the Commission accepted the General Rapporteur's proposal it would refrain for the time being from expressing a preference for the one convention or the other. He thought that the Commission was in agreement that the observations of governments should first be awaited.

27. Referring to Mr. Spiropoulos' assertion that there was no possibility of misunderstanding the relation between the two conventions, he said that for his part he was sure that governments would be confused if, on receiving two apparently contradictory texts from the Commission, the reasons for presenting them both were not stated.

28. The General Rapporteur's proposal that the inadmissibility of reservations to the Convention on the Elimination of Future Statelessness should be mentioned had been criticized, but in his (Mr. Córdova's) view it was essential to declare that that convention was directed to the total elimination of statelessness, and that it would be imposible to achieve that end if reservations to the convention were permitted.

29. As to the vote on the conventions, he considered that both must be submitted to governments for their observations and the two final drafts, incorporating any changes necessitated by those observations, subsequently presented to governments as alternatives for signature and ratification.

30. Mr. SPIROPOULOS repeated that the relation between the two conventions, if there was one, was evident from their titles and texts. Nevertheless, it would be useful to include in the Commission's report an historical account of the origins of the two conventions, starting with the request of the Economic and Social Council that the Commission should "...prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness."[1]

31. He agreed with the Chairman that the disadvantage of taking separate votes on the two conventions was that the Commission would be unable to present to

[1] Council resolution 319 B III (XI), of 11 August 1950.

governments for their observations one of which it happened to disapprove. Therefore, despite the normal practice of taking separate votes on separate subjects, the two conventions should in the circumstances be voted upon together.

32. Mr. LIANG (Secretary to the Commission) said that the relation between the two conventions might be one of mutual exclusiveness or one of co-existence; but whichever was the case, the proposal under discussion was much more concerned, and in his view rightly so, with the progress of the Commission's work. He recalled that at the fourth session, Mr. Sandström had suggested that two conventions be drafted: the outcome of that request was the "Report on the Elimination or Reduction of Statelessness" prepared by the Special Rapporteur (A/CN.4/64), in which the two drafts were elaborated. The Commission should accordingly send both texts to governments and seek their comments on them. At the stage which the Commission had now reached it would be appropriate to suggest that governments might comment first on the desirability of having two conventions, and then on the substance of each of them. Thus the third sentence of the General Rapporteur's proposal, in which it was stated that the Commission did not at present consider it necessary to recommend which of the two conventions should be adopted as a basis for observations by governments, should be modified to read:

> "The Commission requests governments to comment on the two conventions".

33. Mr. LAUTERPACHT said that he would be very glad to take into account, in drafting the report, the observations which members of the Commission had made, at least to the extent to which they were not mutually contradictory.

34. It seemed to him that if, as appeared to be the case, it was possible for misunderstanding to arise in the Commission, so much the greater was the possibility of misunderstanding arising among ordinary readers of the report. He thought it was undeniable that there was a relation between the two conventions, even if it were only that of mutual exclusiveness.

35. He felt that the Commission should first decide whether it could accept the second sentence of his proposal: was the Commission "convinced of the desirability of eliminating or at least drastically reducing statelessness in the future"? Secondly, the Commission should decide whether it was fully agreed that the two conventions should be regarded as alternatives. For his part, he felt that progress would have been achieved by the acceptance of either convention, and that the difference between them was slight.

36. Mr. KOZHEVNIKOV said that the discussion was gradually convincing him that the Commission ought to fall back on its normal procedure and vote on the two conventions separately, for though there was certainly a connexion between them they were not identical, but dealt with different subjects. One was concerned with the total elimination of statelessness in the future; the scope of the other — the reduction of statelessness in the future — was more restricted. Further, they had been discussed separately, and if the Commission followed that procedure to its logical conclusion, its opinion on them should be determined separately.

37. Mr. ZOUREK said that the Commission should eschew peremptory phraseology, such as that of the fourth sentence of the General Rapporteur's proposal. Further, in his view there was no need to refer to the inadmissibility of reservations to the Convention on the Elimination of Future Statelessness, for reservations were normal in the case of all conventions.

38. The General Rapporteur's suggestion that the two conventions be voted upon together was unusual, in so far as it would involve delaying for twelve months any decision the Commission might take on the merits of the two conventions. He did not himself consider that there was any conflict between the third sentence of the General Rapporteur's proposal, that the Commission did not consider it necessary to recommend to governments which of the two conventions they should adopt as the basis for their observations, and the proposal that the Commission should vote on each convention separately.

39. The CHAIRMAN intervened to repeat that if the Commission rejected one convention it would clearly be impossible to submit that text to governments for their consideration.

40. Mr. HSU said that the General Rapporteur's concern that the Commission should not be obliged at a preliminary stage of its work to decide on the relative merits of the two conventions was perfectly legitimate. The Commission should therefore vote only on the two conventions together.

41. He urged the Commission to give its general approval to the General Rapporteur's proposal, and to leave him some freedom to draft his report as he thought fit, taking into account the views expressed by members.

42. Mr. SANDSTRÖM was not clear whether the General Rapporteur's intention was that the Commission, having presented two draft conventions to governments for comment, should ultimately present them with two final drafts for acceptance. He (Mr. Sandström) could not agree that a decision in that sense should be taken forthwith. He preferred the second paragraph of the General Rapporteur's proposal as submitted, and, indeed, would suggest that it be slightly modified so as to leave completely open the question of which, or how many, conventions might be submitted for acceptance in the form of final drafts.

43. Mr. YEPES thought that the Commission should state most emphatically that it was "convinced of the desirability of eliminating or at least drastically reducing statelessness in the future". Secondly, he considered that the two draft conventions prepared were mutually exclusive, and should not both be submitted to governments for comment. He thought that, as the draft Convention on the Elimination of Future Statelessness

would command the less support from governments, only the draft Convention on the Reduction of Future Statelessness should be submitted to them. Thirdly, no mention should be made of the possible inadmissibility of reservations to the Convention on the Elimination of Future Statelessness, for the right to enter reservations was a right that every government enjoyed in respect of every convention.

44. Mr. ALFARO was in general agreement with the views expressed by the General Rapporteur in his proposal. He thought that the first sentence should not be deleted, though it might be amended to read somewhat as follows:

> "The Commission deems it convenient... to indicate at this juncture the reasons which have caused it to present two draft conventions."

45. As to the second sentence, he agreed with Mr. Yepes that the Commission should emphasize that it was convinced of the desirability of eliminating or drastically reducing statelessness. Indeed, that elimination or reduction was not only desirable but necessary, and the Commission should say so bluntly. He agreed with the third sentence, for though the Economic and Social Council had requested the Commission to recommend conventions directed to the elimination of statelessness, it had been considered that total elimination was impossible, and that a draft convention aiming at the reduction of future statelessness was therefore necessary.

46. He agreed with Mr. Zourek that the fourth sentence was too peremptory. It might perhaps be reworded somewhat as follows:

> "However, it is of the opinion that Members of the United Nations, recognizing the urgency of the problem, will give consideration to and will comment on both conventions."

47. He agreed with Mr. Sandström's suggestion concerning the second paragraph, and was also in favour of the two conventions being voted upon as a single whole, as such a vote would be tantamount to a decision on the sum total of the Commission's deliberations on nationality and statelessness.

48. Faris Bey el-KHOURI said that it was useless to present two conventions to governments for their comments, because it would be most undesirable for two conventions to be ultimately opened for signature and acceptance. The existence in international law of two different means of dealing with the problem of future statelessness could only mean that governments would be unnecessarily divided into two groups, according to the way in which they wished to deal with the matter in their own territories. In any event, there was no significant difference between the two conventions. Even the convention that had been entitled "on the Elimination of Future Statelessness" was really concerned with the reduction of statelessness consequent upon the death of existing stateless persons.

49. Mr. KOZHEVNIKOV commended Faris Bey el-Khouri's reasoning to the Commission, and also supported Mr. Yepes' statement that the right to enter reservations to all international conventions was an inherent right of sovereign States.

50. The statements of some members of the Commission gave him the impression that a majority regarded the Convention on the Elimination of Future Statelessness as unrealistic and considered it doubtful whether it would command the necessary support from governments. For his part, he considered the other convention equally unrealistic; but it would be most improper for the Commission to ask governments for their comments on a convention of which it did not itself approve. In the circumstances, the two conventions should be voted upon separately. The Commission should not be afraid of expressing its opinion.

51. Referring to the second sentence of the General Rapporteur's proposal, in which the Commission was stated to be convinced of the desirability of eliminating or reducing statelessness in the future, he said that such a statement was surely superfluous, for if the Commission had not been so convinced it would not have been dealing with the question at all. The real issue hinged not on the desirability of eliminating or reducing statelessness, but on the method of doing so. Some members considered that the methods involved in both draft conventions were wrong, and would fail to have the desired effects; they considered that States ought to take the necessary action individually.

52. Mr. CÓRDOVA felt that the Commission had now come to the crux of the matter, which was whether it should submit one draft convention or two. In his view, it was essential that it should submit both. No one disputed the fact that the final aim of the Commission's endeavours was the elimination of statelessness, or that technically it was attainable. But if the Commission submitted only the draft Convention on the Reduction of Future Statelessness, it would thereby imply that it regarded that aim as unattainable. It was not the responsibility of individual members of the Commission to decide what they would be able to accept if they were the representatives of their governments; their only task, that laid upon them by the Economic and Social Council, was, as international lawyers, to devise a legal formula for the elimination of statelessness. As it seemed, however, that for political reasons it would be difficult to eliminate statelessness, the Commission was also submitting the draft of another convention, designed to reduce it so far as seemed feasible in the present political circumstances.

53. Even if not a single government ratified the draft Convention on the Elimination of Future Statelessness it would do a great deal of good; for, in the same way as the principles of the 1899 and 1907 Hague Conventions had gradually come to inspire the legislations even of the many States which had not ratified them, so it might be hoped that even if the draft Convention on the Elimination of Future Statelessness were not ratified, future legislation would gradually become more and more inbued with its spirit.

54. Mr. SPIROPOULOS pointed out that the normal procedure, as laid down in the Commission's Statute, would be to submit both draft conventions to the General Assembly. There was, however, a danger that if the first were put to the vote, it would be rejected. Moreover, the Economic and Social Council had already taken a very definite stand on the whole matter. For those reasons the General Rapporteur had proposed that the Commission should, by a single vote, decide to submit both conventions for comment by governments, and should not, until the comments of governments had been received, decide whether and in what form it should submit final drafts of them to the General Assembly. The proposed procedure was certainly abnormal, but so were the circumstances. The procedure had, moreover, the advantage that a favourable vote would not commit members to support for the two conventions, as it would not mean anything more than that they should be submitted to governments for comment.

55. Mr. ZOUREK said that the differences between the two conventions were so slight that he could not attach much weight to the argument that if separate votes were taken on them, one might be adopted and the other rejected. He considered, on the other hand, that it would be very difficult to explain why the Commission had taken a single vote on two texts which were not mutually complementary.

56. Mr. YEPES felt that the difficulty arose from the attempt to define the relation between the two conventions. In his view, that was unnecessary, and the Commission should simply have one chapter in its report containing the first draft convention and explaining that although, in the present circumstances, it only represented an ideal, the Commission submitted it because it had been so instructed, and another chapter containing the second draft convention and explaining that it had been prepared with a view to providing a realistic means of substantially reducing statelessness, even in existing circumstances.

57. Mr. LAUTERPACHT felt that Mr. Yepes' suggestion was merely tantamount to voting on each convention separately. For that reason, he could not support it.

58. The CHAIRMAN agreed with those members of the Commission who had pointed out that it must first decide whether it wished to vote on the two conventions together or separately. Once that question had been decided, the Commission could then proceed to the vote — or votes — on the texts themselves.

59. Mr. KOZHEVNIKOV requested that the vote — or votes — on the texts themselves be deferred until the next meeting, since the final texts had only just been distributed.

It was so agreed.

60. The CHAIRMAN put to the vote the proposal that the Commission should take a single vote on the two draft conventions together.

The proposal was adopted by 10 votes to 1, with 2 abstentions.

61. Mr. YEPES explained that he had voted against the proposal for the sole reason that he did not think that the two conventions should be fused into one in that way, and considered that a separate vote should have been taken on each.

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 232nd meeting*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1) *

62. The CHAIRMAN drew attention to the chapter on the régime of the high seas in the draft report of the Commission covering the work of its fifth session (A/CN.4/L.45/Add.1), and suggested that the Commission consider it paragraph by paragraph.

63. Replying to a question by Mr. HSU, he said that there could be no objection to members first making general statements on the draft chapter, provided they did not re-open the substantive discussion on the draft articles themselves.

64. Mr. HSU said that the draft report dealt with every conceivable question except the most crucial one, namely, the reason why the Commission had recognized the sovereign rights of the coastal State over the so-called continental shelf, instead of its exclusive right to the exploration and exploitation of the natural resources thereof. Paragraphs 11 and 12 stated that the term "sovereign rights" had been used instead of the expression "control and jurisdiction" for two reasons: first, "to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, safeguarding the principle of the full freedom of the superjacent sea and the air space above it"; and secondly, so as to leave "no doubts as to the completeness of the rights of the coastal State". Neither was a sufficient reason. A principle could not be safeguarded by impairing it, nor could encroachment on a principle be justified by making the encroachment complete.

65. It was, indeed, admitted in paragraph 16 that "the Commission does not deem it necessary to elaborate the question of the nature or of the legal basis of the sovereign rights attributed to the coastal State". The report went on: "Some of the considerations relevant to this matter have been adduced above in paragraphs 11 and 12". He had already shown that those considerations were unconvincing.

66. It was also admitted that "it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice". Yet immediately afterwards it was stated that "that practice itself is considered by the Commission to be supported by

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

considerations of legal principle and convenience". Leaving aside the question whether a practice which was declared to be something on which it was premature to base the principle of the sovereign rights of the coastal State could properly be regarded as being "supported by considerations of legal principle and convenience", those considerations themselves turned out to be quite irrelevant to the question at issue; for they bore upon the desirability of giving the rights of exploration and exploitation to the coastal State as opposed to giving them to non-coastal States, not to the desirability of giving them to one particular State as opposed to giving them to the community of States.

67. Paragraph 16 ended by stating that the principle that the coastal State should enjoy sovereign rights over the continental shelf was "in no way incompatible with the rationally conceived principle of the freedom of the sea". That statement added nothing. Nowhere in the report was the "rationally conceived principle of the freedom of the sea" explained. Repetition of the assertion that the coastal State enjoyed sovereign rights over the continental shelf did not make it any more compatible with the principle of the freedom of the sea, whether that principle was rationally or irrationally conceived.

68. In section C of the draft chapter entitled "The nature of the task of the Commission", passing reference was again made to the question of the coastal State's sovereign rights. What was said, however, was no more convincing than the passages upon which he had already commented, and further examination of it was therefore unnecessary.

69. What he had said should not be regarded as criticism of the General Rapporteur, who had been given the impossible task of justifying the Commission's decisions: for the Commission itself had not attempted to justify its decisions; it had merely adopted them. It had decided to give the coastal State sovereign rights over the continental shelf, but it had not attempted to explain why; that task had been left to the General Rapporteur. It was little wonder that he had been unable to carry it out satisfactorily, for the Commission's decision, and therefore the whole of the draft articles, was unscientific and unfortunate. The draft articles were unscientific because they were unnecessary and unrealistic, for reasons which he need not again explain. They were unfortunate because they conflicted with an established principle of international law which had served the international community well for three centuries.

70. He could almost agree with the General Rapporteur's suggestion, in paragraph 39, that the Commission should recommend to the General Assembly that it take no action on the draft articles on the grounds that they had already been published, since that would be tantamount to shelving them. Merely to shelve them, however, would be prejudicial to the Commission's prestige, and would also waste all the hard work which the Commission had devoted to the subject. He therefore considered that it would be preferable to take no final decision on the subject at the present session, but to leave it over till the sixth session, when a more scientific draft might be prepared and better use made of the Commission's previous work on the subject.

71. Mr. SCELLE agreed with much of what Mr. Hsu had said; but although he would vote against the draft articles, he would vote for many of the paragraphs in the draft chapter, because they accurately reflected the Commission's decisions.

72. Mr. YEPES saw no need for general discussion on the draft chapter as a whole. However, since the value of the draft articles had been called into question, he wished to place on record that in his view they represented a scientific achievement of great value. On the other hand, there were many paragraphs in the draft chapter which he could not support, since in his view they did not give an accurate account of what had gone on in the Commission. Especially was that true of section B (i), which was entitled "The concept of the continental shelf as used in the articles" and was the most important section in the whole chapter. Within that section, the most important paragraph was paragraph 7. That paragraph stated that the Commission had "adhered literally to the definition adopted in 1951" except with regard to the substitution of the words "to a depth of 200 metres" for the words "where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and sub-soil". That "exception" was fundamental, and the text proposed by Mr. Lauterpacht reminded him of the statement in army drill manuals that the left turn was exactly the same as the right turn, except that it was the other way round.

73. It was also regrettable that although paragraph 7 attempted to explain the reasons why the new definition had been adopted, it contained no mention of the serious objections to it which certain members of the Commission, including himself, had advanced. It was therefore his intention to submit a re-draft of paragraph 7.

74. Mr. KOZHEVNIKOV said that he did not intend to take part in the general discussion, and would only repeat that his acceptance of any part of the comments in section B of the draft chapter did not mean that he accepted them as legally valid comments on the draft articles.

75. Mr. SANDSTRÖM agreed with Mr. Yepes that the Commission's report should indicate the minority's views on certain fundamental points. He also pointed out that, although the Commission had agreed to adopt a neutral formula to define the rights which the coastal State should exercise over the continental shelf, the idea of sovereignty had reappeared in the text proposed by Mr. Lauterpacht.

76. In the absence of further general comments, the CHAIRMAN invited the Commission to consider the draft chapter paragraph by paragraph.

*Paragraph 1 (58)**

Paragraph 1 was approved by 12 votes to none, with 1 abstention.

Paragraph 2 (59)

Paragraph 2 was approved by 12 votes to none with 1 abstention.

Paragraph 3 (60)

Paragraph 3 was approved by 11 votes to none with 2 abstentions.

Paragraph 4 (61)

Paragraph 4 was approved by 12 votes to none with 1 abstention.

Paragraph 5 (62)

77. Mr. KOZHEVNIKOV asked whether, by voting on paragraph 5, the Commission would be voting on the substance of the draft articles embodied therein. If so, it might be desirable to defer the vote in order that the text could be carefully checked. Article 6, paragraph 1, for example, stated that "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production" whereas the exact words in the text adopted by the Commission had been "...in any unjustifiable interference with navigation or fishing or in reducing fish production".

78. Mr. SANDSTRÖM supported the suggestion that the vote be deferred to enable the text to be carefully checked. He himself had noticed that article 6, paragraph 4, read "Due notice must be given of any such installations constructed...", although it had been suggested that those words should be amended to read "Due notice must be given of the construction of any such installations...".

It was agreed that the vote on paragraph 5 should be deferred until the next meeting.[2]

Paragraph 6 (63)

79. Mr. AMADO suggested that the reference to the Commission's own study and discussion of the problems involved should precede the reference to the views enunciated by writers and learned societies.

80. Mr. SCELLE felt that there was a contradiction between paragraph 6, where it was stated that "the Commission has now departed in various respects from its preliminary draft", and paragraph 7 where, as Mr. Yepes had pointed out, the General Rapporteur maintained that no changes had been made.

81. Mr. KOZHEVNIKOV felt that the apologetic tone of paragraph 6 was wholly inappropriate. If the Commission had taken a decision, it must be presumed that it had done so for reasons which it considered good.

82. Mr. LAUTERPACHT said that he had referred first to the views enunciated by writers and learned societies because they had preceded the Commission's own study and discussion, which, indeed, in part rested upon them.

83. He could not agree with Mr. Scelle that there was any contradiction between paragraph 6 and 7. The former stated that the Commission had departed from its preliminary draft in *various respects;* the latter stated that, as regards the definition, it had adhered literally to its previous decision, except in one particular.

84. He could not understand Mr. Kozhevnikov's objection as he could see nothing apologetic about stating that the Commission had adhered to the basic considerations underlying the articles provisionally adopted in 1951, namely, recognition of the coastal State's rights over the continental shelf and the desire to maintain the freedom of the seas.

85. Mr. SCELLE said that it was not the case that the Commission had adhered to all the basic considerations underlying the preliminary draft. It had departed from them in two ways: first, it had introduced the concept of sovereignty over the continental shelf; secondly, it had modified the definition of the continental shelf.

86. Mr. YEPES fully agreed with what Mr. Scelle had said, and felt that the General Assembly would also not be convinced that no basic changes had been made. He therefore proposed that the words "While adhering to the basic considerations" be replaced by the words "While in general taking into account the considerations".

87. Mr. LIANG (Secretary to the Commission) pointed out that paragraph 6 was an attempt to give the Commission's view of the importance of the changes it had made. It was, perhaps, difficult to consider it before deciding what was to be said in the paragraphs relating to the individual articles, and it might therefore be desirable for the vote on it to be deferred.

88. The CHAIRMAN, speaking as a member of the Commission, said that he could not support Mr. Yepes' proposal because, in his view, and he thought in that of the majority of members, the changes which had been made did not affect the basic principles, either with regard to the question of sovereignty or in the definition. He could therefore accept the text proposed by the General Rapporteur.

89. Mr. CÓRDOVA said that he shared the views expressed by the Chairman.

90. Mr. HSU said that he, on the other hand, agreed with Mr. Yepes and Mr. Scelle that the changes which had been made were departures, and departures for the worse, from the basic considerations underlying the preliminary draft.

* The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[2] See *infra,* 234th meeting, para. 58.

Mr. Yepes' proposal was rejected by 5 votes to 2, with 4 abstentions.

Paragraph 6 was approved by 8 votes to 2, with 2 abstentions.

91. Mr. YEPES asked that a footnote be inserted in the Commission's report to the effect that he had voted against paragraph 6 for the reasons he had given during the discussion on it.

The meeting rose at 1 p.m.

234th MEETING

Friday, 7 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Giberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1)* (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the chapter on the régime of the high seas in the draft report covering the work of its fifth session (A/CN.4/L.45/Add.1).

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

*Paragraph 7 (64)***

2. Mr. SANDSTRÖM proposed the insertion, after the first two sentences of paragraph 7[1] referring to the change in the method of delimiting the continental shelf, of a sentence reading as follows:

> "Some members of the Commission wanted to maintain the previously adopted text even in this respect for the reason *inter alia* that it corresponds better to the purpose of the draft not to adopt a fixed limit for the continental shelf but to let the territorial extension and the exercise of the powers to be given the coastal State depend on the practical possibilities of exploiting;"

The text should then continue: "The majority of the Commission, following the considerations adduced by the Special Rapporteur..." instead of "The Commission, following the considerations adduced by the Special Rapporteur...". He also proposed the deletion of the last sentence, reading: "The text thus adopted is not arbitrary, for, as already stated, it also coincides generally with the practical possibilities of exploration and exploitation." The practical possibilities of exploration and exploitation were at present generally limited to a depth of 30 metres, not 200 metres.

3. Mr. YEPES appealed to the Commission's understanding and to the General Rapporteur's sense of fair play to devise a generally acceptable formula for what was the most important paragraph in the whole chapter. He was strongly in favour of the draft articles, but he could not vote in favour of the report unless it was a faithful account of what had actually occurred. He did not see why the Commission should not frankly state that it had changed its mind, since such was the case. Mr. Lauterpacht had not been present at the third session and it was therefore understandable that he should fail to realize how complete was the change

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] Paragraph 7 read as follows:

"7. In defining, for the purpose of the Articles adopted, the term "continental shelf" as referring "to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, *to a depth of two hundred metres*", the Commission adhered literally to the definition adopted in 1951 except with regard to the passage reproduced in italics. The relevant passage of Article 1 as then adopted referred to the area "where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil". The Commission, following the considerations adduced by the Special Rapporteur in the light of observations of governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the fixed limit of two hundred metres — a limit which is at present sufficient for all practical needs — coincides with widely accepted practice and is in conformity with the fact that it is at that depth that the continental shelf, in the geological sense, generally comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not arbitrary for, as already stated, it also coincides generally with the practical possibilities of exploration and exploitation."

which had been made. In its report on that session, however, the Commission had clearly stated, with regard to the article defining the continental shelf: "This article explains the sense in which the term 'continental shelf' is used for present purposes. It departs from the geological concept of that term".[2] Having placed its views publicly on record in that way, the Commission could not pretend that it had not changed them in coming round to those which he had himself expressed in 1951, and adopting a geological definition.

4. As he had mentioned at the previous meeting[3] he accordingly now proposed that paragraph 7 be amended to read as follows:

> "In defining — after lengthy discussion — for the purpose of the articles adopted, the term 'continental shelf' as referring 'to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres', the Commission made a substantial change and abandoned the criterion of exploitability that it had adopted in 1951 in favour of that of a depth of two hundred metres, as laid down in article 1 of the draft. The relevant passage of article 1 as adopted in 1951 referred to the area 'where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil'. The Commission, following the considerations adduced by the Special Rapporteur in the light of observations of certain Governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the fixed limit of two hundred metres — a limit which is at present sufficient for all practical needs — has been fixed because it is at that depth that the continental shelf, in the geological sense, generally comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not arbitrary for, as already stated, it also coincides generally with the practical possibilities of exploration and exploitation. Nevertheless it may be added, in order to be absolutely objective, that some hold the view that even this limit is an arbitrary one, particularly in cases where exploitability extends beyond a depth of two hundred metres."

5. He also proposed that the following new paragraph be inserted after paragraph 7:

> "During the Commission's discussions it was argued that the criterion of depth violated the principle of equality of States in law, since — according to the exponents of that view — certain States, such as the South American Republics on the Pacific Coast, in particular Chile and Peru, whose waters reached a depth of 200 metres at a very short distance from the shore, would have practically no continental shelf if that concept were defined according to depth. It was also argued that the criterion of depth was in no way consistent with the 'declarations' on their respective continental shelves made, since 1945, by several American Governments. One member of the Commission considered that the germ of a veritable customary law on the continental shelf was already apparent in those declarations."

6. The CHAIRMAN, speaking as Special Rapporteur, said, with regard to Mr. Yepes' first proposal, that "cases where exploitability extends beyond a depth of two hundred metres" did not at present exist. As Mr. Sandström had said, the limit of exploitability was usually no more than 30 metres; with the scientific and technical progress which it was at present possible to foresee, the limit might be extended to 60 or 70 metres, but no deeper. The Commission had therefore been extremely generous in fixing the depth at 200 metres, since no practical possibility of exploitation below that depth could be even remotely foreseen. It was, of course, true that if ever the limit of exploitability exceeded a depth of 200 metres, the limit which the Commission had fixed would become arbitrary, but he thought it went without saying that the definition which the Commission had adopted was designed to meet present and foreseeable needs.

7. Mr. YEPES replied that, whatever might be said for or against the argument contained in the last sentence of his text, that argument had been advanced during the discussions and should therefore be reflected in the report, the sole purpose of which was to give an accurate account of the discussions. If, however, he was the only member of the Commission who supported that argument, he would have no objection to the words "some hold the view" being replaced by the words "one member of the Commission maintained".

8. Mr. CÓRDOVA, after mentioning that he had unfortunately been absent when the method of delimiting the continental shelf had been under discussion, stated that in his view the definition which had been adopted in 1951 was not satisfactory, but neither was that which the Commission had adopted at the present session entirely satisfactory either.

9. With regard to paragraph 7, he suggested that for the sake of accuracy the word "usually" should be inserted after the words "the continental slope" in the sentence reading: "It is there that the continental slope begins and falls steeply to a great depth".

10. Mr. HSU said that it was his intention to abstain from voting on all the paragraphs in section B of the draft chapter, and consequently on all the amendments submitted to them. He must say, however, that Mr. Yepes' complaint was largely justified. It was, of course, textually correct to say that the Commission had adhered literally to the definition adopted in 1951, subject to one exception. That exception, however, was all-important; the two definitions were in fact based on two entirely different and irreconcilable conceptions.

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[2] "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 141.

[3] See *supra*, 233rd meeting, para. 73.

11. Mr. SCELLE pointed out that the Commission was not at present discussing the scientific value of the draft articles, but whether the report accurately reflected what the Commission had done. In paragraph 6 it was stated that the Commission had adhered to the basic considerations underlying the articles provisionally adopted in 1951; in fact, it had departed from them in two respects: with regard to the nature of the rights exercised by the coastal State, and in the definition of the continental shelf. The change which had been made in the definition was a radical change, whatever might be said to the contrary in paragraph 7, and he was also quite unable to subscribe to the statement in paragraph 11 that "Essentially the difference between the exercise of control and jurisdiction and the exercise of sovereign rights is one of emphasis", although he agreed with the succeeding sentence, which read: "So is the difference between 'sovereign rights' and 'rights of sovereignty'".

12. The changes which had been made by the Commission during the present session were of great importance, and while he had been unable to vote for the draft articles in 1951 for the reason that they were dangerous, he was unable to vote for them in their new form for the reason that they were catastrophic.

13. Mr. LAUTERPACHT said that, as it had been his aim to submit a draft which accurately reflected the Commission's decisions, he was perturbed to find that some members of the Commission seemed to think that he had failed in his purpose.

14. Mr. Scelle claimed that the decision to replace the term "control and jurisdiction" by the term "sovereign rights" constituted a radical departure from the principles of the 1951 draft, but he (Mr. Lauterpacht) felt that that claim was difficult to sustain when it was borne in mind that most of the articles were devoted to qualifying the coastal State's "sovereign rights".

15. Mr. SCELLE drew attention to the penultimate sentence of paragraph 12, which read: "Such rights [the sovereign rights of the Coastal State] include full jurisdiction, in particular in connexion with the suppression of crime and, if necessary, regulation of civil status". Leaving aside the question whether it was not rather ridiculous to provide for the contingency of births on the continental shelf, the rights referred to had no connexion with control and jurisdiction for the purpose of exploring and exploiting its natural resources; they were the normal rights of sovereignty.

16. Mr. LAUTERPACHT said that, even under the terms of the text approved in 1951, the coastal State would have had to exercise jurisdiction in connexion with the suppression of crime and, if necessary — as it well might be — in connexion with the regulation of civil status. There was no difference, therefore, between the two texts in that respect.

17. To revert to paragraph 7, however, the fact that Mr. Sandström thought it went too far while Mr. Yepes thought that it did not go far enough provided a measure of the difficulty he had had in drafting it. He agreed, however, that the first sentence was open to the reproach that it was somewhat dialectical, and also that the last sentence, reading "The text thus adopted is not arbitrary for, as already stated, it also coincides generally with the practical possibilities of exploration and exploitation" might be so amended as to give some satisfaction to Mr. Yepes. If the Commission agreed, he would submit a re-draft.

18. Mr. YEPES supported Mr. Lauterpacht's suggestion.

19. Mr. AMADO said that he had little to add to what the Special Rapporteur and Mr. Lauterpacht had already said. He personally considered that the first sentence of paragraph 7 faithfully reflected the various stages in the Commission's consideration of the matter. On the other hand, he could not agree with the statement that the fixed limit of two hundred metres "coincides with widely accepted practice", and he would suggest to the General Rapporteur that in his re-draft those words be replaced by the words "is in accordance with practice".

20. Mr. YEPES agreed with Mr. Amado that it was incorrect to state that the fixed limit of two hundred metres "coincides with widely accepted practice", and pointed out that those words were omitted in his own re-draft.

21. The CHAIRMAN pointed out that, even if the General Rapporteur submitted a re-draft of paragraph 7, it would not cover the additional paragraph proposed by Mr. Yepes, which the Commission had, therefore, still to consider.

22. Speaking as Special Rapporteur, he could not understand the first sentence of that proposal, which stated that "the criterion of depth violated the principle of equality of States in law"; for the depth of the superjacent waters had been taken as the criterion in the 1951 draft, as well as in that adopted at the present session. The only difference lay in the manner in which the depth was defined. He also objected to the last sentence, since it was not only "one member of the Commission", but many, including himself, who had expressed the view stated; but that view was no argument against the so-called "criterion of depth".

23. Mr. YEPES pointed out that the criterion which the Commission had adopted in 1951 was not the purely geological criterion of depth, but depth plus exploitability.

24. Whatever could be said for or against them, however, the arguments which were reproduced in the additional paragraph which he proposed had been advanced during the discussions, and should therefore be mentioned in the Commission's report. He would, however, have no objection to the addition of a sentence reading: "The other members of the Commission did not accept these views".

25. Mr. CÓRDOVA said that he was opposed to the additional paragraph proposed by Mr. Yepes, since it was nonsense to say that "the criterion of depth violated

the principle of equality of States in law", or to argue that the criterion which the Commission had chosen for the purpose of delimiting the continental shelf was responsible for the fact that Chile and Peru would have none. It might as well be argued that the definition adopted for the territorial sea was unfair to Bolivia; it was not the definition which deprived Bolivia of a territorial sea, but the fact that it was a land-locked State.

26. If Mr. Yepes insisted on his views being indicated in the report, every other member of the Commission would have the right to insist that their views should be indicated too, which would make the report quite unmanageable.

27. Mr. SPIROPOULOS agreed that Mr. Yepes' proposal for an additional paragraph was unacceptable. The Commission was not responsible for geological factors which would deprive his own country, Greece, as well as the two countries referred to in Mr. Yepes' proposal, of a continental shelf. He also agreed with Mr. Córdova that it would be impracticable for the report to indicate the views of individual members of the Commission.

28. Mr. KOZHEVNIKOV supported the proposal that further discussion of paragraph 7 be deferred until the General Rapporteur had submitted a re-draft. He thought the Commission could also defer further discussion of Mr. Yepes' proposal for an additional paragraph, since the General Rapporteur's re-draft might make it unnecessary. He would therefore merely say, with regard to the substance of Mr. Yepes' proposal, that although he attached the greatest importance to the principle of the equality of States in law, that principle could clearly not be invoked by a State which had no continental shelf for the purpose of claiming one, any more than it could be invoked by an inland State for the purpose of claiming a territorial sea.

29. He had already pointed out on a number of occasions that in his view it was essential for the report to reflect the minority's views on fundamental questions. That did not mean, however, that the report should indicate every minor divergence of view on the part of every individual member of the Commission. For example, he still preferred the definition which he had suggested to that adopted by the Commission, but he had not asked that his views on that question should be indicated in the report. If the views of other members who had not entirely agreed with the Commission's decision were to be included in the report, however, he might feel obliged to make a similar request.

30. Mr. ALFARO said that he, too, was unable to accept Mr. Yepes' proposal for an additional paragraph. The "geographical equality" of States was no concern of the Commission's, and the statement that "One member of the Commission" considered that the germ of a veritable customary law on the continental shelf was already apparent in the declarations made by several American governments would place the other Latin-American members in a very embarrassing position.

31. On the other hand, he agreed that the first sentence of paragraph 7 should be modified, not because it did not state the facts exactly, but because it went further and gave what might appear to be an appreciation of them. Such appreciations should be avoided. It would be preferable to state simply that the Commission had departed from the definition adopted in 1951 to the extent shown.

32. Mr. YEPES said that although, in point of fact, it was he who had advanced the arguments referred to in the additional paragraph he proposed, he appreciated the fact that the suggested wording might prove embarrassing to other members. He would therefore have no objection to replacing the words "One member of the Commission" by "Some members of the Commission".

33. The CHAIRMAN suggested that the General Rapporteur should be requested to submit a re-draft of paragraph 7 taking into account the amendments proposed by Mr. Sandström and Mr. Yepes, and also taking into account, so far as might prove possible, Mr. Yepes' proposal for an additional paragraph.

The Chairman's suggestion was adopted.[4]

Paragraph 8 (65)

34. Mr. SANDSTRÖM said that in his view a depth of 200 metres was not an essential feature of the geographical configuration of the continental shelf, and therefore suggested that the words "if, as is the case in the Persian Gulf, the submarine areas never reach the depth of 200 metres" be replaced by the words "if, as is the case in the Persian Gulf, there exists only a more or less level submarine area without any marked drop".

35. Mr. LAUTERPACHT said that he would bear Mr. Sandström's suggestion in mind in preparing the final text.

On that understanding, *paragraph 8 was approved by 9 votes to none, with 3 abstentions.*

Paragraph 9 (66)

Paragraph 9 was approved by 9 votes to 2, with 1 abstention.

36. Mr. KOZHEVNIKOV, explaining his vote, said that although he could accept the principle laid down in paragraph 9, he could not accept the suggestion that any disputes on the matter must necessarily be submitted to arbitration.

Paragraph 10 (67)

37. Mr. KOZHEVNIKOV asked whether, in the sentence reading "It covers also the submarine areas contiguous to islands regardless of their size", the last four words were not redundant.

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[4] See *infra*, 238th meeting, para. 1.

38. Mr. SCELLE said that there was no doubt that the Commission had intended the expression "continental shelf" to cover the submarine areas contiguous to islands regardless of their size. He could not therefore object to paragraph 10, but would merely point out that the Commission's decision incalculably diminished the freedom of the high seas, for the smallest rock, the merest patch of sand, might be the culminating point of a huge submarine plateau. The implications of the Commission's decision thus served to strengthen his opposition to the draft articles as a whole.

39. Mr. SPIROPOULOS felt that it made no difference at all whether the words "regardless of their size" were deleted or retained. An "island" was an island regardless of its size, without the necessity for saying so.

40. The CHAIRMAN, speaking as Special Rapporteur, agreed.

41. Mr. AMADO proposed that, as they were clearly superfluous, the words "regardless of their size" should be deleted.

Mr. Amado's proposal was adopted by 8 votes to 1, with 3 abstentions.

Paragraph 10, as amended, was approved by 9 votes to none, with 1 abstention.

Paragraph 11 (68)[5]

42. Mr. HSU said that, having at the previous meeting[6] commented on paragraph 11 from his own point of view, he would now try to comment on it from the Commission's. Although he had abstained from voting on the other paragraphs, he would have to vote against paragraph 11 unless it were amended, for it did not describe the situation accurately. It stated that the Commission did not consider the change effected by the substitution of the term "sovereign rights" for the words "control and jurisdiction" to be of fundamental importance. Many members of the Commission, however, did consider it to be of fundamental importance, although perhaps for somewhat different reasons. The General Rapporteur wrote that "the difference between the exercise of control and jurisdiction and the exercise of sovereign rights is one of emphasis". It was in fact just as much a difference of emphasis, but no more so, as was the difference between marriage and co-habitation.

43. His other main objection to paragraph 11 concerned the last sentence, which read: "In adopting the article in its present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, safeguarding the principle of the full freedom of the superjacent sea and the air-space above it". That sounded very fine, but not so fine when it was considered that the Commission had regarded it as of much less importance to safeguard the continental shelf itself against the claims of the coastal State. Having thrown out the baby, the Commission should not pride itself on having kept the bath-water.

44. Mr. LAUTERPACHT said that it was a question of appreciation whether the substitution of "sovereign rights" for "control and jurisdiction" was a change of fundamental importance. He did not believe that the majority of the Commission shared Mr. Hsu's views on that point.

45. Mr. Hsu had also implied that the main purpose of the draft articles was not to safeguard the principle of the freedom of the seas at all, but to parcel them out. The acquisition of certain rights over the continental shelf was, however, a fact. The principal maritime States had made certain claims in that respect, and those claims had never been seriously contested; indeed, many believed that they were not incompatible with the desirability of developing the mineral and other resources of the world to the full. The purpose of the great majority of the draft articles, however, was to limit the possibly injurious effects such claims would have.

46. Mr. HSU remained unconvinced. It was true that no serious protests had yet been made, but he had already pointed out that it took time for protests to become articulate, particularly in cases where the interests of one particular State were not concerned, but only the interests of the collectivity of States.

47. Mr. SANDSTRÖM drew attention to the fact that the choice of the expression "sovereign rights" was the result of a compromise between those members who supported the original draft and those who supported the inclusion of the phrase "rights of sovereignty". The latter phrase, therefore, should not be reinstated by means of a statement in the report to the effect that the change was not of fundamental importance and that the expression "rights of sovereignty" had been preferred by some governments and some members of the Commission, without any reference to the fact that other governments and other members had preferred a different wording.

48. He therefore proposed that the sentence beginning "The Commission does not consider the change..." and ending "...preferred by some governments and some members of the Commission" should be replaced by the following text:

> "The change was arrived at as a compromise between those members who wanted to maintain the expression in the original draft and those who preferred the expression 'rights of sovereignty'."

49. Mr. ALFARO was inclined to support Mr. Sandström. Referring to the General Rapporteur's

[5] Original paragraph 11 read as follows:

"The Commission does not consider the change thus effected to be of fundamental importance. Essentially the difference between the exercise of control and jurisdiction and the exercise of sovereign rights is one of emphasis. So is the difference between 'sovereign rights' and 'rights of sovereignty'. The latter expression was preferred by some governments and some members of the Commission...." [Last sentence as in para. 68 of the "Report"].

[6] *Ibid.*, para. 64.

statement that it was rather a matter of appreciation whether or not the change in the phraseology to "sovereign rights" was a matter of fundamental importance, he said that the report should be concerned with facts rather than with their appreciation.

50. He thought that the difference between "sovereign rights" and "the rights of sovereignty" was that the former were any rights that happened to be exercised by the sovereign State, whereas the latter included all rights comprehended in the concept of sovereignty. The draft articles on the continental shelf only gave specific rights to the coastal State, and thus the expression "rights of sovereignty" would not have been appropriate as a description of them; but when "control and jurisdiction" was exercised by a sovereign State, the phrase "sovereign rights" was applicable.

51. Mr. SPIROPOULOS supported Mr. Sandström and Mr. Alfaro; the General Rapporteur might present a new text taking account of their views.

52. Mr. LAUTERPACHT said he was prepared to consider re-drafting his text, but that it would be meaningless merely to state that a certain wording was a compromise; the theses and antitheses must be described. There was, however, a difficulty in following Mr. Spiropoulos' suggestion inasmuch as whereas Mr. Sandström suggested that the paragraph be compressed, Mr. Alfaro appeared to wish it to be expanded.

53. In his view, a purely factual report would be inadequate. The purpose of the Commission's report on its work during any particular session was to increase both its own prestige and the usefulness of that work by explaining its intentions and the meaning of the drafts it proposed to the General Assembly.

54. Mr. SPIROPOULOS said that it might be undesirable to state in so many words that any decision was the result of a compromise, but it should be possible by describing the exact process from which the decision had resulted, to convey the same idea.

55. Mr. AMADO said that the General Rapporteur's sentence to the effect that the Commission did not consider the change in phraseology from "the exercise... of control and jurisdiction" to "exercises... sovereign rights" to be of fundamental importance was somewhat elliptic. He approved Mr. Sandström's suggestion that the Commission's reports should describe exactly the aims of those advocating various texts.

56. The CHAIRMAN asked the General Rapporteur to present a new text of paragraph 11 at the next meeting.[7]

It was so agreed.

[7] It was not submitted until the 238th meeting. See *infra* 238th meeting, para. 8.

Paragraph 12 (69)[8]

57. Mr. SCELLE said that considerations similar to the views which had been expressed on paragraph 11 also obtained in the case of paragraph 12. Perhaps the General Rapporteur could present a re-draft of that paragraph too.

It was so agreed.[9]

Paragraph 5 (62) (resumed from the 233rd meeting)

58. The CHAIRMAN said that, as Mr. Spiropoulos would not be present the following week, he proposed to take a vote on the complete text of the draft articles on the continental shelf; they were to be found in paragraph 5.

59. Mr. KOZHEVNIKOV, referring to article 6 of the draft articles, said that the text given in paragraph 5 was not the same as that formally adopted by the Commission.

60. The CHAIRMAN and Mr. LIANG (Secretary to the Commission) explained that the changes in question had been made by the Drafting Committee only to render the style more elegant.

61. Mr. KOZHEVNIKOV expressed his satisfaction with that explanation, on the assumption that the sense of the text as adopted had been preserved.

62. Mr. SANDSTRÖM asked what was the exact meaning of the phrase "fish production". Did it refer to breeding, or to the results of fishing?

63. The CHAIRMAN said that the phrase "interference... with fish production" in article 6 (1) referred to any interference with the fish, whether by pollution of the sea, by taking excessive quantities of young fish, or by other means.

64. Mr. LAUTERPACHT recalled that there was a special convention on fish breeding.

65. Mr. AMADO said that, although he would vote for the draft articles as a whole, he was opposed to the wording of article 6. In his view the word "fishing" included the idea of fish production. The Special Rapporteur had insisted on the inclusion of the latter phrase, although he (Mr. Amado) regarded it as superfluous.

66. Mr. KOZHEVNIKOV asked whether it would be in order for him to vote for the draft articles as a whole, but to enter reservations on articles 7 and 8.

[8] Paragraph 12 read as follows:

"12. On the other hand, the reference to the 'sovereign rights' of a coastal State is deemed to serve a useful and probably essential purpose inasmuch as it leaves no doubt as to the completeness of the rights of the coastal State necessary for and connected with the exploration and the exploitation of the natural resources of the continental shelf. Such rights include full jurisdiction, in particular in connexion with the suppression of crime and, if necessary, of regulation of civil status. They naturally include the exclusive rights of exploration and exploitation."

[9] See *infra*, 238th meeting, para. 10.

67. The CHAIRMAN said that that would be entirely in order and in accordance with precedent.

Paragraph 5 was approved and the draft articles on the continental shelf accordingly adopted by 11 votes to 2.

68. Mr. KOZHEVNIKOV requested that it be recorded that, in voting for the draft articles on the continental shelf, he maintained his disagreement in principle with articles 7 and 8, for reasons which he had explained in the course of discussions on those articles.

69. Mr. SCELLE said that he had not felt able to vote in favour of the draft articles, because they gave legal expression to what were nothing more than governmental pretensions that were mutually contradictory, and which were not based on any rule of customary or conventional law. In his opinion, the text was in flagrant violation of existing international law concerning the high seas and the sea-bed. The draft was liable to increase international friction and disturb peaceful relations, because it enlarged without any defined limit the area of anarchy resulting from the separate existence of sovereign States.

70. He regretted, further, that a specialized agency of the United Nations had not been given responsibility for determining what governments or undertakings might be permitted to apply for and be granted concessions for the exploration and exploitation of the bed of the high seas, and for controlling the use made of such concessions.

71. Mr. ZOUREK explained that he had voted for the draft articles on the continental shelf as a whole, because he had felt able to agree with the basic articles of the draft concerning the legal status of the continental shelf. Nevertheless, his vote should not be interpreted as implying that he agreed with article 7, relating to the delimitation of the continental shelf; he maintained his opposition for reasons that he had given at the 204th meeting.[10] Nor should his vote be interpreted as indicating his agreement with article 8, which was concerned with the compulsory referral of disputes to arbitration, which he was also unable to accept for reasons of principle. He was convinced that it was improper to impose on States only one of the various means existing in international law for the peaceful settlement of international disputes. Further, he considered that in the prevailing circumstances, States should not be exposed to the risk of being brought compulsorily before a tribunal for frivolous reasons without adequate means of defending themselves.

72. Mr. YEPES explained that he had voted in favour of the draft articles on the continental shelf as a whole because he thought it was necessary to codify international customary law regarding the continental shelf. The development of that law had begun with the treaty of 26 February 1942 between the United Kingdom and Venezuela relating to the Gulf of Paria, and been continued in the "proclamations" by the United States of America and Mexico in September and October 1945, by Argentina and Panama in 1946, by Chile and Peru in 1947, and then by Brazil in 1950, by the Central American Republics, by certain United Kingdom colonies in the western hemisphere, by the Philippines, by Pakistan, and by various governments in the Persian Gulf. Admittedly the manner in which that customary law had been established was something of an innovation, but it none the less amounted to a new creation of law which must be taken into account.

73. However, the definition of the continental shelf contained in article 1, as adopted by the Commission, was not in conformity with the law as stated in those international instruments. That definition, in his opinion, was contrary to the principle of the legal equality of States, which was fundamental to international law, for the reason that the adoption of depth as the criterion for determining the boundaries of the continental shelf discriminated against those States whose coastal seas reached a depth of 200 metres a very short distance from the coast. It would have been preferable to maintain the criterion of exploitability as indeed the Commission had decided at its third session after a detailed study of the problem. So far as he knew, that criterion had given rise to no serious objections on the part of governments. If that criterion could no longer be retained, the Commission should have chosen a definition sufficiently flexible to permit all States to enjoy the benefits of the doctrine of the continental shelf.

74. Despite that drawback, he considered that, taken as a whole, the draft articles adopted by the Commission represented a real step forward in international law.

75. Mr. HSU explained that he had voted against the draft articles on the continental shelf because he considered that the recognition of the sovereign rights of coastal States over the submarine area contiguous to their coast line was harmful to the interests of the community of nations, and unscientific in its conception. The submarine area or continental shelf, together with the superjacent water and air-space, formed a part of the high seas, and was therefore not subject to the sovereign rights of coastal States, despite the claims made by a number of States in the last decade to exercise "sovereign rights" or "control and jurisdiction" over it. In order to explore and exploit the natural resources of the submarine area, the Coastal State needed a right; and since the area was adjacent to the State, it was reasonable that that right should be exclusive. But it was unnecessary to recognize sovereign rights over the submarine area merely because the coastal State needed an exclusive right to explore and exploit its natural resources, as it would be unnecessary to recognize the sovereign rights of a State to a "contiguous zone" merely because the State had to apply customs, fiscal and immigration

[10] See *supra*, 204th meeting, paras. 18, 19 and 59.

regulations. Further, the recognition of sovereign rights to the submarine area without their recognition in respect to the superjacent water and air-space was unrealistic; for the exploration and exploitation of the sea bed and subsoil would necessarily involve the use of that water and air-space. If they were not subject to the sovereign rights of the coastal State, why should the sea bed be so subject? And if the sea bed was subject to the exercise of sovereign rights, how could the coastal State be prevented from claiming also to exercise the same rights over the superjacent water and air space?

76. It was unscientific to recommend the recognition of unnecessary and unrealistic rights. Further, the recognition of sovereign rights over the submarine area was a denial of the principle of the freedom of the high seas, and thus conflicted with the interests of the community of nations. The principle of the freedom of the high seas was time-honoured, and it was somewhat surprising, to say the least, that the Commission, a learned organ of the United Nations, should have acted to infringe that principle.

77. It was regrettable, too, that the term "continental shelf" should have been chosen in preference to the term "adjacent submarine area", because although the latter included the former, the former did not include the latter. It was often unavoidable in legal definitions to employ terms requiring qualification, but since the law of the "adjacent submarine area" was a new subject, it seemed unwise to adopt a term requiring immediate qualification at the outset, the more so as the use of the term "continental shelf" had naturally influenced the thoughts of members of the Commission.

Paragraph 13 (70)[11]

78. Mr. SANDSTRÖM proposed the insertion at the beginning of the paragraph of the following passage:

"A minority of the Commission was in favour of replacing, as had been proposed by several governments, the term 'natural resources' by the expression 'mineral resources'. Only these resources had earlier been envisaged."

79. He proposed also the addition of the following sentence at the end of the paragraph:

"The minority meant that even if the term 'natural resources' was used, it could not comprise what was not a natural part of the continental shelf, i.e. of the sub-soil, including the sea-bed."

80. Mr. AMADO suggested that the last sentence of the General Rapporteur's draft reading "These are not natural resources" was superfluous, and could be deleted.

81. Mr. LAUTERPACHT agreed.

82. Referring to Mr. Sandström's suggestion, he asked whether the Commission wished to have a full statement of the minority view of each issue included in each paragraph of the draft report. If so, was the view of only a substantial majority also to be included?

83. Mr. AMADO hoped that it might be possible to find some less awkward means of expressing the views of the Commission than the full statement of the views of the majority and minority. He pointed out that the minorities embraced different members on different issues.

84. Mr. SANDSTRÖM said that he had not intended to imply that there was a permanent minority of the Commission, consisting always of the same members.

85. Mr. AMADO disapproved of dividing the Commission into majority and minority. Might it not be better to use the phrase "some members of the Commission"? For it was evident that members of the Commission, representing as they did different legal systems, would differ in their conclusions one from the other, though the lines of cleavage would not necessarily be identical on different issues.

86. Mr. ZOUREK said that the reports of other commissions of the United Nations summarized the different opinions expressed by their members on important questions; in his view, the same procedure should be followed in the case of the Commission's reports, though he agreed with Mr. Amado that it would be unfortunate to refer to minorities and majorities.

87. Mr. LIANG (Secretary to the Commission) recalled that in previous years the Commission's reports had occasionally referred to the minority and the majority. Nevertheless, the forms of words "The Committee decided..." or "The Committee was of the view that..." which were used throughout the text could not be held necessarily to imply unanimity; they meant merely that after a discussion, the Commission had reached a certain conclusion by way of a vote.

88. Mr. SPIROPOULOS agreed with Mr. Amado and Mr. Zourek that the views of different members on important questions ought to be stated in the Commission's report, but felt that the procedure adopted should vary from case to case.

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[11] Paragraph 13 read as follows:

"13. For the latter reason the Commission decided, after considerable discussion, to retain the term "natural resources" as distinguished from the more limited term "mineral resources". This means, having regard to the fact that the continental shelf comprises also the bed of the sea, that natural resources permanently attached to the bed of the sea are subject to the exclusive right of exploitation and exploration of the coastal State. The requirement of permanent attachment implies, on the other hand, that the natural resources of the sea-bed, which are subject to the exclusive rights of the coastal State, do not include so-called bottom-fish and other fish which, although living in the sea, occasionally has its habitat at the bottom of the sea or is bred there. On the other hand, as the exercise of the sovereign rights of the coastal State is confined to exploration and exploitation of natural resources, it follows that those rights do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the sub-soil. These are not natural resources."

89. Mr. KOZHEVNIKOV said that the Commission's report should summarize the discussions accurately and completely. It followed that it should reflect the opinion of any particular minority on any particular issue; but precisely how that was done must depend on the circumstances attending each case.[12]

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/64) (*resumed from the 233rd meeting*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS (*resumed from the 233rd meeting*)

Vote on the texts of both draft conventions

90. The CHAIRMAN said that the Commission had now to vote on the texts of the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness. As had been decided at the previous meeting, the vote was to be taken on the two texts together.[13]

91. Mr. KOZHEVNIKOV suggested that the reference, in the preamble to the draft Convention on the Elimination of Future Statelessness, to " the evil of statelessness " raised an unnecessary moral issue.

92. Mr. AMADO agreed with Mr. Kozhevnikov, and said that the Commission's object was to eliminate statelessness itself.

93. Mr. LIANG (Secretary to the Commission) thought that the English text was satisfactory because it was ambiguous. It could either refer to the evil results of statelessness or mean that statelessness itself was an evil. The former was what had been intended, and the French text should be amended accordingly.

94. Mr. SCELLE said that the French text should refer to *" les maux qui resultent de l'apatridie "*.

It was so agreed.

The texts of the draft Convention on the Elimination of Future Statelessness and the draft Convention on the Reduction of Future Statelessness were adopted by 10 votes to 3.

95. Mr. YEPES explained that he had voted in favour of the texts of both conventions because it was not only desirable, but also necessary, that effective measures should be taken to reduce the evil of statelessness. Nevertheless, he was unable to accept article 1 of the draft Convention on the Elimination of Future Statelessness, according to which the nationality of the State on whose territory an otherwise stateless child was born was conferred on that child. According to his conception of nationality, even States applying the principle of *jus soli* had the right to make the acquisition of nationality by that principle subject to conditions over and above the simple material fact of a child's being born in their territory.

96. Mr. SCELLE explained that he had voted in favour of the texts of both conventions, although he regretted that neither convention provided a remedy for existing statelessness.

97. Mr. HSU said that he took the same position as Mr. Scelle.

98. Mr. CÓRDOVA recollected that it had been in order to fill the gap mentioned by Mr. Scelle that he had been asked to prepare a working paper dealing with the problems of existing statelessness; it would be presented at the next meeting.

99. Mr. KOZHEVNIKOV asked that it be placed on record that he had voted against the texts of both conventions for reasons which he had repeatedly given during the relevant discussions.

100. Mr. ZOUREK explained that he had voted against the texts of both draft conventions, primarily because he considered that they were unrealistic, as questions of nationality were considered by every State to be important issues essentially within their domestic jurisdiction.

101. Further, the drafts expressed an entirely unilateral concept of nationality deriving exclusively from the wish to safeguard the interests of the individual, and completely neglecting the interests of the national collectivity; they emphasized the rights of nationals but passed over in silence their duties to the State of which they were nationals.

102. Another reason why he had voted against the draft conventions was that their coming into force would necessarily oblige States applying the principle of *jus sanguinis* to confer, by reason of the simple fact of birth, their nationality on foreigners who were not in any way attached to them, but who happened to be born in their territory. That ran counter to the fundamental ideas of those States.

103. Finally, he opposed the draft conventions because they contained certain provisions implying a diminution of the powers of States which were not indispensable to the safeguarding of their interests.

104. Faris Bey el-KHOURI said that he had voted against the drafts of both conventions because they would impose on children of stateless refugees the compulsory loss of the nationality of the States from which they and their parents had been driven. Such a rule would be unjust to hundreds of thousands of refugee children.

The meeting rose at 1.10 p.m.

[12] Consideration of paragraph 13 was resumed at the 235th meeting.

[13] See *supra*, 233rd meeting, para. 61.

235th MEETING

Saturday, 8 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 234th meeting*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1) * (*resumed from the 234th meeting*)

Paragraph 13 (70) ** (continued)

1. The CHAIRMAN, inviting the Commission to continue its discussion on paragraph 13, pointed out that Mr. Sandström had submitted the following amendments thereto:

First, the insertion before the first sentence of the following passage:

"Some members of the Commission were in favour of replacing, as had been proposed by several governments, the term 'natural resources' by the expression 'mineral resources'. Only those resources had earlier been envisaged;"

Secondly, the deletion from the first sentence of the words: "for the latter reason".

Thirdly, the addition at the end of the paragraph of the following passage:

"The dissenting members meant that, even if the term 'natural resources' were used, it could not comprise what was not a natural part of the continental shelf; i.e., of the subsoil including the sea-bed."

2. The amendments showed slight changes from those submitted verbally by Mr. Sandström at the previous meeting.[1]

3. Mr. LAUTERPACHT said that there could be no harm in inserting an historical comment, such as Mr. Sandström's first amendment. He could not, however, understand the third amendment.

4. Mr. SANDSTRÖM said that, as he understood it, the view of the majority, as expressed in the second sentence of paragraph 13, was that the term "natural resources" included all attachments to the sea-bed, even though they might be above the level of the floor of the sea. By contrast, he himself considered that the term "natural resources" did not include anything that was not inherently part of the sea-bed, even though attached to it.

5. The CHAIRMAN said that Mr. Sandström's opinion seemed to be that anything situated or occurring above the level of the sea-bed, for example, sedentary fisheries, could not be a natural resource of, and therefore should not fall under the régime of, the continental shelf. If Mr. Sandström's third amendment were adopted, it would only cause confusion.

6. Mr. LAUTERPACHT thought that the report should not invariably record dissenting opinions; such a course would only introduce in another form the system of minority reports, the principle of which the Commission had already rejected. Dissenting views could always be studied in the summary records.

7. Mr. YEPES said that, although he had opposed Mr. Sandström's opinion as to what the natural resources of the continental shelf comprised, he considered that it should be mentioned in the report if Mr. Sandström so wished.

8. Mr. SANDSTRÖM said he could modify his third amendment to read:

"The dissenting members meant that, even if the term 'natural resources' were used, the term 'exploitation of the natural resources of the continental shelf' could not comprise what was not a natural part of the continental shelf, i.e. of the subsoil including the sea-bed."

9. Mr. AMADO said that he understood Mr. Sandström's view to be that there was a logical difference between what was inherently part of the continental shelf and what was foreign, even if attached, to it.

10. Mr. LAUTERPACHT pointed out that paragraphs 12, 13 and 14 formed a unity which would be disrupted by the interpolation of Mr. Sandström's first and third amendments.

11. Mr. SANDSTRÖM said that his first amendment was designed to show how the discussion on termino-

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] See *supra*, 234th meeting, paras. 78-79.

logy had arisen. He did not agree that the subject of paragraph 12 was so intimately connected with that of paragraph 13 that his first amendment could not be inserted between the two paragraphs.

12. Mr. ALFARO agreed that there was no very close connexion between the subjects of paragraphs 12 and 13. Mr. Sandström's first amendment would add weight to the Commission's report; it should therefore be adopted. The third amendment, however, would add little, and should be rejected.

13. The CHAIRMAN recollected that, during the relevant part of the general discussion, the main difference of opinion had emerged over the question whether sedentary fisheries were or were not a natural resource of the continental shelf. Mr. Sandström's third amendment threw no light on that point, and therefore did not accurately express the minority opinion.

14. Mr. SANDSTRÖM suggested that in his third amendment the phrase "natural part of the continental shelf" should be replaced by the phrase "inherent part of the continental shelf".

15. The CHAIRMAN suggested that further discussion be deferred until Mr. Lauterpacht, Mr. Sandström and himself had succeeded in finding a mutually acceptable text for the paragraph.

It was so agreed.[2]

Paragraph 14 (71)

16. The CHAIRMAN, referring to the second sentence of the paragraph, according to which any interference with rights previously acquired by nationals of States other than the coastal State would be "subject to rules of international law ensuring respect of the property of aliens", said that the right to fish was not a proprietary right. The word "property" should, therefore, not be used.

17. Mr. LAUTERPACHT agreed that the word "property" should be replaced by the word "rights".

18. Mr. ZOUREK, referring to the use of the phrase "*droits acquis*" in the French text, said that such rights related to particular legal systems. In the paragraph under discussion, would they be rights acquired under international law or under municipal law? The use of the phrase implied that the Commission considered that it was possible to acquire rights even over the high seas.

19. Mr. AMADO agreed that the phrase "*droits acquis*" had a specific meaning in civil law; some other rendering should be found.

20. Mr. LAUTERPACHT wondered whether Mr. Zourek would be satisfied if the first sentence were amended to read:

> "Neither... can the exclusive rights of the coastal State be exercised in a manner inconsistent with the existing rights of nationals of other States...", instead of "... inconsistent with rights previously acquired by nationals..."

consequential changes being made as necessary elsewhere in the paragraph.

21. Mr. ZOUREK pointed out that Mr. Lauterpacht's new phraseology differed very little from the original text. He referred also to the phrase reading "respect of the property of aliens", to which the Chairman had previously drawn attention, and asked whether the concept of property as it related to sedentary fisheries included a concept of property in the sponges and oysters concerned.

An amended text of paragraph 14 was approved by 6 votes to 2, with 4 abstentions.[3]

22. The text approved read as follows:[4]

"..."

Paragraph 15 (72)[5]

23. Mr. HSU said that paragraph 15 should be either deleted or the second sentence amended to read:

> "They are based on a figment of the imagination and therefore belong to it *ipso jure*."

24. Mr. LAUTERPACHT said that the text was based on the Commission's reports on its work on the régime of the high seas at previous sessions.

25. Mr. SANDSTRÖM said that the statement that the coastal State was "not under a strict duty to issue a proclamation formally asserting its rights to the continental shelf" implied that some sort of duty none the less existed. In his view, there was no need for such a proclamation, and that should be stated clearly.

26. Mr. LIANG (Secretary to the Commission) said that, although he did not go so far as Mr. Hsu in disapproving of the concept expressed in paragraph 15, neither could he go so far as the General Rapporteur in his implicit encouragement of States to assert their rights by proclamation. In the Commission's report

[2] See *infra*, 238th meeting, para. 18.

[3] The third sentence of para. 14 read as follows: "However, apart from the case of existing rights of other States or their nationals, the sovereign rights of the coastal State...".

[4] See para. 71 in the "Report" of the Commission.

[5] Para. 15 read as follows:

"The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious. They may belong to it *ipso jure*. For that reason the coastal State is not under a strict duty to issue a proclamation formally asserting its right to the continental shelf — though having regard to considerations of certainty and orderliness, and also to recent practice, it may be advisable to issue a proclamation to this effect. When made, the proclamation is merely declaratory of an existing right."

covering the work of its third session[6] the comments on the draft article on the continental shelf had been very carefully worded. It was there stated, for example, that the exercise of the right of control and jurisdiction was independent of the concept of occupation. Indeed, it was said that effective occupation of the submarine areas in question would be practically impossible, and that recourse should not be had to a fictional occupation. It was further stated that the right of the Coastal State to the control and jurisdiction of the continental shelf was independent of any formal assertion of that right by that State.

27. He felt that paragraph 15 should follow the wording of that commentary.

28. Mr. AMADO did not like the expression "actual or fictitious". Nor did he think it appropriate for a commission of jurists to tell States what they ought or ought not to do about asserting their rights by proclamation. He much preferred the wording of the relevant comments in the Commission's report covering the work of its third session.

29. Mr. SCELLE suggested that paragraph 15 should be modified in such a way as to bring out the fact that the régime of the continental shelf as it would be established by the articles on the continental shelf was contrary to and no part of existing law. The paragraph stated, for example, that "the rights of the Coastal State... are independent of occupation...". It was possible that if the advice of the Commission was adopted those rights would be independent of such occupation; but to use the present indicative in that sentence gave the paragraph a meaning exactly contrary to existing law.

30. He had similar objections to paragraph 16.

31. The CHAIRMAN pointed out that the present indicative was used in the equivalent sentences of the comment on the draft articles on the continental shelf contained in the Commission's report covering the work of its third session. It was, of course, natural that those members who disapproved of the draft articles on the continental shelf should disagree also with the General Rapporteur's comments. But the Commission could hardly be expected to go back on a decision it had taken formally two years previously regarding the kind of régime it wished to see established over the continental shelf.

32. Mr. SPIROPOULOS said that it was possible to sympathize with Mr. Scelle in his objections to the wording of paragraphs 15 and 16. Nevertheless, the use of the present tense in the first sentence was dictated by the circumstance that the comment was a comment on an existing text.

33. He suggested that the first sentence be amended to read:

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

34. The implied invitation to States to issue proclamations formally asserting their rights to the continental shelf should be eliminated, preferably by deleting the last two sentences of the paragraph.

35. Mr. AMADO wondered whether Mr. Scelle would be happier if the paragraph began with the sentence "The exercise of the rights of the coastal State over the continental shelf is independent of any occupation."

36. Mr. SCELLE replied in the negative; obviously there could be no exercise of rights unless there was occupation.

37. Mr. LIANG (Secretary to the Commission) said that, although the General Rapporteur contended that the text of the paragraph did not differ substantially from the text of the comments on the draft articles on the continental shelf in the Commission's report covering the work of its third session, he (the Secretary) thought that there were serious differences, and even, perhaps, contradictions. For example, comment 6 on article 2 of the draft articles on the continental shelf[7] was worded non-committally, as follows:

> "The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction...";

By contrast, the wording of the first sentence of paragraph 15,

> "The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious.",

was positive.

38. So far as he could remember, the only discussion on the issue of proclamations by States with the object of asserting their rights to the continental shelf had taken place between Mr. Lauterpacht and himself. The last two sentences of paragraph 15 could raise many difficulties, inasmuch as the practice of States regarding the issue of proclamations was by no means uniform, and some proclamations had been immediately challenged by other States. It was, of course, possible for the subject of proclamations to be discussed by the Commission, which might even wish to make a pronouncement on it. Mr. Lauterpacht's thesis was not unreasonable; but in his (the Secretary's) view it would be unfortunate for the Commission to publish at that time a report on the subject that apparently contradicted its report of two years previously.

39. Mr. YEPES recalled that he had proposed an amendment to article 2 substantially in the words adopted by the General Rapporteur for the first sentence of paragraph 15. The Commission had decided that it went without saying that the rights of the coastal State over the continental shelf were independent of occupation, that there was therefore no need to make

[6] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). Also in *Yearbook of the International Law Commission, 1951*, vol. II.

[7] *Ibid.*, Annex, Part I, Article 2, comment 6.

a statement to that effect in the articles themselves, and that the matter could be mentioned in the Commission's report. The General Rapporteur should not be blamed for simply doing what the Commission had asked him to do.

40. To meet Mr. Scelle's objection to the first sentence, he suggested that it might be amended to read:

"In the régime proposed by the Commission, the rights of the coastal State...".

41. He agreed with Mr. Spiropoulos that the last two sentences of the paragraph should be deleted.

42. Mr. LAUTERPACHT said that, apart from the parenthetical sentence suggesting the advisability of governments making proclamations out of regard for considerations of certainty and orderliness and out of regard for recent practice, the substance of the paragraph was identical with that of the equivalent comments on article 2 of the draft articles on the continental shelf, as set forth in the Commission's report covering the work of its third session. He could see no substantive difference between the sentence:

"The exercise of the right of control and jurisdiction is independent of the concept of occupation"

and the sentence:

"The rights of the coastal State over the continental shelf are independent of occupation, actual or fictitious."

43. Even the use of the word "fictitious", to which some members had taken exception, derived from the sentence in the Commission's report on the work of its third session reading:

"Nor should recourse be had to a fictional occupation."

44. He asked whether the Commission wished to provide a legal basis for what must be recognized as a revolutionary innovation, namely, the principle stated in article 2 that:

"The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources."

45. Paragraph 6 of the comment on article 2 of the draft articles on the continental shelf contained in the Commission's report on the work of its third session stated that the principle adopted by the Commission was "based upon general principles of law which served the present needs of the international community"; and further, that the Commission had not "attempted to base on customary law the right of a coastal State to exercise control and jurisdiction" over the continental shelf.

46. Mr. HSU realized that he was in a minority in objecting on principle to the whole concept of the continental shelf as accepted by the Commission, and accordingly in suggesting some qualification of the text of paragraph 15. Nevertheless, he saw no reason to preserve in that paragraph, either in form or in substance, the comments on article 2 of the draft articles on the continental shelf given in the Commission's report covering the work of its third session. The Commission had changed its mind in the light of the observations of governments, and it should not be afraid to change its mind on its own initiative. There was no need to cling to a false concept merely because it had first been conceived two years previously.

47. Mr. ALFARO found paragraph 15 in general both correct and in conformity with the position previously taken up by the Commission. He could accept Mr. Yepes' amendment to the opening words of the first sentence.

48. It might be useful to remind States that they were under no direct obligation formally to assert their rights to the continental shelf, and the parenthetical invitation advising them to do so by proclamation should certainly be deleted. If that were done, however, the last sentence of the paragraph should be allowed to stand.

49. Faris Bey el-KHOURI said that the paragraph was well drafted, that it accurately reported the views of the Commission, and that there was no reason to amend it.

50. The Commission was not proposing to confer on coastal States any rights that they had not previously enjoyed; neither was it proposing to modify the régime of the high seas. On the contrary, the principles laid down in the draft articles on the continental shelf were a natural extension of existing rights.

51. Mr. SPIROPOULOS said that although, as the General Rapporteur had admitted, the parenthetical sentence advising governments to make proclamations contained a new idea that the Commission had not previously discussed, he (the General Rapporteur) had made it very clear that the paragraph was in substance founded on the text of the comments on article 2 of the draft articles on the continental shelf contained in the Commission's report covering the work of its third session. He thought that the ideas expressed in the last three sentences of the paragraph could be conveyed more briefly and clearly by an appropriate addition to the first sentence, the second part of which would then read:

"...actual or fictitious, and of any formal assertion of those rights".

52. Mr. SCELLE said that Mr. Yepes' amendment would entirely meet his objection. He could not admit that the concept adopted by the Commission regarding the continental shelf was in any sense based on existing law.

53. Mr. LAUTERPACHT withdrew the parenthetical sentence reading:

"though having regard to considerations of certainty and orderliness, and also to recent practice, it may be advisable to issue a proclamation to this effect."

54. He was, however, opposed to Mr. Yepes' amendment, for the Commission had assumed as the basis for its work that the articles on the continental shelf were

founded upon general principles of existing law. That assumption was what Mr. Scelle denied, and the adoption of Mr. Yepes' amendment would imply that the Commission shared Mr. Scelle's misgivings.

55. He admitted that there was a slight difference of emphasis between the paragraph and the equivalent paragraph commenting on article 2 of the draft articles on the continental shelf in the report on the third session. That was because the views of the Commission had in fact developed, though they had not developed in the direction that Mr. Hsu wished.

Mr. Yepes' proposal that paragraph 15 should begin with the words: "In the régime proposed by the Commission..." was rejected by 5 votes to 4, with 3 abstentions.

56. Mr. KOZHEVNIKOV explained that he had voted against Mr. Yepes' amendment because it contained the words "In the régime...". He only accepted part of the Commission's draft relating to the continental shelf.

57. Mr. ALFARO said that he had voted in favour of Mr. Yepes' amendment because he conceived one possible meaning of it to be that the régime adopted by the Commission was based upon general principles of existing law.

Mr. Spiropoulos' proposal for the addition, after the words "...actual or fictitious" of the words "and of any formal assertion of those rights" at the end of the first sentence of the paragraph and the deletion of the remainder of the paragraph was adopted by 8 votes to 1, with 3 abstentions.

58. Mr. LIANG (Secretary to the Commission) suggested that the word "fictitious" should be replaced by the word "fictional", to bring the paragraph into line with the corresponding paragraph of the comments on article 2 of the draft articles on the continental shelf in the report on the work of the third session.

It was so agreed.

Paragraph 15, as amended, was approved by 9 votes to 2, with 1 abstention.

59. It read:[8]

"..."

Paragraph 16 (73)[9]

60. Mr. HSU recalled that he had already commented on paragraph 16 from his own point of view, at the 233rd meeting.[10] He would now attempt to comment on it from the Commission's point of view.

61. It was surprising to read in the first sentence that: "The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State." Such a statement could only be justified if the Commission regarded itself as an authoritative body which had merely to lay down the law without explaining it. The paragraph, however, then went on to refer to various "considerations relevant to this matter", all of which, with the exception of the statement that "it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice", were, as he had shown, either unjustified or irrelevant. That being the case, the last sentences of the paragraph, in which it was stated that "all these considerations... provide a sufficient basis of the principle of sovereign rights of the coastal State", and that "that principle is in no way incompatible with the rationally conceived principle of the freedom of the sea", were no more than unfounded assertions. In his view, the entire paragraph should be deleted, unless the Commission wished to set itself up as an authoritative arbiter in international law, in which case the first sentence could be retained.

62. Mr. YEPES proposed the deletion of the sentence reading "There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned", and of the word "For" from the next sentence, since it was inappropriate that the report should mention such theoretical considerations, and because, in any case, the sentence added nothing to the argument. He also proposed the deletion of the words "no longer" from the phrase reading: "it is no longer practicable to treat [the sea-bed and the subsoil] as *res nullius*", since it had never been practicable to treat them in that way. Lastly, he proposed the insertion of the words "geographical continuity" after the word "contiguity" in the sentence reading: "Neither is it possible to disregard the physical phenomenon of geography, whether that phenomenon is described as propinquity, contiguity, appurtenance or identity of the submarine areas in question with the non-submarine contiguous land."

63. Mr. AMADO proposed that the word "physical" be deleted from the English text of that sentence, as it had been from the French. He also proposed that the words "rationally conceived" be deleted from the last sentence.

64. Mr. SANDSTRÖM felt that it would be impracticable to delete paragraph 16 altogether, as Mr. Hsu had suggested, and saw no objection to stating that the Commission did not "deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State". Having

[8] See para. 72 in the "Report" of the Commission.

[9] Para. 16 read as follows:

"The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State. Some of the considerations relevant to this matter have been adduced above in paragraphs 11 and 12. These considerations cannot be reduced to a single factor. In particular, it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice. There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. For that practice itself is considered..."

[10] See *supra*, 233rd meeting, paras. 65-67.

said that, however, the General Rapporteur immediately proceeded to consider the question in some detail. In his (Mr. Sandström's) view, it would be preferable simply to refer to the comments attached to the draft articles which the Commission had approved at its third session, and to delete the remainder of paragraph 16. The wording used in that paragraph was unconvincing, vague and, in one particular, open to misinterpretation, for the reference to considerations of convenience would certainly be interpreted as referring to the convenience of the coastal State instead of to the convenience of the international community as a whole. The matter was dealt with much more satisfactorily in the comment in the report on the third session, where it was clearly stated that "the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community".[11]

65. Mr. LAUTERPACHT accepted the proposals made by Mr. Amado and Mr. Yepes. With regard to Mr. Sandström's suggestion, he felt that it would be highly undesirable, in discussing the legal basis of the sovereign rights attributed to the coastal State, to refer the reader to a report which had been published so long ago as 1951 and which might not be easily obtainable. The comments which the Commission had made in 1951, moreover, did not differ substantially from those contained in paragraph 16, which was, indeed, based on them; so far as the form was concerned, he preferred his own text.

66. The CHAIRMAN put to the vote Mr. Sandström's suggestion that the whole of paragraph 16, except for the first sentence, be replaced by a reference to the relevant comments contained in the report of the Commission covering the work of its third session.

That suggestion was rejected by 6 votes to 3, with 3 abstentions.

67. Mr. SPIROPOULOS said that, although Mr. Lauterpacht had accepted all Mr. Yepes' proposals, he himself was opposed to the deletion of the sentence reading: "There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned".

68. Mr. LIANG (Secretary to the Commission) pointed out that as soon as the General Rapporteur submitted his report to the Commission, it became the property of the Commission. An amendment submitted by a member was not automatically adopted by the mere fact of its acceptance by the General Rapporteur; if other members of the Commission objected to it, it must be put to the vote.

69. The CHAIRMAN therefore put to the vote Mr. Yepes' proposal for the deletion of the sentence reading:

> "There is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned."

Mr. Yepes' proposal was rejected by 5 votes to 1, with 5 abstentions.

70. Mr. YEPES said that he had voted in favour of the deletion of the sentence in question because, though he rejected legal positivism, he considered that unilateral declarations by States could have some value as one of the constituent elements of customary law.

71. Mr. ZOUREK said that, as the sentence was to be retained, he wished to suggest that the words "a unilateral practice resting solely upon the will of the States concerned" be replaced by the words "a non-concordant practice of the States concerned", since if all the States concerned accepted a certain practice, it had, in his view, the authority of a legal rule.

72. Mr. SCELLE said that he could support Mr. Zourek's suggestions, since he agreed that a concordant practice provided a basis for customary law.

73. Mr. LAUTERPACHT said that he would vote against Mr. Zourek's suggestion, since, although recent practice in the matter of the continental shelf was concordant, that in his view did not suffice to give it the authority of a legal rule.

Mr. Zourek's suggestion was rejected by 6 votes to 3, with 2 abstentions.

74. Mr. SPIROPOULOS felt that paragraphs 11 and 12 of the draft chapter did not contain any "considerations relevant to this matter", as was stated in the second sentence of paragraph 16. He also asked what was meant by the word "premature" in the fourth sentence, reading "In particular it may be premature to base the principle of the sovereign rights of the coastal State exclusively on recent practice".

75. Mr. LAUTERPACHT felt that the original drafts of paragraphs 11 and 12 had contained some relevant considerations. Now that they had been amended, however, he agreed that the reference to them was no longer so appropriate, and accordingly suggested that the second and third sentences of paragraph 16 be combined to read: "The considerations relevant to this matter cannot be reduced to a single factor."

With regard to the fourth sentence, it could not be denied that if the practice ever became universal and met with no objections, it would be possible to base the principle of the coastal State's sovereign rights upon it; that was what he meant by "premature".

76. Mr. SPIROPOULOS felt that even in that case practice could not constitute a legal basis. He suggested that the text be amended to read:

> "In particular it is not possible to base the principle of the sovereign rights of the coastal State exclusively on recent practice, for there is no question..."

[11] "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858) Annex, Article 2, comment 6.

He also suggested that the word "For", in the sentence beginning "For that practice itself" be replaced by the word "However".

77. Mr. LAUTERPACHT accepted those suggestions.

Paragraph 16, as amended, was approved by 7 votes to 2 with 2 abstentions.

78. Mr. ALFARO, on a point of order, drew attention to the fact that the Commission had already devoted many hours to the draft chapter on the régime of the high seas, but had considered only 16 of its 61 paragraphs. If the Commission was to finish its work by the end of the following week, as planned, it was obviously essential that less time be spent on the individual paragraphs, and he suggested that the Chairman might make some proposals designed to restrict discussion, particularly of questions of substance.

79. Mr. YEPES and Mr. SCELLE supported Mr. Alfaro's suggestion.

80. After some discussion, Mr. KOZHEVNIKOV suggested that the Chairman should submit his proposals in writing at the next meeting, and that the Commission should in the meantime proceed with its work.

81. The CHAIRMAN said that he would do as Mr. Kozhevnikov suggested,[12] but feared that any proposals which he could make would be insufficient to ensure that the Commission would complete its work by the appointed time. He therefore suggested that the next meeting, on Monday, 10 August, should last from 2.30 p.m. to 6.30 p.m., instead of from 2.45 p.m. to 6 p.m., and that the following meetings should, if circumstances so required, begin at 9 a.m. instead of 9.30 a.m.

It was so agreed.

82. The CHAIRMAN said that, in accordance with Mr. Kozhevnikov's suggestion, the Commission should in the meantime proceed with its work. In view, however, of the impending departure of Mr. Spiropoulos, who had been Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, he suggested that consideration of the draft chapter be deferred in order to enable the Commission to have the benefit of Mr. Spiropoulos' view on the further action it should take in connexion with that subject.

The Chairman's suggestion was adopted.

Draft Code of Offences against the Peace and Security of Mankind (item 6 of the agenda) (A/CN.4/72)

83. The CHAIRMAN drew attention to the note by the Secretariat on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/72). It was there pointed out that, in view of the General Assembly's decision to defer consideration of the draft Code from its sixth session to the seventh, the Secretary-General had invited Member Governments to communicate to him their comments or observations on the draft Code, for submission to the General Assembly at its seventh session. At the seventh session, however, the United Kingdom representative had stated that "in the opinion of his delegation the draft Code was not ripe for consideration by the General Assembly, that the comments received by governments should be submitted to the International Law Commission; and that only after having considered the comments could the Commission present to the General Assembly its final recommendations in the matter". The draft Code had therefore been removed from the General Assembly's agenda, "on the understanding", in the words of the President, "that the matter would continue to be discussed by the International Law Commission".

84. The Commission had therefore to examine the fourteen comments which had so far been received from governments and which were reproduced in documents A/2162 and A/2162/Add.1.[13] When in receipt of governments' comments in the past, the Commission had followed two different courses. In the case of the draft articles on the continental shelf it had requested the Special Rapporteur to study those comments and in the light of them and of the views expressed by other authorities to submit a new report. In the case of the draft on Arbitral Procedure, it had made no such request to the Special Rapporteur, although Mr. Scelle had subsequently given it an oral summary of the comments at the outset of its discussions. In his view, it was essential that the closest possible attention should be given to the comments which had been received on the draft Code of Offences against the Peace and Security of Mankind, since in many cases it was obvious that they reflected very careful and lengthy study on the part of governments.

85. It should also be noted that the General Assembly had set up a special committee for the purpose of establishing a definition of aggression, which was, of course, one of the main offences referred to in the draft Code. He would ask the Secretary to give further particulars of that committee, whose report would obviously have an important bearing on the Commission's work.

86. Mr. LIANG (Secretary to the Commission) said that the special committee set up to establish a definition of aggression was holding a session beginning in August in New York.[14] Its report would be submitted to the General Assembly, which, however, would probably not consider it until its ninth regular session. It would however be available for consideration by the Commission at its next session, preceding the session of the General Assembly. The Commission would have to determine the relation between the draft Code and the special committee's definition, and he did not think it would be feasible for it to wait until its seventh session,

[12] See *infra*, 236th meeting, para. 1.

[13] See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54.

[14] 24 August-21 September 1953.

when the General Assembly would have considered the latter, before doing so. He submitted that the Commission should therefore place the draft Code on the agenda for its next session.

87. The CHAIRMAN asked whether the Commission wished to request the Special Rapporteur to submit a new report to assist it in its consideration of the draft Code at its next session.

88. Mr. YEPES proposed that Mr. Spiropoulos be invited to submit to the next session a report concerning the comments which had been received from governments, and containing the conclusions he had reached from study of them.

89. Mr. HSU supported Mr. Yepes' proposal, but suggested that Mr. Spiropoulos should be left free to submit an entirely new report if he so wished. Several years had elapsed since the Commission had last considered the matter and members had had time for reflection. They might now feel that the draft Code which they had prepared in 1951 had been unduly conservative. At that time, the Commission had regarded it as its main function to study the positive rules of international law; with the conclusion of the draft Convention on Arbitral Procedure it was now venturing more boldly into the field of the progressive development of international law. The draft Code which had been adopted in 1951 merely listed certain acts which could be regarded as offences under existing rules of law;[15] it did not attempt to show the relation between them or to define what was common to them all. In his view the basic offences against mankind were aggression and persecution, but there were many more aspects both of aggression and of persecution than were covered by the merely illustrative list contained in article 2 of the draft Code.

90. Mr. SPIROPOULOS (Special Rapporteur) said that he was at the Commission's disposal and that, unless it received a written report on the subject, the Commission might well be in a difficult situation at its next session. In the case of the draft on Arbitral Procedure the Commission had known that the Special Rapporteur would be present to assist it in its examination of the comments received from governments; in the present instance it had no assurance that either he or any other member would be present at the next session.

91. He recalled that the Commission had decided against attempting to define aggression. The definition adopted by the special committee would not be binding on it, but the Commission would certainly wish to take it into account.

92. The CHAIRMAN pointed out that the Commission could only take a formal decision on the question within the framework of its other decisions concerning arrangements for the next session. It had been of value, however, to discuss the question in the presence of Mr. Spiropoulos, whom he wished to thank on behalf of the Commission for the contribution he had made to all its discussions, and to whom he wished to convey the Commission's best wishes for his re-election.

93. Mr. SPIROPOULOS thanked the Chairman of the Commission for his kind words and expressed his pleasure at having had the privilege of collaborating with all its members.

The meeting rose at 1.5 p.m.

[15] See text in "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858) Chapter IV. Also in *Yearbook of the International Law Commission, 1951*, vol. II.

236th MEETING

Monday, 10 August 1953, at 2.30 p.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 235th meeting*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1)* (*resumed from the 235th meeting*)

1. The CHAIRMAN said that, in pursuance of the suggestion made by Mr. Kozhevnikov at the previous meeting,[1] he wished to propose that the following procedure be adhered to during the discussion of the remainder of chapter III, on the understanding that if it proved satisfactory, the same procedure might also be adhered to during the discussion of the remaining chapters of the draft report:

* Mimeographed document only Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

[1] See *supra*, 235th meeting, para. 80.

"1. The report shall be discussed paragraph by paragraph. The paragraphs shall not be read out.

"2. Members shall be allowed to speak on a particular paragraph only to propose total or partial deletion, addition or changes, and for not more than three minutes. If a proposed amendment involves an addition to the paragraph or a change in the wording, it must be submitted to the Secretariat in writing the day before the discussion.

"3. After the General Rapporteur has had the opportunity of giving his opinion on the proposed amendments, they shall be put to the vote without further discussion.

"4. If no member asks for a vote on a particular paragraph, it shall be regarded as adopted unanimously.

"5. After the voting has taken place, every member shall be entitled to speak for not more than two minutes to explain his vote."

The Chairman's proposal was adopted.

*Paragraph 17 (74) **

2. The CHAIRMAN, speaking as Special Rapporteur, proposed the deletion of the last sentence, reading: "The Commission did not consider that the matter entered within its competence and it makes no formal recommendation in that direction". The matter was within the competence of the Commission, and it had made similar recommendations in connexion with the problem of statelessness.

3. Mr. LAUTERPACHT accepted the Chairman's proposal.

4. Mr. ZOUREK proposed that the whole of paragraph 17 be deleted, since the idea of the internationalization of the continental shelf had been rejected and it was impossible to say anything more without re-opening the whole discussion.

5. Mr. LAUTERPACHT explained that, as some discussion of the question referred to in paragraph 17 had taken place, he had felt it his duty to indicate the gist of what had been said. He therefore felt that the entire paragraph at any rate ought not to be deleted.

6. Mr. KOZHEVNIKOV proposed, as a compromise, that the substance of the first part of the first sentence should be retained and the remainder of the paragraph deleted. The paragraph would then read:

"For the reasons stated, as well as having regard to practical considerations, the Commission has been unable to countenance the idea of the internationalization of the submarine areas comprised in the concept of the continental shelf."

7. Mr. LAUTERPACHT pointed out that, if Mr. Kozhevnikov's proposal were adopted, the Commission's intentions would be distorted.

8. Mr. KOZHEVNIKOV said that he could not agree that his proposal distorted the Commission's intentions, since it had in fact rejected the idea of internationalization of the continental shelf.

Mr. Zourek's proposal was rejected by 6 votes to 3, with 1 abstention.

Mr. Kozhevnikov's proposal was rejected by 5 votes to 2, with 4 abstentions.

The Chairman's proposal was unanimously adopted.

Paragraph 17, as amended, was approved by 7 votes to 1 with 3 abstentions.

Paragraph 18 (75)

Paragraph 18 was approved by 9 votes to none, with 2 abstentions.

Paragraph 19 (76)

9. Mr. ZOUREK proposed the insertion of the words "for the purposes of exploration and exploitation" after the words "although the sea-bed is subject to the sovereign rights of the coastal State", in order to bring the text into line with the text of the articles.

10. Mr. LAUTERPACHT accepted Mr. Zourek's proposal.

Paragraph 19, as amended, was approved by 8 votes to none, with 2 abstentions.

Paragraph 20 (77)

11. Mr. KOZHEVNIKOV proposed the deletion of the last sentence.

12. Article 8 was referred to elsewhere, and it was inappropriate to refer to it in connexion with paragraph 20.

13. Mr. LAUTERPACHT said that he could not accept Mr. Kozhevnikov's proposal, since the last sentence of paragraph 20 was perhaps the most important in the whole paragraph, dealing as it did with the settlement of disputes arising out of the crucial word "reasonableness".

Mr. Kozhevnikov's proposal was rejected by 5 votes to 2, with 3 abstentions.

Paragraph 20 was approved by 8 votes to none, with 3 abstentions.

Paragraph 21 (78)

14. Mr. SANDSTRÖM proposed the deletion of the two sentences reading:

"With regard to notice to be given, in accordance with paragraph 4, of "installations constructed", the obligation in question refers primarily to installations already completed. There is in principle no duty to

* The number within parentheses indicates the paragraph number in the "Report" of the Commission.

disclose in advance plans relating to contemplated construction of installations".

15. The beginning of the last sentence of paragraph 21 should, in consequence, be amended to read: "In cases in which the actual construction of installations is likely to interfere..."

16. What the Commission's intentions had been in 1951 was clear from the relevant comment on the draft articles then adopted, where it was stated:

"Interested parties... should be duly notified of the construction of installations, so that these may be marked on charts. Wherever possible notification should be given in advance." [2]

17. Since the time when it had placed that interpretation on the provision in question, nothing had been said to make the Commission change its mind.

18. Mr. LAUTERPACHT saw no objections to Mr. Sandström's proposal. It might, however, sometimes be difficult for him to comment on proposed amendments without seeking the views of the Special Rapporteur, and he, therefore, hoped that paragraph 3 of the procedural rules which the Commission had adopted on the Chairman's proposal would not be interpreted too strictly.

19. The CHAIRMAN, speaking as Special Rapporteur, said that in the present instance he would be glad of an opportunity of commenting on the proposed amendments, since he could not altogether support them.

20. The Commission was agreed that notice of installations constructed should be given wherever possible, but what it had primarily in mind was permanent installations; it had been agreed that it would not always be necessary to comply fully with the provisions of paragraph 4 of article 6 in the case of temporary installations. The text proposed by the General Rapporteur was not perhaps so clear as might be desired, but he could not agree that the two sentences in question should be deleted. If the Commission agreed, he would submit a re-draft of paragraph 21.

It was so agreed.

Paragraph 22 (79)

Paragraph 22 was approved by 8 votes to none, with 3 abstentions.

Paragraph 23 (80)

21. Mr. ZOUREK proposed that in the French text of paragraph 23 the words "*elle interdit dans leurs limites*" be replaced by the words "*elle y interdit*".

Mr. Zourek's suggestion was adopted.

Paragraph 23, as amended in the French text only, was approved by 10 votes to none, with 1 abstention.

Paragraph 24 (81)

Paragraph 24 was approved by 8 votes to 2, with 1 abstention.

Paragraph 25 (82-84)

22. Mr. ZOUREK proposed the deletion of the last three sentences of paragraph 23 and the insertion, in accordance with the decision taken by the Commission at its 205th meeting,[4] after paragraph 25, of a new paragraph reading as follows:

"The Commission was of the opinion that where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them should be carried out in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question."

23. Mr. LAUTERPACHT said that he could not believe that it had really been the Commission's intention to take a decision which, at first sight, ran directly counter to the principles of article 7, paragraph 2, of the draft articles. That article clearly stated:

"Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States, or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured."

24. Mr. ZOUREK said that the Commission had adopted by 12 votes to 1 the suggestion "that it should be stated in the commentary that the principles governing delimitation of the continental shelf and those governing delimitation of the territorial waters should be the same". There was no contradiction between such a statement and the principles of article 7, paragraph 2, since the latter merely stated the rule which should be followed "in the absence of agreement" between the States concerned.

25. Mr. CÓRDOVA agreed with Mr. Zourek that there was no contradiction between the statement which the Commission had already agreed to insert in the commentary and the principles of article 7, paragraph 2. The States concerned should apply the same principles for delimitation of the continental shelf as for delimitation of the territorial waters; if they could not agree to do so, they should apply the principle which was stated in article 7, paragraph 2.

26. Mr. AMADO and Mr. YEPES agreed that the text proposed by Mr. Zourek should be inserted in the commentary.

[2] "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858) Annex, Part I, Article 6, comment 2. Also in *Yearbook of the International Law Commission, 1951*, vol. II.

[3] See *infra*, 238th meeting, para. 23.

[4] See *supra*, 205th meeting, para. 68.

27. Mr. LAUTERPACHT said that, after further considering the matter, he was inclined to agree that there was no contradiction between that text and article 7, paragraph 2. If a system was already in existence for delimiting the territorial sea of two adjacent States, the same system should be used for delimiting their continental shelves, notwithstanding the provisions of article 7, paragraph 2.

28. The CHAIRMAN, speaking as Special Rapporteur, said that for the purpose of delimiting the territorial sea certain factors had often to be taken into account which were quite irrelevant to delimitation of the continental shelf. If the same principles were to be applied in both cases, the results achieved might well be absurd.

29. Mr. ZOUREK felt, on the contrary, that absurd results would be obtained if the same principles were not applied in delimiting the continental shelf as in delimiting territorial waters; delimitation of territorial waters comprised delimitation of the underlying sea-bed and subsoil, and if the continental shelf was delimited in accordance with principles other than those governing the delimitation of territorial waters, the impossible situation might arise that a State which had begun to exploit the natural resources of the sea-bed and subsoil underlying its territorial sea was obliged to stop exploiting them because they formed part of an adjacent State's continental shelf.

30. Mr. CÓRDOVA felt that it was unnecessary for the Commission to waste time discussing points of detail; it had only to give effect to the decision which it had already taken. That decision was a wise one, since, apart from the fact that the principle stated was sound, it would lessen the rigidity of article 7, paragraph 2.

31. Mr. LAUTERPACHT felt that it was not article 7, paragraph 2, which was rigid; it allowed for exceptions, whereas the text proposed by Mr. Zourek did not.

32. Mr. SANDSTRÖM felt that the decision which the Commission had taken at its 205th meeting could be expressed in a form of words which would not be open, to the same extent as was the text proposed by Mr. Zourek, to the objections to which attention had been drawn.

33. Mr. CÓRDOVA said that there was no reason why the Commission should not add something to the text proposed by Mr. Zourek if that was considered necessary.

34. The CHAIRMAN accordingly suggested that the Commission should agree to include the text proposed by Mr. Zourek, but that it should defer the vote on paragraph 25, to which he understood that other members of the Commission in any case wished to submit further amendments, in order to give them an opportunity of proposing additions to the text proposed by Mr. Zourek, so as to make the Commission's intentions quite clear.

35. Mr. SANDSTRÖM said that he wished to be regarded as abstaining on the Chairman's suggestion, since the text proposed by Mr. Zourek went beyond what the Commission had decided, in that it laid down as an absolute rule what had been intended merely as a statement of principle.

On that understanding, *the Chairman's suggestion was adopted.*[5]

Paragraph 26 (85)

36. Mr. AMADO asked what was meant by the words "as indeed some of the substantive aspects of the question" in the passage "the question of terminology to be used... in the drafts prepared by the Commission, as indeed some of the substantive aspects of the question, will be determined when the Commission adopts its final draft on the regime of territorial waters."

Mr. LAUTERPACHT agreed that those words could be deleted.

Paragraph 26, as amended, was approved by 10 votes to none, with 1 abstention.

Paragraph 27 (86)

Paragraph 27 was approved by 8 votes to 2, with 1 abstention.

Paragraph 28 (87)

37. Mr. SCELLE pointed out that the French text of the fourth sentence,[6] beginning "Thus, it must often remain a question for subjective appreciation, with the consequent possibility of disputes, whether...", conveyed precisely the contrary sense to the English text, which was correct.

38. Mr. SANDSTRÖM proposed the deletion of the word "sovereign" from the phrase "the sovereign rights of the coastal State over the continental shelf" at the end of the second sentence, as it was misleading without the addition of the words "for the purpose of exploration and exploitation of the continental shelf".

39. Mr. CÓRDOVA proposed that in the sentence reading "For these reasons it seems essential that States availing themselves of the sovereign right to exploit the continental shelf should be under a duty to submit to arbitration any disputes arising in this connexion, the words "States availing themselves of the sovereign right to exploit the continental shelf" should be replaced by the words "States which are in dispute concerning the exploration or exploitation of the continental shelf", since it was not only the coastal State which should be placed under that obligation.

40. Mr. LAUTERPACHT accepted both Mr. Sandström's and Mr. Córdova's proposals.

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[5] See *infra*, 238th meeting, para. 25.

[6] It read as follows: "C'est donc souvent par une appréciation subjective — avec les possibilités de contestation qui en résultent — que pourront..."

On the understanding that the French text of the fourth sentence would be brought into line with the English, *paragraph 28, as amended, was approved by 8 votes to 2 with 1 abstention.*

Paragraph 29 (89)

41. Mr. SCELLE said that the last sentence of paragraph 29, reading "Arbitration, as referred to in article 8, is conceived as arbitration in the established meaning, namely, as a procedure aiming at a binding settlement on the basis of law", would be profoundly shocking to any French jurist, at any rate as it stood in the French text. The established meaning of arbitration was very far from being merely "a procedure aiming at a binding settlement on the basis of law", a definition which was equally applicable to the procedure of the International Court of Justice.

42. The CHAIRMAN suggested that the sentence be amended to read: "Arbitration, as referred to in article 8, is conceived as a procedure aiming at a binding settlement on the basis of law".

It was so agreed.

Paragraph 29, as amended, was approved by 8 votes to 1, with 2 abstentions.

Paragraph 30 (90)

Paragraph 30 was approved by 8 votes to 2, with 1 abstention.

Paragraphs 31-39 (91)[7]

43. Mr. LAUTERPACHT, on a point of order, said that he understood that Mr. Sandström intended to make an important statement covering paragraphs 31 to 39, which comprised sections C and D of the draft chapter, entitled respectively "The nature of the task of the Commission" and "Action recommended in respect of the articles on the continental shelf". He suggested that in the circumstances the Commission should waive paragraph 2 of the procedural rules which it had adopted on the Chairman's proposal and permit Mr. Sandström to speak for more than three minutes.

44. The CHAIRMAN agreed, but expressed the hope that Mr. Sandström would be as brief as possible.

45. Mr. SANDSTRÖM, after thanking Mr. Lauterpacht and the Chairman for their courtesy, said that the proposal which he wished to make was that paragraphs 31 to 39 should be replaced by a single paragraph reading as follows:

> "The draft falls within the category of progressive development of international law, and the Commission submits the report through the Secretary-General to the General Assembly with a recommendation in view of the conclusion of a convention [or in view of a recommendation for conclusion of a convention]."

46. He could not accept Mr. Lauterpacht's definition of codification or the conclusion which Mr. Lauterpacht had drawn from it. In his view, codification necessarily entailed the ascertainment (*constatation*) of rules of law with a view to stating what was the law on a given subject. In scientific work one could use whatever terms one pleased, provided that one explained what they meant. The Commission, however, was not — at any rate primarily — concerned with purely scientific work; its task was to decide whether the articles which it had formulated fell within the category of codification or

[7] Paragraphs 31-39 read as follows:

"31. It is considered useful (as in the case of the Reports presented by the Commission), to indicate the general nature of the task undertaken by it in the matter of the Continental Shelf. Although the subject matter of the Articles on the Continental Shelf is of conspicuous novelty, the Commission is of the opinion that the formulation of legal principles which are applicable to it involves elements both of codification and of development of international law.

"32. From the point of view of codification most of the Articles as now submitted to the General Assembly constitute a re-affirmation of the traditional principle of the freedom of the seas in relation to a problem which was not envisaged at the time when that principle was evolved and consolidated. The principle of the freedom of the seas is not inconsistent with the recognition, within a defined compass and for specified purposes, of the sovereign rights of the coastal state over the continental shelf. The utilization of the subsoil of the bed of the sea (except possibly in connection with submarine tunnels) and, except for the purpose of sedentary fisheries and submarine cables, the utilization of the bed of the sea itself were not contemplated till after the Second World War. For this reason the occasional denial on the part of writers of the possibility of placing the subsoil of the bed of the sea and the bed of the sea under the jurisdiction of individual states, cannot be regarded as expression of a legal rule inevitably following from the principle of the freedom of the seas. They were deductions, unrelated to any concrete situation, from a general principle. The purpose of the Articles as here formulated is to maintain and safeguard the principle of the freedom of the seas in relation to submarine areas which it is now considered necessary to subject to a régime of sovereign rights of States for the purpose of the exploration and exploitation of the natural resources of these areas. To that extent these Articles are essentially in the nature of a codification, by reference to a new problem, of an existing legal principle. This is the purpose of Articles 3 and 4 which lay down expressly that the sovereign rights of the coastal State over the continental shelf do not affect the legal status of the superjacent sea or of the air-space above it; of Article 5 which preserves, in general, the right of States to lay and maintain submarine cables on the bed of the sea; and of Article 6 which safeguards the freedom of the sea in the matter of navigation and fisheries, especially in relation to any installations that may be erected in connection with the exploration and the exploitation of the continental shelf.

"33. Secondly, notwithstanding the fact that only a short period has elapsed since the Treaty concluded in 1942 between the United Kingdom and Venezuela and the Proclamation of the President of the United States in 1945, there is already in existence, in the language of Article 15 of the Statute of the Commission, an 'extensive State practice, precedent and doctrine' on the subject. In particular, since 1945 a considerable number of States have proclaimed their rights to the continental shelf or submarine areas contiguous to their coasts. These proclamations have met with no protest on the part of other States except when/where they were combined with claims deemed to go beyond the assertion of rights to the continental shelf or submarine areas generally. While there is as yet lacking, in relation to the practice in

within that of the progressive development of international law, as those categories were defined in its Statute. Article 15 of the Statute was quite clear on the point. It read:

> "In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in the fields where there already has been extensive State practice, precedent and doctrine."

The Commission should not be misled by the words "extensive State practice, precedent and doctrine" since what went before made it clear that those words referred to cases where the practice, precedent and doctrine had been so extensive as to create a rule of law. It was clear that the purpose of the distinction made between progressive development and codification respectively was to enable a different procedure to be followed in respect of the various drafts prepared by the Commission, according to whether they constituted codification or progressive development. It was also clear that, although other drafts prepared by the Commission might contain elements of both codification and progressive development, the draft articles on the continental shelf were a pure case of progressive development. Article 15 of the Statute provided an easy way of deciding whether a question was codification or progressive development; if a relevant rule of law existed, it was codification; if it did not, it was progressive development. None of the rules contained in the draft articles were existing rules of law, and the whole draft clearly dealt with a subject which had "not yet been regulated by international law". Of course, the articles referred to existing rules of law — for instance, when they stated that the status of the high seas was not affected by the rights of the coastal State over the continental shelf. That was, however, merely a negative way of defining and limiting the rights conferred upon the coastal State by the new law.

47. It had never previously been suggested that the draft articles were codification. At its third session, the Commission had decided to give to the draft articles on the continental shelf and related subjects which had then been approved "the publicity referred to in article 16, paragraph (*g*) of its Statute,[8] and article 16 dealt solely with the progressive development of international law.

48. Since the draft articles were a work of progressive development, not of codification, he could not agree with the General Rapporteur that the conclusion of a convention based upon them was neither feasible nor desirable. Article 15 of the Statute made it clear that in matters of progressive development the only course open to the Commission was the preparation of draft conventions; indeed, it was difficult to see how else the Commission's recommendations on such questions could acquire the force of law.

49. Mr. LAUTERPACHT felt that it was unavoidable that the Commission should have to discuss the question raised by Mr. Sandström at some length, since it was relevant to all its work. Mr. Sandström had said that it was easy to distinguish codification from progressive development, but the Commission had agreed, when

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the matter of the continental shelf, that element of general recognition which can qualify it as constituting customary international law, that practice cannot be disregarded. To that extent the Articles on the Continental Shelf, insofar as they take into account a widely adopted practice, including that of important maritime States, must be considered as being in the nature of a codification.

"34. Also, insofar as — as stated above in paragraph 16 — these Articles are merely expressive of the physical fact of contiguity, propinquity, or identity of the submerged land in relation to the not-submerged continent of which they are a prolongation, they cannot be regarded as introducing a drastic innovation.

"35. However, that very declaration — whether of an existing fact or of the existing legal practice — in relation to a problem of manifest novelty is such as to bring the Articles in question within the category of 'development of international law'. The same applies to the safeguards adopted in Articles 3-6 for the principle of freedom of the high seas. While that principle is part of the established law the safeguards thus adopted are of necessity an innovation. They emphasise the dual aspect of the function of the Commission considered as an agency for both codifying and developing international law.

"36. In comparison Article 7, which lays down the principle of equidistance for determining the boundaries of the continental shelf, belongs clearly to the dominion of 'development of international law'. This is so although, intrinsically, it does no more than to give expression to the 'reason of the thing' in the matter.

"D.

"Action recommended in respect of the articles on the continental shelf

"37. As stated above in paragraphs 31 et seq. of this Report, the Articles on the continental shelf as now finally drafted by the Commission fall within both Progressive Development and Codification of International Law in the meaning of the Statute of the Commission. The provisions of Articles 16 and 23 of the Statute referring to recommendations of the Commission in the matter of its final drafts have been surveyed above in paragraphs 44 to 46, Chapter: Arbitral procedure, V. Action recommended with Regard to the Final Draft.

"38. In the opinion of the Commission the course most appropriate and useful with regard to the Final Draft on the Continental Shelf is that envisaged in paragraph (*a*) of Article 23, namely, that the General Assembly shall 'take no action, the report having already been published'. The subject matter of the present final draft is not such as to call, for the time being, for the conclusion of a Convention as contemplated in paragraphs (*c*) and (*d*) of Article 23. There is as yet no sufficiently general practice of governments and no practical experience with regard to the exploration and exploitation of the continental shelf to make feasible and desirable the conclusion of a convention. For the same reason, and also in view of the limited number of States which have so far issued proclamations on the subject, it may not be necessary for the General Assembly in the

dealing with the draft on Arbitral Procedure, that it was sometimes very difficult to distinguish between them.

50. Mr. Sandström had failed to point out that the draft chapter recognized the fact that the draft articles on the continental shelf were largely in the nature of progressive development. If he had elaborated the fact that they also partook to some extent of the nature of codification, that was because that aspect was less obvious. If necessary, the text could be amended in such a way as to make it clear that the Commission recognized that the draft articles were mainly in the nature of progressive development, but it could not be denied that they were also in the nature of codification. He did not, indeed, see how, in the light of what the Commission had itself said concerning the articles in its report on the work of its third session, and again in paragraph 16 of the draft chapter at present under consideration, that could be gainsaid.

51. Mr. Sandström had said that all the rules contained in the draft articles were new. In his own view, all the crucial articles were simply statements of an existing rule of international law in relation to a new phenomenon. If the Commission had stated that the legal status of the superjacent waters or the legal status of the air-space above the superjacent waters, or the traditional rights of navigation and fishing, were affected by the rights given to the coastal State over the continental shelf, it would have been making new rules of law. It had done none of those things, however; it had specifically stated that the legal status of the superjacent waters and of the air-space above the superjacent waters was not affected, and that traditional navigation and fishing rights remained intact. And it had provided detailed machinery for ensuring that those rights were left intact.

52. As was stated in paragraph 33 of his draft chapter of the report, there was still lacking, in relation to practice in the matter of the continental shelf, that element of general recognition which could qualify it as constituting customary international law, but the practice was sufficiently widespread — and was also followed by the major maritime States — for it to be impossible for the Commission to disregard it or to dismiss it as of no legal value. To that extent, the draft articles were in the nature of codification. Doctrine in the matter had also been almost unanimously in favour of what was stated in the draft articles. In other words, the draft articles concerned a field where, in the words of that part of article 15 of the Statute which referred to codification, "there already has been extensive State practice, precedent and doctrine."

53. Even were Mr. Sandström correct in maintaining that the draft articles were purely a work of progressive development, it was surely unnecessary to interpret article 15 of the Statute so rigidly as to argue that the only course open was the conclusion of a convention. In fact, the only States which would accede to such a convention would be those which already claimed a continental shelf, and the whole purpose of the Commission's work, which was to provide a legal framework within which such States could exercise their rights over the continental shelf without jeopardizing the principle of the freedom of the seas, would be defeated.

54. The CHAIRMAN pointed out that, under paragraph 3 of the procedural rules which the Commission had adopted at the beginning of the meeting, Mr. Sandström's proposal should be put to the vote without further discussion. If the Commission wished to waive that rule and to permit further discussion, he would have no objection, but must point out that in that case there was a danger that the Commission would be unable to complete its work by the appointed time.

55. Mr. KOZHEVNIKOV, on a point of order, said that the Chairman's proposals concerning the procedure to be followed during the discussion of chapter III of the draft report referred to the discussion of normal issues. A question of principle, such as that raised by Mr. Sandström's proposal, should clearly be discussed according to the normal rules of procedure; the Commission should therefore first decide whether or not it would discuss it.

56. The CHAIRMAN maintained that, as an amendment to paragraphs 31-39 of chapter III, Mr. Sandström's proposal fell within the terms of his (the Chairman's) procedure proposals. It should therefore be put to the vote. If it were adopted, sections C and D of chapter III would be replaced by the text proposed by Mr. Sandström. If it were rejected, those sections would be discussed paragraph by paragraph.

57. Mr. CÓRDOVA protested that the subject of section C ("The nature of the task of the Commission")

language of paragraph (*b*) of Article 23, 'to take note of or adopt the report by resolution', though, in the view of the Commission, there may be room for considering the adoption of the latter course. The affirmation of the principle of the freedom of the sea in relation to the new problems raised by the exploration and exploitation of the continental shelf is the main feature of the present Final Draft. As such it is of an importance transcending the interests of States which have proclaimed their right to the continental shelf. That fact may be deemed to be of sufficient significance to call for a resolution of the General Assembly expressly approving the Final Draft of the Articles on the Continental Shelf.

"39. Subject to that consideration, the Commission believe that, as already stated, the alternative envisaged under paragraph (*a*) of Article 23 would be most appropriate and the Commission so formally recommends. The Final Draft has been adopted by the Commission after detailed study extending for a period of three years and after prolonged discussion. In drafting the rules governing the regime of the continental shelf the Commission has been guided by the view that the progressive development of international law in this and other matters can be secured only through recognition of new legitimate needs and interests within the framework of established principles of unimpaired vitality. It may be sufficient if the rules thus formulated are allowed, without recourse to any formal act of approval on the part of the General Assembly, to exert the influence to which they are entitled by virtue of their intrinsic merit and authority."

[8] "Report of the International Law Commission covering the work of its third session", *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). Also in *Yearbook of the International Law Commission, 1951*, vol. II.

had not previously been considered. In it were raised important questions of principle which should be carefully discussed. It would be better, in his view, for the Commission to vote for the deletion of that section, than to take a hurried decision on Mr. Sandström's alternative text.

58. Mr. HSU said it was evident that Mr. Sandström's proposal was not universally acceptable. He accordingly formally proposed the deletion of sections C and D of chapter III.

59. The CHAIRMAN, accepting Mr. Hsu's proposal, said that it was first of all necessary for the Commission to decide whether to abide by his (the Chairman's) procedural proposals, or to discuss sections C and D in detail.

60. Mr. SCELLE pointed out that the Chairman's procedural proposals had been formally adopted; the Commission should therefore, in his view, abide by them.

61. Mr. LAUTERPACHT inquired whether Mr. Hsu's proposal was in order, for it was obligatory on the Commission to make some recommendation to the General Assembly when submitting drafts to it. If sections C and D were deleted, and Mr. Sandström's proposal were rejected, the Commission would be departing from the terms of its Statute.

Mr. Hsu's proposal that sections C and D of chapter III of the draft report be deleted was rejected, 4 votes being cast in favour of it and 4 against, with 1 abstention.

Mr. Sandström's proposed alternative text for paragraphs 31-39 inclusive was adopted by 4 votes to 3, with 3 abstentions.

62. Mr. LAUTERPACHT pointed out that Mr. Sandström's proposal included alternative texts for the last clause. Which text had the Commission adopted?

63. The CHAIRMAN thought that that was largely a matter of drafting, and asked Mr. Sandström for his opinion.

64. Mr. KOZHEVNIKOV said that he had abstained from voting on Mr. Sandström's proposal because in his view it was wanting in clarity. It raised an important question of principle which, in his view, had not been adequately discussed. He doubted whether the Commission had in fact known what it was voting on, for there was now some doubt as to exactly what text had been adopted. For his part, he had no objections to the conclusion of a convention, but if that was the recommendation that was to be addressed to the General Assembly, he would appreciate the opportunity of entering certain reservations.

65. Mr. ZOUREK said that he, too, had abstained from voting on Mr. Sandström's proposal as a matter of principle. In his view, the Commission had been wrong to take a decision on an important issue without adequate discussion, especially when it was difficult to know exactly what text was being voted on.

66. Mr. AMADO explained that he had voted in favour of Mr. Hsu's proposal, because the texts of sections C and D of chapter III of the draft report contained a number of polemical statements, with which he declined to be associated.

67. Mr. CÓRDOVA explained that he had voted in favour of Mr. Hsu's proposal because in his view the Commission's report should be confined to providing an account of the Commission's work during the session, and the subject matter of sections C and D had not been discussed previously.

68. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted against Mr. Sandström's proposal because its adoption would have involved the Commission in recommending that a convention be concluded. In his view, such a course would be premature.

69. Mr. ALFARO explained that he had voted against Mr. Sandström's proposal for exactly the same reason.

70. The CHAIRMAN then asked Mr. Sandström and the General Rapporteur for their views on the alternative clauses at the end of the former's proposal.

71. Mr. SANDSTRÖM said that the difference between the two clauses was only a matter of drafting. He had no preference for either.

72. Mr. LAUTERPACHT suggested that the text ought to contain an appropriate reference to the Commission's Statute. He wondered whether Mr. Sandström had in mind article 16, paragraph (*j*), thereof, according to which proposals relating to the progressive development of international law were to be submitted by the Commission "with its recommendations through the Secretary-General to the General Assembly".

73. Mr. SANDSTRÖM thought that the terms of article 23 were more apposite although, as that article was placed in the section of the Statute entitled "Codification of International Law", it could not be referred to specifically.

74. Mr. LIANG (Secretary to the Commission) referring to paragraph 78 in chapter VII of the Commission's report covering the work of its third session,[9] pointed out that it was there stated that the Commission had decided "to give to its drafts the publicity referred to in article 16, paragraph (*g*), of its Statute, in particular to communicate them to governments so that the latter could submit their comments envisaged in paragraph (*h*) in the same article". The vote that had just been taken was a direct consequence of the action that had followed from the decision reported in that paragraph. If, therefore, it was necessary for the report to refer to any article in the Commission's Statute, it must refer to article 16.

[9] *Ibid.*

75. Referring next to article 15 of the Statute, he pointed out that it was there stated that "the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions..." Clearly, Mr. Sandström's proposal followed in that respect, too, the Commission's decision at its third session, which was in the light of the references to article 16 of the Commission's Statute to the effect that the articles on the continental shelf constituted a development of international law.

76. Mr. SANDSTRÖM said that he regarded the list of possible courses of action set forth in article 23 of the Commission's Statute as being descriptive of any recommendations that the Commission might choose to make to the General Assembly, whether on the codification of international law or on its progressive development.

77. Mr. CÓRDOVA wondered whether it would not be wiser for the Commission to reconsider Mr. Sandström's proposal. For his part, for reasons which he had already explained, he had first voted in favour of Mr. Hsu's proposal that sections C and D be deleted, but subsequently for Mr. Sandström's proposal because, had it been rejected, sections C and D would have stood.

78. The CHAIRMAN said that its rules of procedure empowered the Commission to re-open by a two-thirds majority an issue on which a vote had already been taken.

It was then agreed by 7 votes to 2, with 1 abstention, to reconsider Mr. Sandström's proposal to the extent that it involved recommending the conclusion of a convention.

79. Mr. YEPES said that, although article 23 of the Commission's Statute referred to the procedure to be followed in cases of the codification of international law, and although the articles on the continental shelf were concerned rather with the development of international law, yet the alternatives mentioned in article 23 were sufficiently general to be applicable in the present case. He suggested, therefore, that the Commission should, in the words of paragraph 1 (*b*) of article 23, recommend to the General Assembly "to take note of or adopt the report by resolution".

80. Mr. AMADO said that he preferred the wording of paragraph 39 of the General Rapporteur's draft report, namely:

> "... the Commission believes that ... the alternative envisaged under paragraph (*a*) of article 23 would be most appropriate and the Commission so formally recommends."

The alternative thus referred to was that the Commission should recommend to the General Assembly "to take no action, the report having already been published".

81. Mr. LAUTERPACHT said that the recommendation in question had been fully explained in the draft report. He would object to its being made without such explanation, for then the Commission would be implying that it considered the subject to be so unrealistic that no useful purpose would be served by proceeding with it. That would immediately cast doubts on the value of the Commission's work over the past three years.

82. Mr. CÓRDOVA favoured Mr. Yepes' proposal, for it would add political force to the Commission's technical advice. He was not in favour of recommending that a convention be concluded, as such action would make an unnecessary division between the States which had already adopted rules similar to those in the draft articles on the continental shelf and those which had not.

83. Mr. AMADO withdrew his suggestion that the Commission might make a recommendation to the General Assembly along the lines of paragraph 1 (*a*) of article 23 of the Commission's Statute.

84. Mr. YEPES said that the exact wording of paragraph 1 (*b*) of article 23 of the Statute, should not be followed. In his view, the Commission should recommend either than the General Assembly should take note of and adopt its report, or simply that the General Assembly should adopt it.

85. Mr. SANDSTRÖM reminded the Commission that he had not withdrawn his proposal that the Commission should recommend to the General Assembly that a convention be concluded, for which proposal he had already given his reasons, which were based on article 15 of the Commission's Statute. For developments of international law, conventions were necessary; the adoption of the report by resolution of the General Assembly was appropriate only in cases of codification.

Mr. Yepes' proposal that the Commission should recommend the General Assembly to adopt by resolution the draft articles on the continental shelf was adopted by 7 votes to 2, with 1 abstention.

86. Mr. KOZHEVNIKOV explained that he had voted in favour of Mr. Yepes' proposal because he was in agreement with the greater part of the draft articles on the continental shelf. He wished it to be placed on record, however, that he maintained his objections to articles 7 and 8.

87. Mr. ZOUREK also wished it to be placed on record that his vote in favour of Mr. Yepes' proposal was not to be taken as implying that he had abandoned his opposition to articles 7 and 8.

Paragraph 40 (92)

88. Mr. SANDSTRÖM, referring to the footnote [10] at

[10] That footnote read as follows:

"At a previous session the Commission considered the subject of fisheries in connection with the question of the continental shelf for the reason that in various proclamations relating to the latter reference had been to fisheries. The Commission does not now consider that there is any such close connection between these two questions as to warrant their combined treatment."

the end of paragraph 40, said that the first section was in plain contradiction to the first comment on article 2 of the draft articles on resources of the sea in the Commission's report covering the work of its third session,[11] where it was stated that "the question of conservation of the resources of the sea has been coupled with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with".

He therefore considered that the footnote should be deleted.

It was so agreed.

Paragraph 40, as amended, was approved by 9 votes to 1, with 2 abstentions.

Paragraph 41 (93)

Paragraph 41 was approved by 7 votes to none, with 1 abstention.

Paragraph 42 (94)

89. The CHAIRMAN said that paragraph 42 merely quoted the three articles covering the basic aspects of the international regulation of fisheries, and that as those articles had already been approved there was no need to vote on the paragraph.

90. Mr. KOZHEVNIKOV asked whether the Commission had indeed voted on the three articles in question.

91. Having consulted the summary records, the CHAIRMAN said that the three articles had been approved, subject to drafting emendations, at the 210th meeting, held on 7 July.[12] Mr. Kozhevnikov had been right in reminding the Commission that it had not taken a formal vote on them. He suggested that consideration of the matter be deferred.

It was so agreed.

Paragraph 43 (95)

Paragraph 43 was approved by 8 votes to 2.

Paragraph 44 (96)

Paragraph 44 was approved by 9 votes to none, with 2 abstentions.

Paragraph 45 (97)

Paragraph 45 was approved by 8 votes to 2.[13]

Paragraph 46 (98)

Paragraph 46 was approved by 7 votes to 2.

Paragraph 47 (99)

Paragraph 47 was approved by 7 votes to 2, with 1 abstention.

Paragraph 48 (100)

92. Mr. YEPES, referring to the second sentence of paragraph 48, in which it was stated that the Commission had been "influenced by the view that although the prohibition of abuse of rights is not yet firmly established as a doctrine of international law it is not altogether unsupported by judicial and other authorities", said that, although the doctrine of prohibition of abuse of rights had not been unanimously approved, in the sense that certain authorities still contested it, yet it was generally accepted. For at least thirty years the doctrine of abuse of rights had been admitted in the case-law of practically all countries and could now be considered as one of "the general principles of law recognized by civilized nations" mentioned in Article 38 (*c*) of the Statute of the International Court of Justice. He therefore proposed that the second sentence be amended to read:

> "The Commission, in adopting these articles, was influenced by the view that the prohibition of abuse of rights is clearly supported by judicial and other authority and is germane to the situation caused by these articles".

93. Mr. LAUTERPACHT thought that there was insufficient authority for the statement that the doctrine of abuse of rights had clearly become part of international law. He would prefer the sentence to be deleted altogether.

94. Mr. SANDSTRÖM could not accept the contention that the rule formulated in the final draft of the articles on fisheries was in the nature of codification. He therefore proposed the deletion of the first sentence of paragraph 48, and also of the sentence reading:

> "to that extent, it may be held that that Article is not altogether in the nature of a drastic departure from the principles of international law".

95. Mr. YEPES suggested that further discussion on the matter be deferred.

It was so agreed.[14]

The meeting rose at 6.10 p.m.

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[11] *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). Also in *Yearbook of the International Law Commission, 1951*, vol. II.

[12] See *supra*, 210th meeting, paras. 18-21.

[13] See *infra*, 238th meeting, paras. 58-64.

[14] *Ibid.*, paras. 65-74.

237th MEETING

Tuesday, 11 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1) * (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the chapter on the régime of the high seas in the draft report covering the work of its fifth session (A/CN.4/L.45/Add.1). Since not all the amendments to paragraph 48 had been distributed, he suggested that further consideration of that paragraph be held over and that the Commission proceed to consider paragraph 49.

It was so agreed.

*Paragraph 49 (101) ***

2. Mr. SANDSTRÖM said he had proposed the deletion of the first and the last three sentences of paragraph 48 and that if his amendment were adopted, it would be necessary to insert the second part of the last sentence, namely, "The Commission is of the opinion that the articles adopted fall generally within the category of Development of International Law", at the beginning of paragraph 49. He did not object to the Commission's voting on paragraph 49 at once, provided it was understood that he would have the right to propose that insertion in the event of his amendment to paragraph 48 being adopted.

On that understanding, paragraph 49 was approved by 6 votes to 2.

Paragraph 50 (102)

3. The CHAIRMAN said that, as paragraphs 50, 51 and 52 dealt with a matter which the Commission had not yet discussed, he felt that it should waive the rules which it had adopted at the beginning of the preceding meeting,[1] so as to permit a free discussion. He would only point out, however, that what the General Rapporteur proposed was in exact conformity with what the Commission had decided concerning the draft articles on the continental shelf itself.

4. Mr. SANDSTRÖM and Mr. YEPES supported the General Rapporteur's proposals.

5. Mr. ZOUREK felt that it would be preferable to delete any mention of the United Nations Food and Agriculture Organization, since many States were not members of it, and the aim which the Commission had in mind in the draft articles on fisheries could not therefore be achieved by entrusting that organization with the preparation of a draft convention. He therefore proposed that paragraph 50 should read simply:

> "With respect to the action which may appropriately be taken by the General Assembly in the matter of the present report incorporating the final draft of articles on fisheries, the Commission recommends that the General Assembly adopt the report and the articles by resolution."

Mr. Zourek's proposal was rejected by 6 votes to 2, with 2 abstentions.

6. Mr. LIANG (Secretary to the Commission) pointed out that the General Rapporteur proposed that the Commission recommend:

> "(*a*) That the General Assembly adopt the report and the articles [on fisheries] by resolution, and (*b*) that it entrusts the United Nations Food and Agriculture Organization with the preparation of a draft convention based on the principles incorporated in the articles adopted by the Commission".

7. In view of the fact that article 4 of the Agreement between the United Nations and the Food and Agriculture Organization made it clear that the former could only submit *recommendations* to the latter, and that such recommendations had to be approved by the appropriate organs of the Food and Agriculture Organization, the wording used in paragraph 50 seemed inappropriate. The words "entrusts the United Nations Food and Agriculture Organization with the preparation of a draft convention" might be replaced by the words "recommends the United Nations Food and Agriculture Organization to prepare a draft convention". Alternatively, the Commission might think it preferable that the convention should be prepared by the General

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] See *supra*, 236th meeting, para. 1.

Assembly itself, in consultation with the Food and Agriculture Organization, since, as Mr. Zourek had already pointed out, not all States Members of the United Nations were Members of the Food and Agriculture Organization.

8. Mr. LAUTERPACHT suggested that the operative passage should read: "(*b*) that it enters into consultation with the United Nations Food and Agriculture Organization, with a view to the preparation of a draft convention". That would leave open the question of how and by whom the draft convention should be prepared.

Mr. Lauterpacht's suggestion was adopted.

9. Mr. CÓRDOVA suggested that the words "based on the principles incorporated in the articles adopted by the Commission" meant very little, and should be replaced by the words "incorporating the principles adopted by the Commission".

10. Mr. LAUTERPACHT accepted Mr. Córdova's suggestion.

Paragraph 50, as amended, was approved by 6 votes to 2, with 2 abstentions.

Paragraph 51 (103)

11. Mr. ZOUREK felt that the terms used in paragraph 51 to lay down the course of action which the General Assembly should follow were inappropriate, particularly in the sentence reading: "In particular, endorsement should be given to the view that..."

12. Mr. LAUTERPACHT said that he was never impressed by the argument that the Commission should refrain from telling the General Assembly what course of action it should, in its opinion, follow. He thought that the text proposed for paragraph 51 was perfectly acceptable.

13. Mr. YEPES agreed. The Commission was not presuming to give the General Assembly orders; it was merely making a recommendation as to what, in its opinion, it should do.

Paragraph 51 was approved by 7 votes to 2, with 1 abstention.

Paragraph 52 (104)

14. Mr. CÓRDOVA pointed out that the words "... the General Assembly should instruct the Food and Agriculture Organization to study the matter and prepare drafts of a convention, or conventions" should be brought into line with the text approved for paragraph 50.

15. Mr. LAUTERPACHT agreed.

On the understanding that that would be done, paragraph 52 was approved by 7 votes to 2.

Paragraph 53 (105)

16. Mr. YEPES said that he would be unable to support any of the paragraphs (53-61) relating to the contiguous zone since, as he had stated during the relevant discussions, he was opposed to the whole fictitious concept of the contiguous zone, and considered that the only honest solution to the difficulties which had given rise to it was to extend the width of the territorial sea.

17. The CHAIRMAN stated that, as paragraph 53 merely reproduced the text of the article on the contiguous zone, there was no need to vote on it.

18. Mr. ZOUREK said that he had submitted an amendment for the addition to the section on the contiguous zone of a paragraph giving the views of the minority, but his amendment had not yet been distributed.

19. The CHAIRMAN said that the Commission would take up the amendment as soon as it was distributed.

Paragraph 54 (106)

Paragraph 54 was approved by 6 votes to 1, with 2 abstentions.

Paragraph 55 (107)

Paragraph 55 was approved by 5 votes to 2, with 1 abstention.

Paragraph 56 (108)

Paragraph 56 was approved by 6 votes to 2, with 1 abstention.

Paragraph 57 (109)

Paragraph 57 was approved by 7 votes to none, with 3 abstentions.

Paragraph 58 (111)

Paragraph 58 was approved by 6 votes to none, with 4 abstentions.

Paragraph 59 (112)

Paragraph 59 was approved by 6 votes to 2, with 1 abstention.

Paragraph 60 (113)

Paragraph 60 was approved by 7 votes to none, with 3 abstentions.

Paragraph 61 (114)[2]

20. Mr. SANDSTRÖM appreciated the difficulties with which the General Rapporteur had been beset in his

[2] Paragraph 61 read as follows:

"61. With regard to the action to be recommended by the Commission to the General Assembly, in accordance with Articles 16 and 23 of its Statute, on the subject of this Article the Commission believes that no action is required

attempt to draft a recommendation on the contiguous zone in accordance with the provisions of the Commission's Statute. The result was a slight contradiction between the first sentence and the third and fourth sentences of paragraph 61.

That contradiction could be removed by deleting the first sentence.

21. Mr. LAUTERPACHT said that he would have no objection to the deletion of the first sentence.

22. At the suggestion of Mr. AMADO, he also agreed to the deletion of the word "inherently" from the sentence reading:

> "It is useful that some such acknowledgment of the legality of practices which are not inherently unreasonable and which have been followed".

23. Mr. ZOUREK pointed out that the recommendation contained in paragraph 61 had not been discussed by the Commission. In the form in which it was drafted, paragraph 61 was unacceptable for the reason that, as was recognized by many members of the Commission, the problem of contiguous zones was closely connected with the problem of the territorial sea, and it was therefore inappropriate to recommend the General Assembly to approve an article which would prejudge the Commission's consideration of one important aspect of that latter problem.

24. Mr. KOZHEVNIKOV shared Mr. Zourek's views. It would be premature to ask the General Assembly to approve the article on the contiguous zone. If the Commission, nevertheless, wished to make such a request, it was at least essential that the latter part of the paragraph should be deleted, since, although the wording used was far from clear, it gave the false impression that the Commission had to all intents and purposes already made up its mind concerning the limits of the territorial sea.

25. Mr. LAUTERPACHT pointed out that the whole section on the contiguous zone stressed the provisional nature of the Commission's recommendations. He would regret the deletion of the latter part of paragraph 61, which dealt with a question of substance. He had endeavoured to word that part in such a way as to make it clear that the article on the contiguous zone did not prejudge consideration of the question of the limits of the territorial sea. In any case, the paragraph could not be deleted in its entirety, since that would leave the foregoing seven paragraphs without a conclusion.

26. Mr. CÓRDOVA said that in his view the whole of paragraph 61 was unnecessary. Paragraph 57 clearly stated that:

> "In adopting the limit of twelve miles for the exercise of the protective rights of States within the contiguous zone, the Commission does not intend to prejudice, in any direction, the results of its examination of the question of the territorial sea and of its limits".

The last sentence of paragraph 61 appeared, however, to have precisely that effect; it read:

> "Above all, the authoritative declaration of the existing legal position in the matter of contiguous zones may draw attention to the possibility that the principle implied in the practice of contiguous zones may provide one of the means of the solution of the question of the limits of the territorial sea."

That sentence, in fact, expressed the opposite of what the Commission had agreed, since it had agreed that the principle applied in the practice of contiguous zones could not possibly be applicable to the question of the territorial sea. At the very most, only the first sentence of paragraph 61 should be retained.

27. Mr. YEPES agreed that it was unnecessary to make any recommendation with regard to the article on contiguous zones, since it was agreed that that article represented no more than a provisional solution, pending consideration of the question of the territorial sea.

28. After further discussion, Mr. LAUTERPACHT said that he still felt it essential to retain the first sentence of paragraph 61, but that if other members of the Commission thought that the remainder implied that the article on the contiguous zone prejudged, however remotely, the question of the limits of the territorial sea, he agreed that it should be deleted.

29. Mr. ZOUREK suggested that paragraph 61 be replaced by the following text:

> "As the Commission has not yet adopted draft rules on the territorial sea, it recommends the General Assembly to take no action with regard to the article on the contiguous zone, the report having already been published (article 23, paragraph 1 (*a*) of the Commission's Statute)".

30. Mr. LAUTERPACHT accepted Mr. Zourek's suggestion.

Mr. Zourek's suggestion was adopted by 7 votes to none, with 2 abstentions.

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by the General Assembly other than taking note of or giving approval to this part of the Report of the Commission. Although the Article as here proposed is substantially in the nature of a codification of the existing practice, its subject matter forms part of the wider topics of both the territorial sea and the régime of the high seas. For this reason it may be desirable, for the time being, not to give it any impress of finality. On the other hand, approval on the part of the General Assembly, in any form that may be deemed expedient, would be of distinct usefulness. It would finally remove from what has been a very widely accepted practice any reproach of arbitrariness or of mere unilateral action. It is useful that some such acknowledgment of the legality of practices which are not inherently unreasonable and which have been followed in good faith should take place in the course of the accomplishment of the task of codifying international law. Above all, the authoritative declaration of the existing legal position in the matter of contiguous zones may draw attention to the possibility that the principle implied in the practice of contiguous zones may provide one of the means of the solution of the question of the limits of the territorial sea."

31. Mr. KOZHEVNIKOV, explaining his vote, said that, although he could support Mr. Zourek's proposal in principle, it contained some hint of approval of an article which he could not approve, and he had therefore been obliged to abstain from voting on it.

32. The CHAIRMAN noted that the Commission had reached the end of the 61 paragraphs contained in the chapter on the régime of the high seas in its draft report covering the work of its fifth session. He suggested that consideration of those paragraphs which had been reserved, and of the various proposals for additional paragraphs, should be deferred until the next meeting.

It was so agreed.

Arrangements for the next session

33. The CHAIRMAN said that, although it was not the Commission's task to draw up the agenda for the next session, it was its duty to ensure that the necessary reports would be available, in order that the session might be as fruitful as possible. At its next session the Commission would have to consider Mr. Lauterpacht's report on the law of treaties (A/CN.4/63), his own second report on the régime of the territorial sea (A/CN.4/61) and his third report on the régime of the high seas (A/CN.4/51); that report did not exhaust all aspects of the question, but he recalled that the Commission had previously agreed to leave certain aspects on one side. It did not seem, therefore, that any further work needed to be done before the next session in connexion with those three reports. In addition, there appeared to be agreement that Mr. Spiropoulos should submit a further report on the draft Code of Offences against the Peace and Security of Mankind to the next session, when the Commission would also have to consider the question of diplomatic intercourse and immunities, which the General Assembly had requested it to codify as soon as possible. In that connexion, the Commission had to decide whether it was necessary to appoint a Special Rapporteur on diplomatic intercourse and immunities forthwith; in his view, the appointment of a Special Rapporteur could be left till the next session, since it was clear that the Commission would have sufficient to keep it occupied without any reports over and above the four he had mentioned. For the same reason, and also because the funds available for the remuneration of Special Rapporteurs were limited, he thought there was no point is asking Mr. Córdova to submit his report on existing statelessness to the next session, or in asking Mr. Lauterpacht to submit to it the next instalment of his report on the law of treaties.

34. In connexion with the question of the remuneration of Special Rapporteurs, he recalled that the figure had so far been the same in every case, regardless of the amount of work involved. Special Rapporteurs received their remuneration in two instalments, half being charged against the budget of one year for the work done in that year and half against the budget of the next year for the work done in that year. Since the further report which Mr. Spiropoulos was to submit on the draft Code of Offences against the Peace and Security of Mankind would entail very little work for the reason that it would be limited to analyzing the fourteen replies received from governments he suggested that it might perhaps be possible to invite Mr. Spiropoulos to submit that report by the end of the current year, in which case he would of course receive only half the normal remuneration.

35. Mr. YEPES said that while he agreed with all the Chairman's other suggestions he would take no part in the discussion on the remuneration of Special Rapporteurs, since he had never realized before that they received any remuneration at all.

36. Mr. ALFARO suggested that in order to facilitate the discussion, the Chairman's suggestions should be considered one by one.

It was so agreed.

Diplomatic intercourse and immunities

37. The CHAIRMAN drew attention to the note by the Secretariat (A/CN.4/73), which reproduced resolution 685 (VII), by which the General Assembly had requested the International Law Commission "as soon as it considers it possible, to undertake the codification of the topic 'Diplomatic Intercourse and Immunities' and to treat it as a priority topic". As was pointed out in the Secretariat's note, it was left to the Commission "to decide when it considers it possible to undertake the codification of the topic in question". The subject was a broad one, and in addition to the considerations which he had already advanced, it seemed inappropriate for the present members of the Commission, in the last year of their term of office, to elect one of their number as Special Rapporteur, since they could not know whether he would be re-elected or not. He therefore proposed that the Commission should not appoint a Special Rapporteur on the subject of diplomatic intercourse and immunities at the present session.

38. Mr. KOZHEVNIKOV said that, although the question of diplomatic intercourse and immunities was extremely complex, he had no objection in principle to the Commission's studying it. Its study could not, however, be regarded as urgent, and as the Chairman had pointed out, the General Assembly left in to the Commission "to decide when it considers it possible to undertake the codification of the topic". The agenda for the next session would be very full, and he therefore supported the Chairman's proposal that the Commission should not appoint a Special Rapporteur on diplomatic intercourse and immunities at the present session.

The Chairman's proposal was unanimously adopted.

Law of treaties

39. The CHAIRMAN asked members for their views on whether Mr. Lauterpacht, the Special Rapporteur for the subject, should be asked to continue his report on the law of treaties.

40. Mr. CÓRDOVA said that the Special Rapporteur had so far completed only part of the whole projected

report on the law of treaties (A/CN.4/63). He should be given an opportunity of finishing the work, so that even if he were not re-elected to the Commission, a relatively complete study would be available.

41. Mr. LAUTERPACHT said that there was no question of his being able to finish the whole projected report during the next year. Four topics remained to be covered, namely: operation and enforcement of treaties; interpretation of treaties; termination of treaties; and rules and principles applicable to particular types of treaties.

42. Mr. ALFARO agreed with Mr. Córdova that the Special Rapporteur should be asked to continue his work and to complete as much as he could, for the benefit of the re-constituted Commission.

43. Mr. SANDSTRÖM considered that the Special Rapporteur should not only be asked to continue his work, but also be given full freedom to decide how much of it he could undertake in the next year. He (Mr. Sandström) suggested that the Commission might establish a time-table for the consideration of the law of treaties, dependent on the time estimated to be available for consideration of the subject during the sixth session.

44. The CHAIRMAN said that even the section that had already been prepared would probably take six weeks to discuss.

45. Mr. YEPES said that the Special Rapporteur should be asked to continue his valuable work, and in addition suggested that members might care to let the Special Rapporteur have their opinions in writing on the section of the report already completed. That would surely enhance the value of the work.

46. Mr. KOZHEVNIKOV said that in his view the law of treaties was an important subject in contemporary international law, partly because, as treaties rested on the will of the parties, they were the most important source of international law, and partly because treaties determined the relationships between States. The Commission should discuss the subject at its next session.

47. He hoped, however, that the Special Rapporteur would bear in mind the opinions expressed by certain members of the Commission at the present session to the effect that the subject of international law was the State rather than the individual, and that the State had a sovereign right to enter reservations to international instruments. He hoped that subsequent sections of the report on the law of treaties might take account of a very wide range of practice so as to make it acceptable to as many members as possible.

48. The CHAIRMAN said that the Commission appeared to be unanimous in agreeing that the Special Rapporteur should present to the sixth session of the Commission a first instalment of the continuation of his report on the law of treaties.

It was so agreed.

49. Mr. LAUTERPACHT said that he willingly accepted the task that the Commission had laid upon him. He hoped that the Commission to be elected at the next regular session of the General Assembly might be able to consider a comprehensive report on the law of treaties within its term of office.

Territorial waters

50. The CHAIRMAN said that there seemed to him, as Special Rapporteur for the subject, to be no need for the Commission to undertake any further work on the subject of territorial waters.

It was so agreed.

Régime of the high seas

51. The CHAIRMAN said that, in the Commission's report covering the work of its second session,[3] it was stated that it did not wish to concern itself immediately with all questions concerning the régime of the high seas, but only with the more important ones. Nevertheless, if the Commission thought that a complete codification of the régime of the high seas was desirable, he, as Special Rapporteur, should be asked to continue his report on the matter. In his personal capacity, however, he thought there was no need for the Commission to undertake any further codification of the régime of the high seas.

52. Mr. LAUTERPACHT said that his ambition was to see the Commission complete its treatment of three major subjects in international law during the next three years. Those subjects were: the régime of the high seas; nationality, including statelessness; and the law of treaties. If that were achieved, it would be possible to say that, in its first decade, the Commission had treated perhaps one half of the whole body of international law.

53. In consequence, he thought that the Special Rapporteur should be asked to continue his study of the régime of the high seas. The excellent report so far submitted had been concerned with wide but disjointed aspects of the matter. Their completion, co-ordination and systematization was essential.

54. Mr. LIANG (Secretary to the Commission) believed that Mr. Spiropoulos and himself, as representative of the Secretary-General, had for two years been urging the necessity for consolidating the régime of the high seas. At its second session, the Commission had decided to give priority to certain matters, for example, the continental shelf and related subjects, but there had been no decision that other subjects — the right of pursuit, the nationality of ships, collision and so forth — should not be treated in due course. In his view, therefore, the Commission's work on the régime of the high seas should be continued, and other aspects of the subject examined during the next year or two. There was no need to await the completion of the whole

[3] *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316) Part VI, Chapter III. Also in *Yearbook of the International Law Commission, 1950*, vol. II.

study before submitting parts of it to the General Assembly; but the finished work would in the end, he hoped, be a most adequate presentation of the subject.

55. Mr. SANDSTRÖM agreed with the Secretary that the Commission had not previously taken any decision to limit its work on the régime of the high seas; it had merely given priority to certain aspects of the subject. He thought the work should be continued.

56. The CHAIRMAN, speaking as a member of the Commission, drew attention to paragraph 184 of the Commission's report covering its second session (A/1316),[4] where it was stated that:

> "The Commission thought that it could, for the time being, leave aside... subjects which were being studied by other United Nations organs... subjects which, because of their technical nature, were not suitable for study by it... [and] subjects, the limited importance of which did not appear to justify their consideration by the Commission in the present phase of its work".

57. In his view, those considerations still applied. A complete codification of the régime of the high seas would be extremely difficult, on account of the technical nature of the subject.

58. Mr. LAUTERPACHT said that the Commission should concern itself with the systematization of the régime of the high seas. Other United Nations organs were not concerned in the same way. Systematization would not necessarily involve the Commission in a study of questions so technical that they fell outside its professional competence.

59. He therefore formally proposed that the Commission should request the Special Rapporteur to continue his work on the régime of the high seas with a view to the eventual presentation of a systematic treatment of the whole subject.

Mr. Lauterpacht's proposal was approved by 9 votes to 1.

60. The CHAIRMAN, speaking as Special Rapporteur for the régime of the high seas, said that he had opposed Mr. Lauterpacht's proposal because of the difficulty of the task. However, he was, naturally, at the Commission's disposal.

Nationality, including statelessness

61. Mr. LAUTERPACHT observed that the Commission's study of nationality had so far been limited to the problem of statelessness. There were, however, other matters comprised in the general subject which ought to be studied in detail, even though they had been touched on in their relation to statelessness, for example: dual nationality, naturalization, marriage, and the conferment of nationality.

62. In his view, nationality, including statelessness, was one of the topics on which the Commission should concentrate during its first seven or eight years of life. The Special Rapporteur should be asked to take up forthwith the entire subject, to decide on the topics which should next be studied, and to present the results of his study to the next two sessions of the Commission.

63. Mr. CÓRDOVA said that it was unlikely that his second report on the elimination or reduction of statelessness (A/CN.4/75) would be discussed at the present session; there was, indeed, still work for him to do on that report which he had been obliged to prepare in some haste. He proposed accordingly to revise and extend it before the sixth session, and hand it over to the Secretariat if he were not re-elected.

64. The Commission as a whole should decide the course which it wished to follow in continuance of its general study of nationality; he personally would be unable to produce any important new work before the end of the year.

65. Mr. LIANG (Secretary to the Commission) said that the subject of nationality, including statelessness, should be further studied, so as to enable a complete report on the entire subject to be presented to the General Assembly in due course.

66. It was not necessary to renew the Special Rapporteur's terms of reference. Mr. Córdova remained Special Rapporteur on nationality and statelessness unless and until a new appointment was made.

67. Mr. ALFARO agreed that the Special Rapporteur would continue in office until he ceased to be a member of the Commission or until a successor was appointed. He supported Mr. Lauterpacht's suggestion that the study on nationality including statelessness be continued.

Mr. Lauterpacht's suggestion that the Special Rapporteur (Mr. Córdova) should continue to study the whole subject of nationality, including statelessness, was approved by 6 votes to none, with 2 abstentions.

68. Mr. KOZHEVNIKOV explained that he had abstained from the vote because the scope of the proposed study was not clear. His abstention had no personal implications whatsoever.

69. Mr. ZOUREK emphasized that his abstention, too, had no personal implications; in his view, Mr. Córdova had every qualification for presenting a report on nationality, including statelessness.

70. Nevertheless, he considered that in view of the draft conventions already prepared on the elimination and reduction of future statelessness, there remained very little for the Commission to do on that aspect of the subject. The decision whether or not fresh work should be undertaken ought to be left to the new members of the Commission.

Draft Code of Offences against the Peace and Security of Mankind

71. The CHAIRMAN asked members whether in their view Mr. Spiropoulos should be asked to continue his

[4] *Ibid.*

work on the draft Code of Offences against the Peace and Security of Mankind.

72. Mr. AMADO said that in his view he should.

73. Mr. YEPES agreed.

It was unanimously agreed that the Special Rapporteur (Mr. Spiropoulos) should be requested to continue his work on the draft Code of Offences against the Peace and Security of Mankind.

74. Mr. LIANG (Secretary to the Commission) said that, in considering whether to invite members to continue to act as Special Rapporteur at a time when it was not known whether or not any present member of the Commission would be re-elected, the Commission should ignore budgetary considerations.

75. It was normal practice in the United Nations for payment of remunerations to be authorized on the receipt of finished work. The Secretariat of the Commission had, however, followed a slightly different practice, which was to recommend payment to Special Rapporteurs at the end of each calendar year on the understanding that the results of their work would be presented to the Commission at its following session. That year, evidently, the normal practice would have to be observed; members who were not re-elected should present their work at the end of the year, when their appointments as Special Rapporteurs would lapse, so that payment could be made.

76. The CHAIRMAN wondered whether is was equitable that Special Rapporteurs engaged on limited tasks that took little time should receive the same remuneration as their colleagues engaged on more onerous tasks that called for a great deal of time. He himself could see no solution to the problem, and thought that unless the Commission could find one, it should continue to pay all Special Rapporteurs the same honorarium.

77. Mr. LAUTERPACHT agreed, adding that only small sums were involved. Equal payment for unequal work was, however, a principle that might raise some questions outside the Commission.

78. Mr. ALFARO said that the Commission had never previously been concerned with honoraria, which were fixed by the Advisory Committee on Administrative and Budgetary Questions with the Secretariat. The Commission should not go further than recommend that certain special reports be produced, the question of the remuneration of the Special Rapporteurs being left to the Secretariat.

79. Mr. YEPES agreed.

80. Mr. LIANG (Secretary to the Commission) said it was true that the Commission had never been concerned with the honoraria to be paid to the Special Rapporteurs; nor had the Advisory Committee on Administrative and Budgetary Questions or the Secretariat ever attempted to evaluate the time spent, or the value of the work done, by them. It was assumed that all the subjects selected for special study required their undivided attention.

81. He earnestly reminded the Commission, however, that it bore a considerable responsibility whenever it entrusted a piece of work to a Special Rapporteur. The appointment of a Special Rapporteur could be justly criticized if little work was entailed. The present position was that no decision was or could be taken on the amount of work that a special study might entail, and that Special Rapporteurs were accordingly free to present as much or as little as they saw fit.

82. Mr. KOZHEVNIKOV asked the Chairman to list the subjects to be suggested for inclusion in the agenda of the sixth session.

83. The CHAIRMAN said that the list included consideration of the following reports:

(i) Report by Mr. Lauterpacht on the Law of Treaties;

(ii) Report by Mr. François on the Régime of the High Seas;

(iii) Report by Mr. François on Territorial Waters;

(iv) Report by Mr. Spiropoulos on the draft Code of Offences against the Peace and Security of Mankind; and

(v) Report by Mr. Córdova on Nationality including Statelessness.

84. As to the last subject, a decision on future studies would have to be taken by the new Commission.

85. Mr. YEPES asked whether the topic "Diplomatic Intercourse and Immunities" was to be discussed by the Commission pursuant to the General Assembly's request.

86. The CHAIRMAN said that it had already been agreed that the decision on that point should be left to the new Commission.

87. Mr. YEPES proposed that the matter be re-opened. He thought that a report on the subject should be presented to the new Commission, and that Mr. Zourek should be appointed special rapporteur.

Mr. Yepes' proposal that the topic "Diplomatic intercourse and immunities" should be re-opened was rejected by 5 votes to 4.

88. Mr. ZOUREK thanked Mr. Yepes for making his suggestion, but said that at the present time he would in any event have had to decline appointment as a Special Rapporteur.

89. Mr. KOZHEVNIKOV maintaincd his view that the appointment of a special rapporteur on that subject would depend on the Commission's future composition.

Nationality, including statelessness (item 5 of the agenda) (A/CN.4/75) (*resumed from the 234th meeting and concluded*)

90. The CHAIRMAN requested the Special Rap-

porteur to introduce his second report on the elimination or reduction of statelessness (A/CN.4/75).

91. Mr. CÓRDOVA said that the Commission had decided at its fourth session that he should not draft a report on the elimination or reduction of existing statelessness. At the present session, however, he had emphasized that, in his view, the Commission should not neglect that subject, which was an important influence in international relations. He had, therefore, been asked[5] to draw up the second report in the preparation of which he had been materially assisted by Mr. P. Weis, of the Office of the United Nations High Commissioner for Refugees.

92. With regard to the elimination of present statelessness, he had thought it most appropriate to draft an additional protocol to the draft Convention on the Elimination of Future Statelessness, according to which the provisions of that convention might be applied to cases of present statelessness. Although there were some gaps, which it had been impossible to fill for lack of time, the protocol would, on the whole, eliminate present statelessness.

93. His proposals for the reduction of present statelessness were based on the assumption that States were likely to be more willing to amend their legislation so as to reduce future statelessness, than to amend it so as to reduce present statelessness, because in many States there were political, racial and religious difficulties in the way of the latter course. He had endeavoured, therefore, to make his suggestions as realistic as possible, and had drafted them in the form of a "convention on certain measures for the reduction of present statelessness". The provisions of the draft convention were not necessarily cumulative; States might select those which they wished to adopt, and exclude the others.

94. He had particular difficulty in adapting the Commission's proposals on arbitration to the needs of the draft protocol and the draft convention on present statelessness. In view of the very large number of cases with which it might be expected to be concerned, it was possible that a tribunal similar to those recommended in the draft Conventions on the Elimination and the Reduction of Future Statelessness would prove impracticable, but either the special agency recommended in those conventions or a similar institution ought, in his view, to be set up to protect the interests of existing stateless persons.

95. The suggestions he had made in his second report were tentative, rather than firm. They should therefore not be examined in detail. He would, however, welcome the views of members of the Commission by way of guidance for his further work on the subject.

96. Mr. KOZHEVNIKOV said that he had had no opportunity of studying the text of the second report on the elimination or reduction of statelessness. He recalled however, that the Commission had decided to take the subject up only if time permitted. He had assumed that that decision meant that the matter would not be taken up until the agenda had been exhausted. He must therefore point out that certain other matters still remained to be disposed of.

97. Mr. SANDSTRÖM agreed with Mr. Córdova that it would not be possible to examine the second report in detail at the present session.

98. He hoped that Mr. Córdova might find it possible in his more extended study to give some attention to the relationship between the various drafts and recommendations on the elimination and reduction of statelessness. How far was their co-existence possible? What order or priority was desirable for them?

99. Again, he thought that Mr. Córdova should study the requirements of stateless persons themselves; they might not in fact wish to acquire the nationality that would be conferred on them by the terms of the various draft conventions in preparation.

100. The CHAIRMAN said that any full discussion of the elimination or reduction of present statelessness would have to be postponed to the sixth session. At the present session, nothing more could be done than to give the Special Rapporteur some guidance.

The meeting rose at 1.5 p.m.

[5] See *supra*, 225th meeting, para. 75.

238th MEETING

Wednesday, 12 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*resumed from the 237th meeting*)

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1)* (*resumed from the 237th meeting*)

The CHAIRMAN invited the Commission to take up the outstanding paragraphs (and amendments thereto) of chapter III in the draft report covering the work of its fifth session (A/CN.4/L.45/Add.1), and the additional paragraphs proposed for inclusion.

*Paragraph 7 (64)***

1. The CHAIRMAN said that the Commission had to consider amendments proposed by Mr. Yepes[1] and Mr. Sandström,[2] as well as a new draft of paragraph 7 submitted by the General Rapporteur.

2. Mr. YEPES and Mr. SANDSTRÖM withdrew their amendments in favour of the General Rapporteur's re-draft, which read as follows:

"In defining, for the purpose of the articles adopted, the term 'continental shelf' as referring 'to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres', the Commission abandoned the criterion of exploitability adopted in 1951 in favour of that of a depth of two hundred metres as laid down in article 1 of the present draft. The relevant passage of article 1 as adopted in 1951 referred to the area 'where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil'. Some members of the Commission favoured the retention of the text adopted in 1951 for the reason, *inter alia*, that it is more in accordance with the purpose of the draft not to adopt a fixed limit for the continental shelf but to let the territorial extension of the exercise of the powers given the coastal State depend on the practical possibilities of exploitation. The Commission, following the considerations adduced by the Special Rapporteur in the light of observations of certain governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the fixed limit of two hundred metres — a limit which is at present sufficient for all practical needs — has been fixed because it is at that depth that the continental shelf, in the geological sense, generally comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not wholly arbitrary for, as already stated, it takes into account the practical possibilities, so far as they can be foreseen at present, of exploration and exploitation. Such unavoidable element of arbitrariness as is contained in that text is mitigated by the rule formulated below in paragraph 8 which covers to a large extent the case of those States whose waters surrounding the coast reach a depth of two hundred metres at a very short distance from the coast."

Mr. CÓRDOVA suggested that the word "wholly" be deleted from the penultimate sentence.

Mr. Córdova's proposal was rejected by 4 votes to 3, with 2 abstentions.

The re-draft of paragraph 7 proposed by the General Rapporteur was approved by 8 votes to none, with 1 abstention.

3. Mr. YEPES pointed out that paragraph 6, as adopted, stated that the Commission had adhered in the articles on the continental shelf to the basic considerations which underlay the articles provisionally adopted in 1951. The new text of paragraph 7 made it quite clear, however, that the Commission had now adopted a criterion for defining the continental shelf which was quite different from that adopted in 1951. The contradiction should be removed.

4. The CHAIRMAN could see no need for amending paragraph 6.

5. Mr. LAUTERPACHT, agreeing with the Chairman, said that the supposed contradiction depended on the view that the criterion for defining the continental shelf was a "basic consideration". In his view, it was not.

6. Mr. SANDSTRÖM agreed.

7. Mr. YEPES would not press his point, provided it were recorded that he considered there was a contradiction between paragraphs 6 and 7.

Paragraph 11 (68)

8. Mr. SANDSTRÖM withdrew the amendment that he had proposed to paragraph 11.[3]

9. The CHAIRMAN said that the Commission accordingly had before it only the re-draft proposed by the General Rapporteur, reading as follows:

"While article 2 as provisionally formulated in 1951 referred to the continental shelf as 'subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources', the article as now formulated lays down that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources'. The formulation thus adopted takes into account the views of those members of the Commission who attached importance to maintaining the language of the original draft and those who considered that the expression 'rights of sovereignty' should be adopted. In adopting the article in its

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter III.

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] See *supra*, 234th meeting, para. 4.

[2] *Ibid.*, para. 1.

[3] *Ibid.*, para. 48.

present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, safeguarding the principle of the full freedom of the superjacent sea and the air-space above it."

The General Rapporteur's re-draft of paragraph 11 was approved by 9 votes to none, with 1 abstention.

Paragraph 12 (69)

10. The CHAIRMAN said that the Commission had before it a re-draft[4] proposed by the General Rapporteur, reading as follows:

"On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and the exploitation of the natural resources of the continental shelf. These rights are essentially tantamount to full control and jurisdiction, including the right to reserve exploitation and exploration for the coastal State or its nationals. Such rights include also full jurisdiction, in particular in connexion with suppression of crime."

11. Mr. SANDSTRÖM said that he was in general agreement with the re-draft but suggested that the second sentence be amended to read:

"These rights are essentially tantamount to full control and jurisdiction for those purposes including the right..."

12. Mr. LAUTERPACHT accepted Mr. Sandström's suggestion.

13. Mr. CÓRDOVA preferred the General Rapporteur's re-draft. It was more comprehensive, as the control and jurisdiction of the coastal State included the suppression of crime.

14. Mr. SANDSTRÖM said that the right to suppress crime could only be exercised in so far as that suppression was connected with exploitation and exploration. He wished to make it clear that the control and jurisdiction of the coastal State over the continental shelf was limited.

Mr. Sandström's proposal was rejected by 3 votes to 2, with 4 abstentions.

15. Mr. ALFARO said that the phrase "essentially tantamount" was imprecise. He proposed that the second sentence of the paragraph be amended to read:

"These rights comprise full control and jurisdiction and the right to reserve...".

Mr. Alfaro's amendment was adopted by 4 votes to 1, with 4 abstentions.

16. Mr. CÓRDOVA proposed that the third sentence of paragraph 12 be amended to read:

"Such rights include jurisdiction in connexion with suppression of crime".

Mr. Córdova's proposal was adopted unanimously.

Paragraph 12, as amended, was adopted unanimously.

17. As adopted, it read:[5]

"...

Paragraph 13 (70)

18. The CHAIRMAN said that the Commission had before it certain amendments proposed by Mr. Sandström,[6] and a text which he (the Chairman) had submitted in his capacity as Special Rapporteur. That text read:

"The Commission decided, after considerable discussion, to retain the term 'natural resources' as distinguished from the more limited term 'mineral resources'. It is true that in its previous draft the Commission only considered mineral resources, and certain members proposed adhering to that course. The Commission concluded, however, that the products of sedentary fisheries, in particular, being natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term 'natural resources'. It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there. Nor do these rights cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the sub-soil."

Since the French text was the original, he thought that the English translation of the second sentence should be amended to read:

"The Commission concluded... in particular, to the extent that they were natural resources permanently attached..."

19. Mr. SANDSTRÖM suggested that the second sentence should be amended to read:

"The Commission concluded, however, that natural resources permanently attached to the bed of the sea should not be outside...".

20. The CHAIRMAN said that he had specified sedentary fisheries in his text because the Commission had been particularly concerned about them. They had originally been excluded from the definition of the resources belonging to the continental shelf, but the Commission had changed its mind and had come to the conclusion that sedentary fisheries ought to be considered as natural resources permanently attached to the bed of the sea, and therefore an integral part of the continental shelf. In view of that change of mind, the

[4] For previous discussion of para. 12 see *supra* 234th meeting, para. 57.

[5] See para. 69 in the "Report" of the Commission.

[6] *Ibid.*, paras. 78-79.

text should stand as he had proposed, for the sake of clarity.

21. Mr. SANDSTRÖM withdrew his suggestion.

22. Mr. LAUTERPACHT suggested that the phrase "It is true that" at the beginning of the second sentence be deleted.

It was so agreed.

The re-draft by the Special Rapporteur of paragraph 13, as amended, was approved by 7 votes to none, with 3 abstentions.

Paragraph 21 (28)[7]

23. The CHAIRMAN said that as drafted the last sentence of paragraph 21 was concerned with the due notice that had to be given, and with the means of warning that had to be maintained, in cases in which the construction of installations was likely to interfere with navigation; it had been suggested that such notice and warning should be identical with those required in the case of installations already completed.

24. He felt, however, that it would not always be practical for due notice to be given in respect of provisional installations. The sentence might therefore, he suggested, read as follows:

"However, in cases in which the actual construction of provisional installations is likely to interfere with navigation, due means of warning must be maintained in the same way as in the case of installations already completed and, as far as possible, due notice must be given."

The Chairman's proposal was unanimously accepted.

Paragraph 25 (82-84)[8]

25. The CHAIRMAN said that the Commission had before it two amendments proposed by Mr. Zourek. The first was that the paragraph should end at the words "some elasticity", the remainder of the paragraph being deleted; the second was for the insertion, after paragraph 25, in accordance with a previous decision by the Commission,[9] of a new paragraph to read:

"The Commission was of the opinion that where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them should be carried out in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question."

26. The Commission also had before it a proposal, which he (the Chairman) put forward in his capacity as Special Rapporteur, that a clause be inserted after the clause which Mr. Zourek had proposed, to read as follows:

"The actual method used for delimiting the territorial seas in special cases might be affected however by certain considerations, particularly as regards navigation and fishing interests which would not apply in the case of the continental shelf."

27. Thirdly, Mr. Kozhevnikov had proposed the addition of the following passage:

"It should, however, be noted that several members of the Commission considered that it would be premature to apply for the purposes of delimiting the continental shelf the principles drawn up by the Committee of Experts on the delimitation of territorial waters, since those principles have not yet been discussed by the Commission. In their opinion, the proper course would be to provide that the boundaries of the continental shelf contiguous to the territories of two or more States should be determined by agreement between the States concerned. In the absence of such agreement, the resultant dispute between them should be settled by one of the appropriate procedures for the peaceful settlement of disputes."

28. Mr. KOZHEVNIKOV said that in the first sentence of his amendment the word "several" in the English translation should be replaced by the word "certain" so that the English text might conform with the Russian. A similar change should be made in the French text.

29. In reply to the CHAIRMAN, Mr. ZOUREK said that he was unable to withdraw his first proposal. As article 8 of the draft articles on the continental shelf was quite general in its application, there seemed to him to be no purpose in citing it in a paragraph of the draft report otherwise concerned only with the boundaries of the continental shelf.

30. Mr. LAUTERPACHT said that it was essential to mention the possibility of arbitration in the proposed additional paragraph.

31. If Mr. Zourek's second proposal were accepted, it should be introduced by the phrase "Having regard to the element of elasticity implied in article 7 as adopted...".

32. Mr. ALFARO pointed out that disputes concerning the boundary of the continental shelf were one case in which arbitration might perhaps be necessary.

33. Mr. ZOUREK said that the Commission seemed to be considering his second proposal as a new suggestion, whereas in his view it was a direct consequence of the decision previously taken by the Commission. Further, he was unwilling to accept Mr. Lauterpacht's suggestion that a decision previously reached be used to illustrate the latter's contention about the elasticity implicit in article 7.

34. Mr. CÓRDOVA agreed with Mr. Zourek that there was no connexion between his (Mr. Zourek's) second proposal and the element of elasticity in article 7. Nevertheless, article 7 of the draft articles on the continental shelf and the new paragraph proposed by Mr. Zourek were contradictory. If the new paragraph were accepted, the contradiction would have to be resolved.

[7] Resumed from the 236th meeting, paras. 14-20.

[8] *Ibid.*, paras. 22-35.

[9] See *supra*, 205th meeting, para. 68.

35. The CHAIRMAN, referring to Mr. Kozhevnikov's and Mr. Zourek's contention that, as a result of its previous decision, the Commission was obliged to insert Mr. Zourek's second proposal without change, said that Mr. Zourek's proposal that the draft articles on the continental shelf should include an article according to which the principles governing delimitation of the continental shelf and those governing delimitation of territorial waters should be the same had been rejected by 7 votes to 2, with 4 abstentions.[10] It had been agreed, however, by 12 votes to 1, that "it should be stated in the commentary that the principles governing delimitation of the continental shelf and those governing delimitation of the territorial waters should be the same".[11] The Commission had not, however, agreed on any particular text for the commentary.

36. Mr. ZOUREK said that the summary record in question was incomplete.

37. Referring to the possible contradiction between his proposal and the text of article 7, he said that the method laid down in article 7 for determining the boundary of the continental shelf was to be used, in the words of the article, "in the absence of agreement between those States or unless another boundary line is justified by special circumstances". His proposal was no more than that the principles according to which the boundary of the continental shelf was determined should normally, whether by agreement between the States concerned or as a result of special circumstances, be the same principle as governed the delimitation of the territorial waters.

38. Mr. SANDSTRÖM, referring to Mr. Lauterpacht's earlier proposal, suggested that the text of Mr. Zourek's second proposal should be introduced by the phrase "Without prejudice to the element of elasticity implied in article 7...".

39. Mr. LAUTERPACHT withdrew his suggestion in favour of Mr. Sandström's.

40. The CHAIRMAN also accepted Mr. Sandström's suggestion, and withdrew his own amendment to the paragraph.

Mr. Zourek's first amendment was rejected by 5 votes to 4, with 1 abstention.

41. Mr. CÓRDOVA explained that he had voted in favour of Mr. Zourek's proposal, not because he was against the principle of arbitration, but because the wording of paragraph 25 of the draft report implied that the principle of arbitration was restricted to matters arising under article 7.

Mr. Sandström's amendment was adopted by 6 votes to 3, with 1 abstention.

Mr. Zourek's second amendment was adopted unanimously.

It was agreed, by 6 votes to 3, that the text of Mr. Zourek's second amendment, as amended by Mr. Sandström, should form a separate paragraph.

42. Mr. KOZHEVNIKOV said that he had no objection to the text which he had proposed as an addition to paragraph 25 being made a separate paragraph.

43. Mr. LAUTERPACHT did not favour Mr. Kozhevnikov's proposal either as a new paragraph or as an addition to the existing one, for it was merely a statement of the views of a minority, and was thus out of harmony with the form of the report.

44. Mr. YEPES reiterated his view that the report should reflect the views of all members of the Commission. Mr. Kozhevnikov's proposal should be accepted.

45. Mr. ZOUREK also supported Mr. Kozhevnikov's proposal, and maintained that it was untrue to say that it was contrary to accepted practice to report minority opinions. Indeed, in view of the fact that the Commission's report was in the nature of a commentary on draft conventions, it was particularly important that the General Assembly should have before it the views of those who had been unable to accept the views of the majority.

46. Mr. ALFARO said that he did not object to Mr. Kozhevnikov's proposal, although it was customary in drafting reports to state the dissenting views first and the conclusion reached afterwards. He therefore doubted the wisdom of making Mr. Kozhevnikov's proposed text an independent paragraph.

47. In order to make it clear that the three sentences of Mr. Kozhevnikov's proposal were all descriptive of the minority view, the full stops separating them should be replaced by semi-colons.

48. Mr. CÓRDOVA said that he had been a member of the minority some of whose views were summarized in Mr. Kozhevnikov's proposal. He was, however, in favour of arbitration for the settlement of international disputes; the last sentence of Mr. Kozhevnikov's proposal, therefore, did not entirely reflect his position. He suggested, accordingly, that the last two sentences of the proposed text be dropped.

49. Mr. KOZHEVNIKOV said that he was glad to see that a number of members of the Commission thought that minority opinions should be included in the Commission's report; that was a good democratic principle.

50. He accepted Mr. Alfaro's suggestions concerning punctuation. Referring to Mr. Córdova's suggestions, he said that the second sentence of his proposed text was organically connected with the first, and must be retained. The third sentence did not mention arbitration specifically, but "appropriate procedures for the peaceful settlement of disputes" in general; arbitration was undoubtedly one such procedure.

51. Mr. LAUTERPACHT thought that Mr. Kozhevnikov's proposed text should not be made a separate paragraph; if it were, that section of the report would

[10] *Ibid.*, para 65.

[11] *Ibid.*, para. 68.

appear disjointed and undue prominence would be given to the views of the minority.

52. Mr. KOZHEVNIKOV said that it appeared logical to him for the majority opinion, which was described in paragraph 25, to be followed by the minority opinion in a separate paragraph.

The text of Mr. Kozhevnikov's proposal, as amended, was approved by 5 votes to none, with 3 abstentions.

It was agreed by 5 votes to 4 that Mr. Kozhevnikov's proposal should form a separate paragraph.

Paragraph 25, as amended, was approved by 9 votes to 3.

Additional paragraph (88) *to follow paragraph 30*

53. Mr. ZOUREK said that, as some members of the Commission had been opposed to the insertion of a clause on compulsory arbitration, a clause which had not figured in the original draft articles, he felt it desirable that the report should indicate their views on a question of such importance. He therefore proposed the insertion, after paragraph 30, of a new paragraph reading as follows:

"Certain members of the Commission were strongly opposed to the insertion in the draft of a clause on compulsory arbitration on the ground that there was no reason for imposing on States one only of the various measures laid down in current international law, and particularly in Article 33 of the Charter of the United Nations, for the pacific settlement of international disputes. They also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. A few members raised the further objection that such a clause would give any contracting State the right to take action on any pretext against the other contracting States by a unilateral request to international tribunals, thus increasing the possibility in present circumstances of putting pressure on the weaker States and in effect curtailing their independence."

54. Mr. LAUTERPACHT said that, as he had already had occasion to recall, the Commission had at the beginning of the session rejected the suggestion that a minority should be entitled to have its views included in the report in a way that would deprive the majority of the right to reply. The various points discussed in Mr. Zourek's proposal were not otherwise mentioned in the draft report, so that if it were adopted the last word on the question of arbitration would effectively rest with the minority. With regard to the specific proposal under consideration, that did not seriously worry him, as he thought that none of the various objections raised — particularly that in the last sentence — called for a reply. He would, however, suggest the deletion of the word "strongly" from the first sentence.

55. Mr. ALFARO said that, as he could not agree to the views of the minority being given greater prominence than those of the majority, he could only accept Mr. Zourek's proposal if it preceded paragraph 30 instead of following it.

56. Mr. LAUTERPACHT suggested that the most appropriate point at which to insert Mr. Zourek's proposal would be at the end of paragraph 28.

57. Mr. ZOUREK had no objection to his proposed text being inserted as a separate paragraph to follow paragraph 28.

It was agreed, by 6 votes to none, with 2 abstentions, to insert Mr. Zourek's proposal, without the word "strongly", as a separate paragraph to follow paragraph 28.

Additional paragraph (last part of para. 97) *to follow paragraph 45*

58. Mr. ZOUREK proposed that the following text be inserted as a new paragraph to follow paragraph 45:

"Certain members of the Commission were definitely opposed to the adoption of the text of article 3, on the ground that there was no real need for the creation of an international authority, since fisheries could be regulated as in the past, by means of agreements between States. They pointed out that the proposal to give an international authority power to issue regulations binding on the nationals of States was clearly in conflict with the basic principles of international law."

59. Mr. LAUTERPACHT said that he could not accept Mr. Zourek's proposal, which was entirely negative, and explained nothing.

60. Mr. ZOUREK pointed out that the text which he proposed was necessarily negative, since it gave the views of those members of the Commission who did not accept the Commission's decision.

61. In his view, the Commission's report should present a faithful account of the Commission's discussions, and the text which he proposed was in accordance with what had been said.

62. Mr. SANDSTRÖM suggested that the word "definitely" should be deleted, and that the proposed text should be added to paragraph 45, instead of being made a separate paragraph.

63. Mr. ZOUREK accepted Mr. Sandström's first suggestion; and said that in the present instance he had no objection to the second.

64. Mr. ALFARO said that he was in favour of permitting those members of the Commission who disagreed with the Commission's decisions to indicate their views in the report, but that he was strongly opposed to any system which gave the views of the minority greater prominence than those of the majority. He would therefore vote against Mr. Zourek's proposal if it was to be inserted after the existing text of paragraph 45.

It was agreed by 5 votes to 1, with 2 abstentions, to insert the text proposed by Mr. Zourek, without the word "definitely", at the end of paragraph 45.

Paragraph 48 (100) (resumed from the 236th meeting)

65. Mr. YEPES recalled that he had proposed[12] that the second sentence, which was dangerous and incorrect and which read:

> "The Commission, in adopting these articles, was influenced by the view that although the prohibition of abuse of rights is not yet firmly established as a doctrine of international law, it is not altogether unsupported by the judicial and other authority and that it is germane to the situation caused by these articles."

should be replaced by the following:

> "The Commission, in adopting these articles, was influenced by the view that the prohibition of abuse of rights is clearly supported by judicial and other authority and is germane to the situation caused by these articles."

66. Mr. LAUTERPACHT pointed out that the words "the situation caused by these articles", which had been taken by Mr. Yepes from his own text, should read: "the situation covered by these articles". He also pointed out that the word "clearly" should be deleted from the English text of Mr. Yepes' proposal, which was stronger than the French and went much further than he considered appropriate. In his view, the wording which he had himself proposed described the situation with complete accuracy, particularly when taken in conjunction with the fourth sentence, which read:

> "The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized states, provides to a considerable extent an accurate legal basis for the general rule, as formulated in article 3."

67. Mr. SCELLE felt that any ambiguity in such a matter would be most undesirable. The doctrine of abuse of rights had made great headway during the past decade, and in his view it could now be regarded as belonging to what Article 38 of the Statute of the International Court of Justice called "the general principles of law recognized by civilized nations". There was a concordance of theory with regard to it, and he believed that the existence of concordance was of much greater importance in that connexion than in relation to the doctrine of the continental shelf, with regard to which Mr. Lauterpacht had cited it.

68. Mr. ZOUREK said that, although the Commission had touched on the question of abuse of rights and had agreed that it was of great importance, it had not examined it in any detail. In his view, the proponents of that doctrine were inclined to extend the principles of municipal law to international law too mechanically. Since the question was controversial and had not been discussed, he thought it would be wiser for the Commission not to mention it in the report.

69. Mr. LAUTERPACHT said that, as could be seen from the relevant summary records, both he and Mr. Scelle had made detailed reference to the doctrine of the abuse of rights.

70. Replying to a question by the CHAIRMAN, Mr. YEPES said that he had no objection to the deletion of the word "clearly" from the English text of his amendment.

Mr. Yepes' amendment, without the word "clearly" in the English text, was adopted by 7 votes to 1, with 2 abstentions.

71. Mr. AMADO proposed the deletion of the fifth sentence of paragraph 48, reading:

> "To that extent it may be held that [Article 3] is not altogether in the nature of a drastic departure from the principles of international law."

72. Mr. SANDSTRÖM agreed that the sentence should be deleted, but felt that the first and last two sentences should be deleted as well. The wording used by the General Rapporteur implied that the rule formulated by the Commission contained some element of codification, whereas in his view it was clear that it was wholly an innovation.

73. Mr. LAUTERPACHT said that he could agree to the deletion of the first and last sentences, since they referred directly to codification and Mr. Sandström thought there was no element of codification in the rule in question. He did not understand, however, why it should be thought necessary to delete the antepenultimate and penultimate sentences as well.

74. Mr. SANDSTRÖM thought that the effect of paragraph 48 as a whole would be enhanced by the deletion of those sentences, since they were somewhat out of place and their substance was in any case given in the penultimate sentence in paragraph 51.

Mr. Sandström's proposal that the first sentence be deleted was adopted by 5 votes to none, with 4 abstentions.[13]

Mr. Sandström's proposal that the last three sentences be deleted was rejected by 6 votes to 3, with 1 abstention.

Mr. Amado's proposal that the ante-penultimate sentence be deleted was rejected, 4 votes being cast in favour and 4 against, with 2 abstentions.

Paragraph 48, as amended, was approved by 7 votes to 1, with 2 abstentions.

Paragraph 54 (106) (resumed from the 237th meeting)

75. The CHAIRMAN stated that Mr. Kozhevnikov had submitted an amendment for the insertion of an additional sentence at the end of paragraph 54, but had

[12] See *supra*, 236th meeting, para. 92.

[13] The first sentence read as follows: "This latter circumstance, as well as considerations of wider legal principles, lend some support to the view that, in a sense, the rule now formulated in the final draft of the articles on fisheries is in the nature of codification."

requested that, as he had been obliged to leave the meeting, discussion of it be deferred until the next meeting, when the Commission would also have to vote on the draft chapter as a whole.

76. Mr. ZOUREK recalled that he too had submitted an amendment to the section of the report dealing with the contiguous zone. Since the purpose of his amendment was identical with that of Mr. Kozhevnikov's, he would consult him with a view to submitting a joint proposal for consideration at the next meeting.[14]

CHAPTER IV: NATIONALITY, INCLUDING STATELESSNESS (A/CN.4/L.45/Add.2) *

77. The CHAIRMAN invited the General Rapporteur to introduce the chapter on nationality, including statelessness, in the draft report covering the work of the Commission's fifth session (A/CN.4/L.45/Add.2).

78. Mr. LAUTERPACHT said that he was in a difficulty, as he feared from what Mr. Córdova had said about previous chapters that the chapter on nationality, including statelessness, would not conform to the Special Rapporteur's ideas of what the report should contain. The Commission's report could, of course, be limited to a summary of what had been said in the discussion, but in his (Mr. Lauterpacht's) view it was essential that it should explain the purpose of the texts which the Commission was submitting to the General Assembly, and their relation to existing international law, even if those questions had not been discussed in the Commission. There was no question of his trying to impose his own views on the Commission, but only of presenting the Commission's views to the world in the manner best calculated to secure their acceptance. The Commission was under an obligation to explain to the General Assembly and to the world at large what it was doing, and why, and whatever had been the practice in the past, he intended, so long as he remained General Rapporteur, to press for the adoption of a report along the lines he had indicated.

79. He would not, however, wish the Commission to include in its report a chapter which did not meet with the approval of the Special Rapporteur, and if his fears proved well-founded, he saw no alternative to withdrawing the whole of the draft chapter on nationality, including statelessness, except the first six paragraphs.

80. Mr. CÓRDOVA agreed that he had said it was essential that in preparing his draft report the General Rapporteur should limit himself to what had been said in the discussions, in order to avoid controversy as to whether the views expressed were those of the Commission as a whole. In the present instance, however, he wished to make it quite clear that he had no objections to the general form of the draft chapter on nationality, including statelessness, and wished to pay a tribute to the excellence of the General Rapporteur's work. It was true that not everything in the chapter had been said in the discussions, but even if it had not been said, it had been present in members' minds.

81. Mr. LIANG (Secretary to the Commission) pointed out that the chapter on nationality, including statelessness, was not on the same plane as the chapters on arbitral procedure and on the régime of the high seas. It was clear from the Commission's Statute that the draft conventions on the elimination and on the reduction of future statelessness should be submitted to governments for comment, and given appropriate publicity; for that purpose they might or might not be accompanied by explanatory comment, and the chapter drafted by Mr. Lauterpacht could or could not be regarded as such explanatory comment. It should be clearly understood, however, that the Commission was not submitting to the General Assembly the final results of its work on statelessness.

82. He suggested that it would be desirable for the Commission to submit the draft conventions to the Economic and Social Council as an interim report, in accordance with the second part of article 17, paragraph 2 (*c*), of its Statute.

83. The CHAIRMAN said that, in view of what Mr. Córdova had said, there was clearly no need for the General Rapporteur to consider withdrawing any part of the draft chapter. The explanations contained in it were absolutely necessary to avert misunderstanding of the draft conventions, and the Commission would begin to examine it paragraph by paragraph at the next meeting, adhering strictly to the procedural rules which it had adopted at the beginning of the 236th meeting.[15]

The meeting rose at 1 p.m.

[14] See *infra*, 239th meeting, para. 83.

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter IV.

[15] See *supra* 236th meeting, para. 1.

239th MEETING

Thursday, 13 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Faris Bey el-KHOURI,

Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER IV: NATIONALITY, INCLUDING STATELESSNESS (A/CN.4/L.45/Add.2) * (*concluded*)

1. The CHAIRMAN invited the Commission to take up, paragraph by paragraph, the chapter on nationality, including statelessness, in its draft report covering the work of its fifth session (A/CN.4/L.45/Add.2).

*Paragraphs 1-3 (115-117) ***

Paragraphs 1, 2 and 3 were approved without discussion.

Paragraph 4 (118)

2. Mr. LAUTERPACHT suggested the following addition to paragraph 4:

"The Commission also appointed Mr. Ivan Kerno as an expert to assist the Special Rapporteur; in his report the Special Rapporteur expressed his appreciation of Mr. Kerno's help."

3. Faris Bey el-KHOURI suggested the insertion of the phrase "for reasons of health" in order to explain that Mr. Manley O. Hudson had been unable to continue as Special Rapporteur owing to ill health.

It was agreed by 7 votes to 2 to make the suggested additions.

Paragraph 4, as amended, was approved by 8 votes to 2.

Paragraph 5 (119-120)

4. Mr. LAUTERPACHT suggested that the following passage be added at the end of the paragraph:

"Reference is also made to the report, referred to above in paragraph 3, of Mr. Manley O. Hudson presented in 1952; the report, referred to in this paragraph, of Mr. Córdova on the elimination or reduction of statelessness (A/CN.4/50); the memorandum prepared by Dr. I. S. Kerno on national legislation concerning grounds for deprivation of nationality (A/CN.4/66); and the consolidated report by the Secretary-General on the problem of statelessness (E/2230, A/CN.4/56)."

It was so agreed.[1]

Paragraph 5, as amended, was approved by 7 votes to 2.

Paragraph 6 (121)

5. Mr. CÓRDOVA suggested, and Mr. LAUTERPACHT agreed to, the deletion of the words "desirable and" from the third sentence.

6. Mr. ALFARO, referring to the same sentence, suggested that the verb "can solve" be qualified by the word "fully" ("*entièrement*").

It was so agreed.

7. Mr. SANDSTRÖM suggested the insertion of the phrase "in the future" after the word "statelessness" at the end of the first clause of the third sentence.

It was so agreed.

8. After some discussion, in which Mr. KOZHEVNIKOV, Mr. LAUTERPACHT and the CHAIRMAN took part, *it was agreed* that the phrase "as a whole" should be deleted from the fourth sentence.

Paragraph 6, as amended, was approved by 5 votes to 2, with 1 abstention.

Additional paragraphs (122-123)

9. Mr. LAUTERPACHT proposed that the following two additional paragraphs be inserted after paragraph 6:

"7. The Commission decided, in view of the considerations adduced below in paragraph 9, to ask the Secretary-General to transmit to the Economic and Social Council the draft conventions and the comment thereon as embodied in the report, as well as the supporting documentation referred to at the end of paragraph 5.

"8. In adopting the titles 'Convention on the Elimination of Future Statelessness' and 'Convention on the Reduction of Future Statelessness' the Commission desired to draw attention to the fact that, as is the normal case, these Conventions are not intended to have retrospective effect, and that they are not concerned with the problem of the elimination or reduction of existing statelessness. The Commission devoted discussion to the latter problem. During the session the Special Rapporteur prepared an interim report and drafts of Conventions bearing on this subject. The Commission asked the Special Rapporteur to devote further study to the matter and to prepare a report for the next session."

10. Mr. SANDSTRÖM asked whether the Commission was permitted by its Statute to transmit reports to a United Nations body other than the General Assembly.

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter IV.

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

[1] In view of this proposed addition, paragraph 5 was later split into two parts and the passage suggested by Mr. Lauterpacht was added at the end of the first part (para. 119), the remaining part becoming paragraph 120.

11. Mr. LIANG (Secretary to the Commission) confirmed that the Commission was so permitted under article 17 (*c*) of its Statute.

12. Mr. KOZHEVNIKOV wondered whether the Russian translation was correct, since in the new paragraph 8 it was stated that the Commission had discussed the elimination or reduction of existing statelessness.

13. Mr. LAUTERPACHT said that the Commission had discussed that problem, with the result that a special report had been prepared by the Special Rapporteur during the session.

14. Mr. KOZHEVNIKOV thought that the second sentence of the new paragraph 8 therefore might be worded: "The Commission discussed the latter problem in a general manner."

15. Mr. ZOUREK thought that the sentence in question was inaccurate, even if amended as suggested by Mr. Kozhevnikov, for there had been only the shortest general discussion of the report on existing statelessness, and not all members had even had an opportunity of making known their views on it.

16. Mr. LAUTERPACHT suggested that it might be better to delete the sentence in question.

It was so agreed.

17. Mr. SCELLE, referring to the phrase "as is the normal case" in the first sentence of the new paragraph 8, said that some conventions had retrospective effect, whereas in others it was specified that they were not to be retrospective. That indicated that it was not completely abnormal for conventions to have retrospective effect. The phrase should accordingly be deleted.

It was so agreed.

The additional paragraphs proposed by the General Rapporteur, as amended, were approved by 8 votes to none, with 2 abstentions.

Paragraph 7 (124)

18. Mr. LAUTERPACHT said that the word "also" should be deleted from the first sentence.

Paragraph 7 was approved by 7 votes to none, with 3 abstentions.

Paragraph 7 bis *(125)*

19. Mr. LAUTERPACHT said that the text immediately following the heading of section II of the chapter should form a numbered paragraph (for the sake of convenience, 7 *bis*), and that a sentence should be inserted at the beginning reading as follows: "The preambles of the two conventions are as follows:".

Paragraph 7 bis *was approved by 7 votes to 2, with 1 abstention.*

Paragraph 8 (128)

20. Mr. ZOUREK suggested, and Mr. LAUTERPACHT agreed to, the deletion of the word "precise" from the first sentence, in the phrase "precise legal obligation".

21. Mr. KOZHEVNIKOV, referring to the second sentence, in which it was stated that the Universal Declaration of Human Rights had been "conceived as an expression of compelling moral principle", asked whether it was in order to raise moral considerations in a purely legal text.

22. Mr. LAUTERPACHT thought that it was entirely in order, as the Commission was involved in the development of international law which was based on considerations not exclusively legal, and as various moral considerations had been adduced in the preambles to the two conventions on the elimination and reduction of future statelessness.

Paragraph 8, as amended, was approved by 7 votes to none with 2 abstentions.

Paragraphs 9, 10 and 11 (127-129)

Paragraphs 9 and 10 were approved by 7 votes to none, with 3 abstentions.

Paragraph 11 was approved by 6 votes to none with 3 abstentions.

Paragraph 12 (130)

23. Mr. CÓRDOVA said that the first two sentences appeared slightly contradictory, in that the first referred to nationality as "the link between the individual and international law", whereas the second affirmed that the rights of the individual were not yet independent of the law of the State; unless and until international law recognized the rights of individuals independent of national law it would be impossible to say there was a link between the individual and international law.

24. Mr. LAUTERPACHT said that the meaning of the first sentence was that unless an individual had a nationality he could have no direct connexion with international law, as he would have no State to protect his interests.

25. Mr. CÓRDOVA said that if, as he understood it, the meaning of the first sentence was that the State was the link between the individual and international law, it should be clearly so stated.

26. Mr. LAUTERPACHT suggested that the word "situation" be substituted for the word "principle" at the beginning of the second sentence.

27. Mr. ZOUREK had considerable difficulty with the first sentence, which seemed to imply that the individual could be the subject of international law. The second and subsequent sentences seemed to him to be mere speculation, appropriate to an academic paper but not to the Commission's report. He therefore proposed that the whole of paragraph 12 be deleted.

28. Mr. SCELLE thought that the paragraph was quite clear and should stand.

29. Mr. CÓRDOVA suggested the deletion from the fourth sentence of the phrase "although permitted by international law".

30. Mr. LAUTERPACHT felt some hesitation about agreeing, for the object of the paragraph was to show the inconsistency between the existence of statelessness and one of the basic principles of existing international law.

31. Mr. ALFARO suggested that the phrase to which Mr. Córdova had objected should be amended to read "although not prohibited by international law".

It was so agreed.

Mr. Zourek's proposal was rejected by 6 votes to 3, with 1 abstention.

Paragraph 12, as amended, was approved by 6 votes to 3, with 1 abstention.

Paragraph 12 bis *(131)*

32. The CHAIRMAN suggested that, for the sake of convenience, the second paragraph erroneously numbered 12 should be referred to as paragraph 12 *bis*.

33. Mr. LAUTERPACHT proposed that the last sentence be amended by the deletion of the words "very limited" in the phrase "to that very limited extent..." and by the replacement of the words "to codify" by "to give expression to" ("*de marquer*").

It was so agreed.

Paragraph 12 bis, *as amended, was aproved by 6 votes to none, with 4 abstentions.*

Paragraph 13 (132)

34. Mr. CÓRDOVA suggested the deletion from the fourth sentence of the phrase "in a sphere which has been hitherto within the exclusive domestic jurisdiction". The Commission should not gratuitously furnish States with a pretext for maintaining that all questions of nationality and statelessness were within their domestic jurisdiction.

35. Mr. LAUTERPACHT said that that matter would undoubtedly be raised in the General Assembly in any event. The report would be the stronger for having mentioned it first.

36. Mr. CÓRDOVA withdrew his suggestion.

37. Mr. ZOUREK suggested the deletion of the penultimate sentence. Any treaty imposing obligations would not be compatible with the sovereignty of States, and would thus not be in conformity either with international law or with the Charter of the United Nations.

38. Mr. LAUTERPACHT said that he had inserted that sentence in an endeavour to meet Mr. Zourek's and Mr. Kozhevnikov's point of view.

39. Mr. KOZHEVNIKOV said that Mr. Lauterpacht had evidently not achieved his object, as his opposition was maintained. It would be better to delete the sentence.

40. The CHAIRMAN suggested that the sentence to which Mr. Zourek had referred might be amended to read as follows:

"Agreements of this kind freely concluded between States in the full exercise of their sovereign rights would not be incompatible with their sovereignty".[2]

It was so agreed.

41. Mr. KOZHEVNIKOV, although proposing no formal amendment, wondered whether the last sentence might not be improved if the word "only" were replaced by "also" or "equally".

42. Mr. LAUTERPACHT pointed out that the basis of the Commission's work was that only international agreement was capable of securing maintenance of the necessary national legislation.

Article 13, as amended, was approved by 7 votes to 2 with 1 abstention.

Paragraph 14 (133)

Paragraph 14 was approved by 7 votes to 1, with 2 abstentions.

Paragraph 15 (134)

Paragraph 15 was approved by 7 votes to 1, with 2 abstentions.

Paragraph 16 (135)

Paragraph 16 was approved by 7 votes to none, with 3 abstentions.

Paragraph 17 (136)

43. Mr. ZOUREK, referring to the fourth sentence, asked, as a matter of information, whether it was true that countries whose law was based on *jus soli* in fact conferred their nationality according to the principles of *jus sanguinis* on children born to their nationals abroad.

44. Mr. CÓRDOVA said that nearly all *jus soli* countries did so.

45. Mr. ALFARO added that to the best of his knowledge only Uruguay applied *jus soli* absolutely.

Paragraph 17 was approved by 7 votes to 2, with 1 abstention.

Paragraph 18 (137)

46. Mr. LAUTERPACHT thanked the Chairman for the help he had given him in drafting paragraph 18.

Paragraph 18 was approved by 7 votes to none, with 3 abstentions.

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[2] Instead of "However, being an agreement freely included by States in the full exercise of their sovereign right to conclude treaties, it would not in any way be incompatible with their sovereignty".

Paragraph 19 (138)

47. Mr. ZOUREK said that the last sentence was inaccurate and should be deleted. The use of the word "fully" in the phrase "fully safeguards" was particularly objectionable.

48. The CHAIRMAN agreed that it was going too far to say that article 1 of the draft convention on the reduction of future statelessness fully safeguarded the basic considerations of the law of countries not adhering to *jus soli*.

49. Mr. LAUTERPACHT agreed that the word "fully" should be deleted.

It was so agreed.

50. Mr. ZOUREK proposed that the whole paragraph be deleted.

Mr. Zourek's proposal was rejected, 3 votes being cast in favour and 3 against, with 4 abstentions.

51. Mr. ALFARO pointed out that the French text of the paragraph required emendation so as to make it concord with the English original.

Paragraph 19 was approved by 7 votes to 2, with 1 abstention.

Paragraphs 20, 21, 22 and 22 bis *(139-142)*

Paragraph 20 was approved by 7 votes to 1, with 2 abstentions.

Paragraph 21 was approved by 7 votes to 2, with 1 abstention.

Paragraph 22 was approved by 7 votes to none, with 3 abstentions.

Paragraph 22 bis *was approved by 7 votes to 2, with 1 abstention.*

Paragraph 23 (143)

52. Mr. ALFARO thought it had already been decided that the Committee should refer to the "dissolution" rather than to the "termination" of marriages.

53. The CHAIRMAN asked the Secretariat to verify whether that was so, and to make any necessary emendation.

Paragraph 23 was approved by 7 votes to none, with 3 abstentions.

Paragraph 24 (144)

54. Mr. CÓRDOVA, referring to the position adopted by the Commission on the Status of Women to the effect that the nationality of women should be no more affected by marriage than was the nationality of men, suggested the addition of the following sentence:

"The Commission has refrained from expressing any opinion on the question of the retention of their original nationality by women who marry nationals of a foreign country."

It was so agreed.

Paragraph 24, as amended, was approved by 7 votes to none, with 3 abstentions.

Paragraph 25 (145)

Paragraph 25 was approved by 7 votes to 2, with 1 abstention.

Paragraphs 26 and 27 (146-147)

Paragraphs 26 and 27 were approved by 7 votes to none, with 3 abstentions.

Paragraph 28 (148)

55. Mr. LAUTERPACHT said that Mr. Sandström had suggested to him that the title of section VI was neither elegant nor precise. He proposed that the Commission leave it to him (Mr. Lauterpacht) and the Secretariat to reconsider that title, and insert an improved version in the final text.[3]

Is was so agreed.

Paragraph 28 was approved by 7 votes to 2, with 1 abstention.

Paragraph 29 (149)

Paragraph 29 was approved by 7 votes to 2, with 1 abstention.

Paragraph 30 (150)

Paragraph 30 was approved by 7 votes to 1, with 2 abstentions.

Paragraph 31 (151)

56. Mr. LIANG, Secretary to the Commission, pointed out that the phrase in the first sentence "national-born" should read "natural-born".

Paragraph 31, as thus amended, was approved by 7 votes to none, with 3 abstentions.

Paragraph 32 (152)

Paragraph 32 was approved by 7 votes to none, with 3 abstentions.

57. Mr. KOZHEVNIKOV explained that he had abstained from voting on paragraph 32 not because he had any doubt as to the principle proclaimed in article 8 of both draft conventions, but because in his view deprivation of nationality fell within the domestic jurisdiction of States.

58. Mr. ZOUREK said that during the discussions on article 8 he had made it clear that he accepted the prin-

[3] The title remained unchanged.

ciples proclaimed therein; he had abstained from voting on the paragraph because in his view the application of those principles ought to be left to the judgement of the State concerned.

59. Faris Bey el-KHOURI explained that he too agreed with the principle proclaimed in article 8; but the article was out of place in the draft conventions. As originally worded it had provided that the parties should not deprive "... persons of their nationality on racial, ethnical, religious or political grounds so as to render them stateless". The final phrase alone could have justified the inclusion of the article in the draft conventions, yet it had been deleted at Mr. Sandström's instance. He (Faris Bey el-KHOURI) had therefore abstained from voting on the paragraph.

Paragraphs 33, 34 and 35 (153-155)

Paragraph 33 was approved by 7 votes to 2, with 1 abstention.

Paragraphs 34 and 35 were approved by 7 votes to none, with 3 abstentions.

Paragraph 36 (156-157)

60. Mr. LAUTERPACHT pointed out that the first word of the comment, following the quotation of article 10, should be "this" rather than "that"; that the word "provisions" in the first sentence should be in the singular; and that the phrase "advisory opinions" in the parentheses in the fourth sentence should be "advisory opinion".[4]

Paragraph 36 was approved by 7 votes to 3.

Paragraph 37 (158)

61. Mr. CÓRDOVA proposed that the word "nationals" in the last sentence be replaced by the word "persons".

It was so agreed.

Paragraph 37, as amended, was approved by 7 votes to 3.

Paragraphs 38 and 39 (159-160)

Paragraphs 38 and 39 were approved by 7 votes to 3.

62. Mr. ZOUREK explained that he had voted against paragraph 39 as a matter of principle, and referred to the arguments he had put forward during the discussion of article 10 of the draft conventions. In his view, the terms of the Charter of the United Nations did not empower the General Assembly to create the organs suggested in article 10. He requested that his position be made clear in the summary records.

[4] That phrase became footnote 17 of the "Report".

Paragraph 40 (161)

63. Mr. LAUTERPACHT pointed out that the first sentence was incomplete.[5] It should read:

"... after having been approved by the General Assembly, will enter into force."

64. He also proposed that the word "binding" in the third sentence be replaced by the word "devolving".

It was so agreed.

65. Mr. ZOUREK proposed the deletion of the second sentence, as there were no such things as "United Nations conventions".

66. Mr. CÓRDOVA agreed that, in the literal sense of the words, United Nations conventions did not exist. However, it was clear that what was meant was conventions concluded by governments under the auspices of the United Nations.

67. Mr. LIANG (Secretary to the Commission) said that the second sentence was not inaccurate, although it might perhaps be regarded as an exaggeration.

68. Referring to the first sentence, he pointed out that the entry into force of the two conventions was not dependent on their approval by the General Assembly. The first two sentences would therefore read better if drafted as follows:

"After one or both of the two draft conventions have been approved by the General Assembly and accepted by States, they would become in a general sense United Nations Conventions."

69. Mr. LAUTERPACHT accepted the Secretary's suggestion.

70. The CHAIRMAN agreed that the Secretary's suggestion was in accordance with the sense of the Commission. Nevertheless, the text was still somewhat obscure, and required further polishing. He proposed therefore that it be approved on the understanding that the Drafting Committee should make the necessary emendations.

It was so agreed.

71. Mr. CÓRDOVA, referring to the last sentence, said that the phrase "the international community organized in the United Nations" suggested that the Commission considered that the United Nations was a kind of super-State.

72. Mr. ALFARO thought that the last sentence should refer to "... the international community organized by the Charter of the United Nations".

73. Mr. LIANG (Secretary to the Commission) thought that the text was satisfactory as it stood. Its meaning was simply that there was an international community organized in the form of the United Nations.

[5] The first sentence read as follows: "The two draft conventions are based on the assumption that in due course one or both of them will be accepted by States and after having been approved by the General Assembly they will then become ...".

74. The CHAIRMAN thought that the problem might be solved by deleting the words "international community organized in the".

It was so agreed.

75. Mr. LIANG (Secretary to the Commission) suggested that the word "binding", which was superfluous — for if conventions were no longer in draft form they were automatically binding on the parties to them — should be deleted from the same sentence.

Mr. Zourek's proposal that the last two sentences be deleted was rejected by 6 votes to 3, with 2 abstentions.

76. Mr. KOZHEVNIKOV thought that paragraph 40 was extremely confused. Members had had their doubts about the first sentence. The second sentence was an attempt on the part of Mr. Lauterpacht to obtrude his own point of view — which had not been discussed by the Commission — that international organizations could be subjects of international law. The fifth sentence contained the unequivocal statement that persons "threatened" with statelessness had no State to protect them; that was *prima facie* inaccurate. And the sixth sentence carried the implication that States not members of the United Nations were not members of the international community either; yet there were many active members of that community who were not allowed to take part in the activities of the United Nations.

77. He therefore proposed that the entire paragraph be deleted.

78. Mr. LAUTERPACHT said that an important purpose of article 10, which was a crucial part of the draft conventions, was to link them with the United Nations. He could assure Mr. Kozhevnikov that it was neither his wish nor his intention to use the Commission's report to push his own point of view; nor had he any intention of linking the commentary on article 10 with the question of treaties.

Mr. Kozhevnikov's proposal was rejected by 7 votes to 3, with 1 abstention.

Paragraph 40, as amended, was approved by 8 votes to 1, with 1 abstention.

79. Mr. KOZHEVNIKOV requested that his observations on the different articles of the draft conventions be included as footnotes in the Commission's report.

80. Mr. LIANG (Secretary to the Commission) said that they might be included either as footnotes to the articles themselves, or as footnotes to paragraph 5 of the chapter.

81. The CHAIRMAN asked the General Rapporteur to consider where Mr. Kozhevnikov's observations would best be placed.

The chapter on nationality including statelessness in the Commission's draft report covering the work of its fifth session (A/CN.4/L.45/Add.2) was adopted by 8 votes to 2.

82. Mr. YEPES explained that he was still opposed to article 1 of the draft Convention on the Elimination of Future Statelessness, for reasons which he had given in the course of the discussions and in his explanations of his votes.

CHAPTER III: RÉGIME OF THE HIGH SEAS (A/CN.4/L.45/Add.1) (*resumed from the 238th meeting and concluded*)

Paragraph 54 (106)

83. The CHAIRMAN said that the Commission had before it a proposal by Mr. Kozhevnikov that the following passage be added at the end of paragraph 54:

> "Certain members of the Commission were opposed to the inclusion of this article in the draft, on the ground that it had no direct connexion with the régime of the high seas; moreover several governments in their observations had also put forward the view that the article in question should be examined in connexion with the discussion of territorial waters."

84. Mr. KOZHEVNIKOV requested the Secretariat to ensure that the French text was brought into conformity with the Russian and English versions.

85. Mr. LAUTERPACHT said that, as the Commission had adopted similar paragraphs, the present one should also be adopted. The English text, however, might be slightly re-drafted to read:

> "... the régime of the high seas, and moreover that several governments..."

It was so agreed.

Mr. Kozhevnikov's proposal was adopted by 9 votes to none, with 1 abstention.

86. Mr. KOZHEVNIKOV asked that the text just adopted should form a separate paragraph, in accordance with precedent.

87. Mr. SANDSTRÖM pointed out that the precedents varied.

Mr. Kozhevnikov's proposal that his text form a separate paragraph was rejected, 5 votes being cast in favour of and 5 against it.

88. The CHAIRMAN suggested that, in view of the tied vote, the decision whether or not Mr. Kozhevnikov's text should form a separate paragraph should be left to the General Rapporteur.

89. Mr. LAUTERPACHT said that he would endeavour to make the result satisfactory to Mr. Kozhevnikov.

Additional paragraph (110) to follow paragraph 57 (109)

90. The CHAIRMAN said that the Commission had before it a proposal by Mr. Zourek for the addition of a new paragraph to follow paragraph 57, reading:

> "Certain members of the Commission opposed the inclusion in the draft of the article on the contiguous zone, on the ground that it prejudged the question of the outer limit of territorial waters. They pointed out

that, by taking as the base line the inner limit of the territorial waters, the article tended to restrict the width of these waters — a point on which the Commission had not yet taken any decision."

91. Mr. ZOUREK explained that the purpose of his amendment was to make it clear that the Commission would in future be free to adopt any limit it might choose for the territorial sea.

92. Mr. LAUTERPACHT thought that that followed from the text of article 57 as it stood.

93. Mr. YEPES recollected that during the relevant discussions several members had spoken in the sense of Mr. Zourek's amendment, which should therefore be adopted.

94. Mr. ZOUREK said that he had drafted his amendment on the basis of the summary records of the relevant meetings. He also asked that in the French version the word "*souligné*" in the second sentence be replaced by the word "*affirmé*".

It was so agreed.

Mr. Zourek's proposal was adopted by 8 votes to none, with 2 abstentions.

95. After some discussion in which Mr. YEPES, Mr. LAUTERPACHT and the CHAIRMAN took part, *it was agreed* that it would not be in order for the Commission to vote separately on the various sections of the chapter under consideration.

The chapter on the régime of the high seas in the Commission's draft report covering the work of its fifth session (A/CN.4/L.45/Add.1) was adopted by 8 votes to none.

96. Mr. YEPES explained that, although he had voted in favour of the draft chapter as a whole, he remained opposed to section IV (contiguous zone), because in his opinion the question of the contiguous zone ought to be examined together with the problem of the territorial sea. Further, in his view, it would be better not to create an artificial zone contiguous to the territorial sea, but to extend the limits of the territorial sea correspondingly, as was envisaged in American international law.

97. Mr. KOZHEVNIKOV explained that he had abstained from voting on the draft chapter as a whole because, although he approved of some paragraphs, he had opposed or abstained on others.

98. Mr. ZOUREK said that, in abstaining, he had been actuated by the same considerations as had Mr. Kozhevnikov.

99. Mr. LAUTERPACHT congratulated the Chairman on the successful conclusion of an important piece of work as Special Rapporteur on the régime of the high seas. He had displayed immense learning, patience and restraint.

The meeting rose at 1.5 p.m.

240th MEETING

Friday, 14 August 1953, at 9.30 a.m.

CONTENTS

Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its fifth session (*concluded*)

CHAPTER I: INTRODUCTION (A/CN.4/L.45/Add.3) *

1. The CHAIRMAN invited the Commission to consider paragraph by paragraph the introductory chapter in its draft report covering the work of its fifth session (A/CN.4/L.45/Add.3).

Paragraphs 1 to 5 (1-5) **

Paragraphs 1 to 5 were adopted unanimously.

Paragraph 6

2. Mr. ZOUREK was surprised to note that there was no mention in paragraph 6, in which the agenda for the fifth session was set forth, of an item which the Commission had added to its provisional agenda in a perfectly regular manner, namely: "Ways and means of providing for the expression of dissentient opinions in the report of the Commission covering the work of each session". He proposed that that item be inserted after item (8).

3. The decision which the Commission had taken on that issue was, in his view, an unfortunate one, which it was still open to it to reconsider as regards future sessions. Unless other members of the Commission were in favour of reopening the question, however, he would not press that point, but at least it was essential that the

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter I.

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

matter should be referred to in the Commission's report and he therefore also proposed that the following statement be inserted at an appropriate point in the draft chapter on other decisions (A/CN.4/L.45/Add.4): *

"The Commission discussed a proposal to recognize:

"(*a*) That any member of the Commission may attach a statement of his dissenting opinion from any decision by the Commission on draft rules of international law, whenever the whole or part of that decision does not express the unanimous opinion of the members of the Commission;

"(*b*) That any dissenting member may briefly explain his views in a footnote if, in any cases other than those covered by sub-paragraph (*a*) above, a decision has been taken on a question of principle affecting the work of the Commission.

"This proposal was rejected by the majority of the Commission.

"During the discussion, a compromise was proposed to the effect that members of the Commission should be entitled to record, in an annex to the final report, their dissent from all or part of a report adopted by the Commission, and to append a brief statement of the reasons for their dissenting opinion, at a length agreed to by the Chairman or, in the event of disagreement between the Chairman and the member concerned, by the officers of the Commission. The Commission was divided on this question, six members voting in favour and six against, so that the proposal was rejected." [1]

4. The CHAIRMAN suggested that, for the sake of convenience, Mr. Zourek's two proposals should be discussed simultaneously, although the second related to the draft chapter on other decisions.

It was so agreed.

5. Mr. LAUTERPACHT agreed that, in order to make the report accurate, paragraph 6 of the introductory chapter must be amended in the manner proposed by Mr. Zourek. If that were done, it would hardly be possible to avoid referring to the discussion and decision on that item of the agenda in the chapter on other decisions. The only question was how such reference should be made. The text proposed by Mr. Zourek gave no indication as to why the two proposals had been rejected, and it might therefore be wrongly construed.

6. Mr. KOZHEVNIKOV said that he, too, had been surprised to find no mention of the additional item in the Commission's report; however, as Mr. Lauterpacht agreed that it should have been mentioned, no discussion of Mr. Zourek's first proposal seemed necessary.

The second proposal reflected exactly what had taken place in the Commission, and he saw no reason why that should give rise to discussion either.

7. Mr. LIANG (Secretary to the Commission) said that responsibility for the absence of any mention of the additional item lay with the Secretariat, which had prepared the two draft chapters under consideration at the request of the General Rapporteur. It had seemed to the Secretariat that that item was related to the conduct of the Commission's business, and questions concerning the conduct of business had not been reflected in the Commission's previous reports, nor were they reflected in the reports of other United Nations organs. That was, of course, no reason why the Commission should not mention the item in its own report if it felt it to be of sufficient importance.

8. Although it was true that the item had appeared on the agenda for a number of the Commission's meetings, that did not necessarily imply that it had been formally placed on the agenda for the session.

9. Mr. YEPES said that the item in question had been placed on the agenda for the session, and that the decisions referred to in Mr. Zourek's second proposal had been taken. In the circumstances he did not see how the Commission could adopt any other course than that which Mr. Zourek proposed.

10. Mr. SANDSTRÖM said that, although he was not opposed to mention being made in the Commission's report of the item in question, he wondered whether the Commission's decision on it had in fact been as negative as Mr. Zourek's proposal implied. In rejecting the two proposals mentioned by Mr. Zourek, the Commission had tacitly reaffirmed the previous rules, to which reference should, perhaps, be made.

11. Mr. ALFARO said that he had always been in favour of allowing the minority to state their views in the Commission's report, but that he agreed with Mr. Lauterpacht that Mr. Zourek's second proposal might give the wrong impression. In particular, mention of "a compromise" was inappropriate. He would be unable to vote for Mr. Zourek's second proposal unless it were suitably amended.

12. Mr. ZOUREK pointed out, with regard to the Secretary's explanations, that the item in question went far beyond the conduct of the Commission's business, since it affected the form of all the Commission's future reports. It would, however, be unnecessary for him to dwell on that side of the question, since there seemed to be no opposition to the item being mentioned in the Commission's report.

13. For the sake of brevity, he had purposely omitted mention of the reasons advanced for and against the two proposals which had been made, but he would have no objection to including them, if the General Rapporteur thought it desirable. It had also been suggested that reference should be made to the existing rules, but during the Commission's consideration of the item those rules had not been discussed, nor had they been formally reaffirmed. The only formal decisions the Commission

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter V.

[1] This amendment became para. 163 of the "Report" of the Commission.

had taken had been to reject the two proposals which had been made.

14. Mr. SANDSTRÖM saw no reason for indicating the arguments which had been advanced for and against those proposals.

15. The CHAIRMAN suggested that the Commission might first vote on Mr. Zourek's first proposal, namely: that the following item be inserted after item (8) in paragraph 6 of the introductory chapter:

"Ways and means of providing for the expression of dissentient opinions in the report of the Commission covering the work of each session."

The proposal was adopted unanimously.

16. After some informal consultation together, Mr. LAUTERPACHT and Mr. ZOUREK suggested that the second paragraph of the text which Mr. Zourek proposed be inserted in the chapter on other decisions should be amended to read as follows:

"During the discussion, it was proposed that Members of the Commission... by the officers of the Commission. The proposal was not accepted, the vote being equally divided. The existing rule, adopted at the third session, provides that the Commission's report should only contain a statement to the effect that, for the reasons given in the summary records, one member was opposed to the adoption of a particular passage in the report."

The joint proposal was adopted unanimously.

Mr. Zourek's second proposal, as amended, was adopted unanimously.

Paragraph 6, as amended, was approved unanimously.

Paragraphs 7 and 8 (7-8)

Paragraphs 7 and 8 were approved unanimously.

CHAPTER V: OTHER DECISIONS (A/CN.4/L.45/Add.4)

17. The CHAIRMAN then invited the Commission to discuss, paragraph by paragraph, the chapter on Other Decisions in its draft report covering the work of its fifth session (A/CN.4/L.45/Add.4).

Paragraph 1 (164)

18. Mr. YEPES said that he did not think the proposed text of paragraph 1 exactly reflected the Commission's decisions on the law of treaties, and proposed the addition to it of the following sentence:

"After a brief exchange of views on this subject, the Commission decided that the rapporteur, in the final draft of his report, should take account of any observations members of the Commission might make in the form of written statements."

19. Mr. LAUTERPACHT said that he could see no objection to Mr. Yepes' proposal, which he therefore accepted.

Paragraph 1, as amended, was approved unanimously.

Paragraph 2 (165)

Paragraph 2 was approved unanimously.

Paragraph 3 (166)

Paragraph 3 was approved by 8 votes to none, with 2 abstentions.

Paragraphs 4, 5 and 6 (167-169)

Paragraphs 4, 5 and 6 were unanimously approved.

Paragraph 7 (170)

20. Mr. LAUTERPACHT suggested that, in the phrase reading: "the periodical election of the Commission will take place at the eighth session of the General Assembly", the words "will take place" should be replaced by the words "is due to take place".

It was so agreed.

Paragraph 7, as amended, was approved unanimously.

Paragraphs 8 and 9 (171-172)

Paragraphs 8 and 9 were approved unanimously.

Paragraph 10 (173)

21. Mr. KOZHEVNIKOV proposed the deletion of the three sentences reading:

"Past experience has shown that the quiet atmosphere of Geneva is more conducive to efficiency in the kind of work the members of the Commission have to perform. The library facilities in the European Office, with material gathered and organized since the days of the League of Nations, have proved to be unsurpassed in the field of international law. As it is necessary to hold the session during the summer months, consideration should also be given to the fact that climatic conditions in New York at that time of the year are rigorous to the point of interfering with the health and working capacity of the members."

Those three sentences were couched in a style which was inappropriate in a formal report.

22. Mr. AMADO, Mr. SANDSTRÖM and Mr. CÓRDOVA agreed that, at least, the last of the three sentences referred to by Mr. Kozhevnikov should be amended.

23. Mr. LIANG (Secretary to the Commission) said that the Secretariat had included those three sentences because it believed it to be the Commission's desire that the memorandum which Mr. Alfaro had sent to him (the Secretary) for submission to the Interim Committee on Programme of Conferences,[2] and on which the sentences were based, should be brought to the attention of the appropriate authorities. He felt that it was most desirable that the Commission should give the reasons

[2] See *supra*, 226th meeting, para. 76.

for which it preferred Geneva to New York, instead of stating the fact baldly.

24. Mr. ALFARO agreed with Mr. Kozhevnikov that what had been said in his memorandum would, perhaps, be inappropriate in a formal report. On the other hand, he agreed with the Secretary that it was desirable that the Commission should indicate the reasons for its decision.

25. The CHAIRMAN first put to the vote Mr. Kozhevnikov's proposal that the last three sentences of paragraph 10 be deleted.

That proposal was rejected by 6 votes to 4.

26. After some consultation Mr. LAUTERPACHT and Mr. ALFARO proposed that paragraph 10 be amended to read as follows:

"The Commission decided, after consulting the Secretary-General in accordance with the terms of article 12 of its Statute and receiving the views of the latter, to hold its next session in Geneva, Switzerland, for a period of 10 weeks beginning on 17 May 1954. The Commission is unanimously in favour of Geneva as a meeting place in preference to New York, as general conditions in Geneva are more conducive to efficiency in the kind of work the members of the Commission have to perform. In particular, the library facilities in the European Office, with material gathered and organized since the days of the League of Nations, have proved to be unsurpassed in the field of international law."

The joint proposal was adopted unanimously.

Paragraph 11 (174)

Paragraph 11 was approved by 8 votes to none, with 2 abstentions.

Paragraph 12 (175)

Paragraph 12 was approved by 8 votes to none, with 2 abstentions.

Paragraph 13 (176)

Paragraph 13 was approved by 8 votes to none, with 2 abstentions.

Paragraph 14

27. Mr. KOZHEVNIKOV, on the grounds that such a statement was inappropriate in a formal report, proposed the deletion of paragraph 14, which read:

"In view of these considerations, the Commission is of the view that the added expenditure caused by holding the session in Geneva at the time decided upon by the Commission would be fully compensated by the resulting satisfactory working conditions and the efficiency in the work of the Commission."

28. Mr. LIANG (Secretary to the Commission) agreed that paragraph 14 could be deleted, since its substance was already covered by the preceding paragraphs.

Mr. Kozhevnikov's proposal was adopted unanimously.

29. Mr. LAUTERPACHT recalled that he had abstained from voting on the date and place of the sixth session, since he had had serious misgivings about the effect the Commission's decision would have on its work. He had voted in favour of the paragraphs in the Commission's report dealing with that question, because they accurately reflected the reasons behind the Commission's decision. He wished, however, to place the following statement on record:

"The decision to convene the Commission for 17 May 1954 was dictated by the desire to meet the wishes of the General Assembly with a view to effecting economies. The probable result of that decision is that the Commission may have to meet with one-quarter or more of its members absent. The value of the deliberations and decisions of a Commission so constituted is bound to suffer in consequence of the absence of a considerable number of members. Moreover, such deliberations and decisions are likely to be re-opened when the Commission is complete. The result must be waste of time and money.

"The necessity for the decision taken by the Commission is also regrettable inasmuch as, for reasons of small and doubtful economies, it prevents some members from associating themselves with the work of the Commission at all its stages. In view of this, it is to be hoped that members of the new Commission may have an opportunity of reviewing the decision regarding the date of the next session in the light of the circumstances then prevailing and also that the President, when in New York, will make the appropriate representations to the organs of the General Assembly."

Closure of the session

30. The CHAIRMAN announced that the Commission had now completed its work, although it had by no means completed its agenda. Eleven weeks had proved much too short for all the Commission had had to do. It had, however, drawn up rules governing three important subjects, arbitral procedure, the continental shelf and statelessness.

31. The present Commission had also reached the end of its term of office. Taking into account the fact that it had had to build up its own experience as it went, it could, he thought, feel satisfaction at what it had accomplished, tempered by an increasing awareness of the immensity of the task which the Commission had been set. It had already informed the General Assembly that in its view that task could be carried out only by a permanent body, and although that view had not been accepted, he thought that it was borne out by experience.

32. The Commission realized that the drafts it was submitting to the General Assembly did not meet fully

all the requirements of article 20 of its Statute, but in view of the limited time at its disposal that was unavoidable. What could afford all its members full satisfaction was the spirit of harmony, mutual confidence and even friendship in which, despite unavoidable and important differences of view, it had always worked. Members could only hope that the same atmosphere would continue to pervade the Commission in the future.

33. His last and most pleasant task was, on behalf of the Commission, to thank all those who had contributed to its work: the General Rapporteur for a report whose scientific value all members could commend and which undoubtedly enhanced the Commission's prestige; the First Vice-Chairman, who had so admirably steered the Commission through perhaps the most difficult stage of its journey; the Second Vice-Chairman and the Special Rapporteurs; and finally the Secretary, who had fulfilled his dual functions with such distinction, and all members of his devoted and efficient staff.

34. After voicing the Commission's hopes for the complete recovery of Judge Manley O. Hudson, whose absence had been so great a loss to the Commission at the present session, he said that it only remained for him to thank all members of the Commission for their confidence and loyal co-operation.

35. Mr. AMADO said that, although it fell to him as First Vice-Chairman to thank the Chairman for the services which he had rendered to the Commission, he feared he was quite unable to express at all adequately what the Commission would wish him to say. All its members had known Mr. François' ability and renown as an international lawyer, but it was as Chairman that he had given the full measure of his qualities. The Commission was under a deep debt of gratitude to him for his unfailingly courteous yet energetic conduct of its proceedings.

36. In conclusion, he would only express his own pleasure at having had the honour of working with the other members of the Commission for five years.

37. The CHAIRMAN thanked Mr. Amado for his kind words, and *declared the fifth session of the International Law Commission closed.*

The meeting rose at 11.35 a.m.

INDEX

ABBREVIATIONS

Ann., Annex.
Art., Article.
Conf., Conference.
Conv., Convention.
GA, General Assembly
ICJ, International Court of Justice.
ILC, International Law Commission.
Int., International.
Res., Resolution.

Note: The numbers refer to the pages of Volume I of this publication, except those preceded by R., which refer to the *paragraphs* of the Report of the International Law Commission covering the work of its fifth session in Volume II. Annexes I and II refer to the annexes to the report.

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