

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1954

Volume I

*Summary records
of the sixth session*

3 June - 28 July 1954

UNITED NATIONS



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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE SIXTH SESSION

*Held at the Headquarters of the United Nations Educational, Scientific and Cultural Organization, Paris,
from 3 June to 28 July 1954*

241st MEETING

Thursday, 3 June 1954, at 3.15 p.m.

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Chairman : Mr. J. P. A. FRANÇOIS
later : Mr. A. E. F. SANDSTRÖM

Present :

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

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 declared the sixth session of the International Law Commission open, and welcomed the members.

Statements by the Director-General of UNESCO and the Chairman

2. Dr. Luther H. EVANS (Director-General of the United Nations Educational, Scientific and Cultural Organization) welcomed the members of the Commission.

3. He observed that it was the first session of the Commission to be held at the seat of a specialized agency of the United Nations and said that it was especially significant that the session of a body set up by the General Assembly of the United Nations to encourage "the progressive development of international law and its codification" should be held at the headquarters of UNESCO, an organization created, in the words of its Constitution, "to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms".

4. The activities of UNESCO and the other specialized

agencies had a bearing on the development of international law, for the conventions drafted by them embodied new international obligations and international standards. In performing such quasi-legislative functions, international organizations were modifying a number of traditional concepts of the law of nations, and UNESCO thus regarded the Commission as an ally in its task, and looked to it for guidance on the principles to be implemented.

5. The deliberate creation of new law, or the legislative process, was a safer method of formulating international law than that of leaving its development to the discretion of individual States or of a number of States.

6. A democratic legislative body should represent the main forms of civilization and the principal legal systems of the world, and the Commission, by its very composition, fulfilled those conditions.

7. The specialized agencies, for their part, reflected in all their activities the same preoccupation with universality. In particular, UNESCO, which had a membership of seventy-two States, represented a concerted attempt at integrating the world community above political differences and controversies.

8. In their quest for world peace, international organizations should think primarily in terms of the rules of law to be applied. As Mr. John Foster Dulles—the present Secretary of State of the United States—had said in 1948, an adequate world organization required legislative and judicial bodies to translate agreed moral principles into law. To think in terms of enforcement rather than of law was to approach the problem from the wrong end: law-making should precede law-enforcement.

9. In conclusion, he expressed the hope that the members of the Commission would be satisfied with the facilities provided by his organization.

10. The CHAIRMAN said that as a consequence of the elections held at the eighth session of the General Assembly, certain changes had occurred in the membership of the Commission. Mr. J. M. Yepes, Mr. Ricardo J. Alfaro, Mr. F. I. Kozhevnikov and Mr. Manley O. Hudson were no longer members and he wished to express his appreciation and that of the Commission for the valuable contribution they had made to the work of the Commission.

11. He welcomed Mr. F. V. García-Amador and Mr. C. Salamanca as new members. Of the other members, Mr. S. B. Krylov had cabled that he would be unable to attend the session, as he was undergoing an operation; Mr. J. Spiropoulos would be arriving on Saturday, 5 June; no news had been received from Mr. J. Zourek.

12. In the period between its fifth and sixth sessions he had represented the Commission at the eighth session of the General Assembly in New York. Little had been achieved at the Assembly since neither the draft convention on arbitral procedure nor the draft articles on the continental shelf submitted by the Commission¹ had been discussed. The discussion of the first of those documents had been postponed to the tenth session of the General Assembly in 1955,² while the study of the draft articles on the continental shelf adopted by the Commission had been postponed until such time as the reports of the Commission on the régime of the high seas and the territorial sea were ready,³ which, as the Commission knew, would not be for some time.

13. He thanked the Director-General of UNESCO on behalf of the Commission for the words of welcome addressed to the Commission and the facilities so generously placed at its disposal.

14. Mr. SCALLE wished, as a Frenchman, to welcome his colleagues to Paris. France had a splendid tradition of legal scholarship and upheld the principle that law and not force should prevail in international relations. In particular, articles 26 and 28 of the French Constitution acknowledged the supremacy of international law over municipal law.

15. France could proudly point to a long line of lawyers who had given the weight of their authority to the doctrine that international law was essentially a projection of the rules of law on the international relations of States. In addition, French statesmen such as Bourgeois, Briand, Herriot and Schuman had made contributions to the progress of international law, and French ideas had been incorporated in the basic charters of such bodies as the Institute of International Law, the International Law Academy at The Hague, and UNESCO itself. Léon Blum, who had been closely associated with UNESCO in its early days, had stressed the need to fight the spirit of war in the minds of men before fighting it in the realm of facts and he (Mr. Scelle) was glad to see that both UNESCO and the International Law Commission were by the very nature of their work pursuing the same objective.

16. Mr. el-KHOURI commended the Chairman for the most efficient manner in which he had represented the interests of the Commission at the eighth session of the General Assembly. He welcomed the choice of Paris as a meeting place for the present session of the Commission, as the French capital was considered throughout the Near East as a world capital in the fields of law and education.

¹ 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)*. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

² General Assembly resolution 797 (VIII) of 7 December 1953.

³ General Assembly resolution 798 (VIII) of 7 December 1953.

Election of officers

17. The CHAIRMAN invited the Commission to elect its officers for the sixth session. He nominated Mr. Sandström as Chairman.

Mr. Sandström was elected Chairman by acclamation, and took the chair.

18. The CHAIRMAN thanked the Commission for the honour conferred upon him, and said that he would do his utmost to emulate the high standard set by his predecessor in the chair.

19. He invited members to submit nominations for the offices of first Vice-Chairman, second Vice-Chairman and Rapporteur.

20. Mr. HSU nominated Mr. Córdova as first Vice-Chairman.

Mr. Córdova was elected first Vice-Chairman by acclamation.

21. Mr. el-KHOURI nominated Mr. Pal as second Vice-Chairman.

Mr. Pal was elected second Vice-Chairman by acclamation.

22. Mr. LAUTERPACHT nominated Mr. François as Rapporteur. He said that the preparation of the annual report of the Commission was one of its most important functions and one in which Mr. François' scholarship and capacity for work would be of invaluable assistance.

Mr. François was elected Rapporteur by acclamation.

Consideration of the provisional agenda of the sixth session (A/CN.4/78)

23. The CHAIRMAN invited the Commission to consider the provisional agenda of the sixth session.

The agenda as contained in document A/CN.4/78⁴ was adopted, subject to modification of the order of agenda items.

24. Mr. SCALLE, speaking on the order in which items would be discussed, stressed the particular importance of item 6 of the provisional agenda (law of treaties) and the relevant report prepared by Mr. Lauterpacht (A/CN.4/63).⁵ He was anxious for that item to be studied early in

⁴ It contained the following items:

1. Filling of casual vacancy in the Commission;
2. Régime of the territorial sea;
3. Régime of the high seas;
4. Draft code of offences against the peace and security of mankind;
5. Nationality, including statelessness;
6. Law of treaties;
7. Question of codifying the topic "Diplomatic intercourse and immunities";
8. Request of the General Assembly for the codification of the principles of international law governing state responsibility;
9. Control and limitation of documentation;
10. Date and place of the seventh session;
11. Other business.

⁵ See text in *Yearbook of the International Law Commission, 1953*, vol. II.

the session as he would probably have to leave before the end. The study of items 2 and 3 (régime of the territorial sea and régime of the high seas) was already well advanced, and item 4 (draft code of offences against the peace and security of mankind) might be left till later. He suggested that item 6 should be discussed immediately on two days a week and items 2, 3 and 5 (nationality, including statelessness) on the other days.

25. Mr. CORDOVA said that items which had been left over from previous sessions should be disposed of so that the General Assembly might take up those questions. The last three weeks of the sixth session might be devoted exclusively to the study of item 6.

26. Mr. LAUTERPACHT said that the parallel study of two questions would be unpractical as a dispersal of effort was hardly conducive to concentration. He proposed that items 2 and 3, or one of them, should be dealt with during the first two weeks of the session; item 5 during the following week; item 4 might be disposed of in two or three days; the last three weeks of the session, apart from the last week during which the general report would be discussed, could, as suggested by Mr. Córdova, be reserved for the study of the law of treaties. The report on the law of treaties was of a detailed character and contained a great deal of the information required. That being so, three weeks would be sufficient for completing the study of the first part of the report. He was anxious to proceed with the study of that question as four years would be needed to dispose of it.

27. Mr. PAL agreed with the timetable proposed by Mr. Lauterpacht, but doubted if it would be possible to dispose of item 4 in two or three days.

28. Mr. FRANÇOIS said that it would be equally difficult to dispose of items 2 and 3 in two weeks, particularly as he, who was the Special Rapporteur for these subjects, would have to be absent for some of the time at the beginning of the session.

29. Mr. CORDOVA proposed that after item 1 (filling of casual vacancy in the Commission) the Commission consider item 5 (nationality, including statelessness), in connexion with which he had prepared two reports (A/CN.4/81 and A/CN.4/83).⁶

30. The CHAIRMAN said he would prefer the order of agenda items to be as flexible as possible for the time being, the necessary modifications to be made as and when the need arose.

The meeting rose at 4.30 p.m.

242nd MEETING

Tuesday, 8 June 1954, at 9.30 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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/2456, A/CN.4/82 and Add.1, 2, 3 and 4)

DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS

General debate

1. The CHAIRMAN invited Mr. Córdova, Special Rapporteur on the topic of nationality, including statelessness, to analyse briefly the comments submitted by Member States (A/CN.4/82 and Add.1, 2, 3 and 4)¹ on the two draft Conventions on the Elimination of Future Statelessness and the Reduction of Future Statelessness (A/2456) prepared by the Commission.²

2. Mr. CORDOVA, Special Rapporteur, said that on the whole the eleven³ replies received from Member States were encouraging. The United Kingdom and Norway both appeared willing to amend their domestic legislation along the lines suggested by the Commission. Norway, Sweden and Denmark were in a rather special position because the Scandinavian countries had enacted concor-

¹ See "Report of the International Law Commission covering the work of its sixth session", *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*, annex. Also in *Yearbook of the International Law Commission, 1954*, vol. II.

² The two draft conventions are included in "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)*, chapter IV. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

³ In the course of the session, four more replies were received. See annex referred to in footnote 1.

⁶ See texts in *Yearbook of the International Law Commission, 1954*, vol. II.

dant nationality legislation and hence could not amend it except by mutual agreement. The United States of America, on the other hand, while sympathizing with the Commission's aims felt that the adoption of the draft conventions would encounter numerous difficulties.

3. Mr. LAUTERPACHT said that the comments by Governments were not discouraging. He hoped, however, that governments would not be content with stating that some of the provisions of the drafts in question were unacceptable because inconsistent with their municipal law. It was of the essence of the Commission's work to formulate rules, by way of codification or development, the adoption of which involved changes in the legislation of various States. The mere fact that a draft convention necessitated legislative changes was not relevant unless the changes were of a fundamental nature. What had to be considered was the relative importance of the convention and of the legislative changes.

4. With regard to the United States of America, he said that its Government's comments indicated that in only very few cases did its legislation result in statelessness. Accordingly, there was reason for hoping that the United States legislation might be amended in such a way that its operations would be modified in cases in which it did result in statelessness.

5. Mr. CORDOVA, Special Rapporteur, noted with regret that certain Governments merely pointed to the incompatibility of the draft articles with their municipal law, without showing any willingness to amend the latter. That was particularly true of article 10, which was, incidentally, not indispensable.

6. Faris Bey el-KHOURI said that each Government, when proposing the ratification of the conventions to its legislature, could at the same time introduce a bill to amend its municipal legislation so as to bring it into line with the provisions of the convention in question. This method would be in accordance with the principle of the supremacy of international over municipal law.

7. The CHAIRMAN, speaking as a member of the Commission, pointed out that, in Sweden, it was customary to amend municipal legislation prior to ratifying international conventions of that type.

8. Referring to the comments by Governments, he thought it was premature to express an opinion; the practical importance of the comments varied according to whether the legislation of the particular country was the cause of a large number of cases of statelessness or not. Moreover, in view of the solidarity of the Scandinavian countries in the matter of nationality, the importance of Norway's conciliatory attitude was to some extent impaired by the reservations formulated by Sweden and Denmark.

9. Mr. CORDOVA, Special Rapporteur, thought that the Scandinavian countries, which had brought their respective nationality legislations into line, should be all the more ready to take a further step forward by accepting the Commission's proposals. The final paragraph of the Norwegian Government's comments showed that that

country did not consider it impossible to amend its municipal legislation in certain respects. The Commission ought also, for its part, to be prepared to make certain concessions, especially with regard to article 10, which had met with general hostility.

10. Mr. SCALLE said he could not share the Special Rapporteur's optimism concerning the comments by Governments. The reservations expressed were numerous and, besides, were by no means in conformity *inter se*.

11. Mr. SPIROPOULOS said that the work accomplished by the Commission in the matter of statelessness, at the request of the Economic and Social Council, was not so much a matter of codifying international law, but rather of unifying the municipal law of the various States. The Commission should consider the suggestions made by Governments, and endeavour to make allowance for them as far as possible.

12. The CHAIRMAN asked the Commission to commence the study of the two drafts, article by article, in the light of the relevant comments by Governments.

13. Mr. LAUTERPACHT suggested that the Special Rapporteur should prepare, in the light of the comments by Governments, draft amendments relating to each article for consideration by the Commission.

14. Mr. CORDOVA, Special Rapporteur, agreed to the suggestion.

Article 1

15. Mr. CORDOVA, Special Rapporteur, felt that the objections raised by the Belgian Government concerning article 1 were partly based on a misunderstanding. The Commission's draft did not relate to the case of adults deprived of their nationality of origin by their governments, but rather the question of acquisition of nationality by birth. The object was to reconcile the conflict of laws between *jus soli* countries and *jus sanguinis* countries. Possibly, however, in deference to the Belgian argument, the conditions of residence and connexion with the country of birth, mentioned by the Belgian Government, might be added to the conditions governing the attribution of nationality according to the Commission's draft.

Mr. Pal, Vice-Chairman, took the chair.

16. The CHAIRMAN said that the Belgian proposal was tantamount to deleting completely article 1. The suggestions made by the other Governments should be discussed first.

Mr. Sandström resumed the chair.

17. Mr. CORDOVA, Special Rapporteur, expressed the fear that, in practice, the Belgian suggestion might result in preventing many stateless persons from acquiring a nationality.

18. Mr. FRANÇOIS considered that the main question was whether residence had to continue beyond the age of eighteen years; for his part, he did not think that was a necessary condition.

19. Mr. SPIROPOULOS pointed out that the Commission's draft went really much further than the Belgian Government's comment ; the Commission should reject the Belgian suggestions.
20. Mr. FRANÇOIS said an important question of principle was involved. The Commission's object was that everybody should have a nationality so that there would be fewer cases of statelessness. Belgium, on the other hand, was trying to protect the freedom of choice of individuals and their right to remain stateless if they preferred. The Commission had to decide the point.
21. Mr. LAUTERPACHT felt that the Belgian proposal ran counter to the principle of article 1, which, firstly, laid an obligation upon a State to confer its nationality and, secondly, gave individuals the right to acquire it.
22. Mr. AMADO said it was preferable to adhere to the existing text of article 1, which was the cornerstone of both conventions.
23. Mr. SCALLE entirely shared the opinion of Mr. Lauterpacht and Mr. Amado. The Belgian proposal was absolutely contrary to the principle of automatic acquisition of nationality which was becoming a rule of positive law. The Commission could not entertain the Belgian proposal.
24. Mr. CORDOVA, Special Rapporteur, said that perhaps article 1, paragraph 2 of the draft Convention on the Reduction of Future Statelessness might be supplemented by a clause relating to option.
25. Mr. FRANÇOIS could not agree to that interpretation of paragraph 2 which only mentioned the conditions imposed upon "all persons born in the party's territory". A State did not require all persons born in its territory to opt for its nationality.
26. Mr. CORDOVA, Special Rapporteur, pointed out that, according to Mexican law, all children born in Mexico of Mexican parents automatically acquired Mexican nationality, whereas children born in Mexico of foreign parents only acquired that nationality if they opted for it. Perhaps the last phrase of paragraph 2 should be drafted more explicitly.
27. The CHAIRMAN pointed out that in the existing draft of paragraph 2, the crucial words were "preservation" and "to retain nationality", whereas Belgium was placing the emphasis on the exercise of an option which was subject to certain conditions of residence.
28. Mr. HSU said that, in some cases, an option might usefully supplement the conditions governing the acquisition of nationality.
29. Faris Bey el-KHOURI said that according to the Belgian proposal the acquisition of a nationality would in effect become a right, in conformity with the Universal Declaration of Human Rights, whereas article 1 of the draft seemed to regard it as a duty which might be imposed upon the person. The Commission should therefore settle that important question of substance.
30. Mr. CORDOVA, Special Rapporteur, said that, in order to eliminate statelessness, every individual should be required to have a nationality. The elements of the Belgian suggestion were already embodied in the terms of paragraph 2 and, if the Commission felt that the Belgian suggestion should be rejected, it would have to revise that paragraph.
31. Mr. PAL said that at its fifth session the Commission had debated whether nationality was to be regarded primarily as a right or as a duty and had decided to put the emphasis on the "human right to a nationality". He had serious doubts whether the Commission's approach was the one best calculated to translate that human right into a political reality. As the draft convention now stood, stateless persons had no choice or option in the matter of the acquisition of a nationality : instead of receiving assistance in obtaining their "human right", all they were getting through the draft Convention was a nationality forced upon them — a nationality determined by the accident of birth.
32. The draft was also open to criticism in respect of the obligations it placed upon States. A State would be asked to grant rights to a stateless person from whom it could not expect an unswerving and sincere allegiance — the spontaneous outcome of a disposition to prefer the nation to all other human groups. Such an allegiance was an essential political trait of the state system, and was implied by the term "nationality". The factors underlying allegiance were numerous and, if States were going to be compelled to accept certain persons as nationals, the circumstances surrounding their cases should at least be such as to justify placing the States under such an obligation. If the discussion on the subject was not closed, he would ask the Commission to make some allowance for the factors underlying allegiance.
33. Mr. LAUTERPACHT acknowledged the weight of the opinions expressed by Mr. Hsu and Faris Bey el-Khoury, and suggested that, in deference to them, the following words should be added at the end of paragraph 2 : "and make a formal declaration to that effect."
34. Mr. SCALLE said that paragraph 2 should be redrafted along those lines, so as to preserve not only the right of individuals to repudiate their nationality but also the right of a State not to accept as nationals persons whom it might consider undesirable. He did not, however, think that the Belgian proposal should be accepted.
35. The CHAIRMAN agreed that the concluding words of paragraph 2, as drafted, were liable to misinterpretation ; it would, however, be undesirable to make the retention of nationality dependent upon an option the exercise of which would, in practice, be neglected by most persons, who might then become stateless.
36. Mr. HSU hoped nevertheless that the right of persons to change their nationality in certain circumstances would be expressly recognized.
37. Mr. AMADO recalled that he had not been in favour of including the final passage of paragraph 2 ; he still thought that it could be deleted.

38. Mr. CORDOVA, Special Rapporteur, suggested that the concluding words of paragraph 2 should be replaced by the following text: "and provide that, on attaining this age he must express his willingness to retain such nationality."

39. Mr. FRANÇOIS, summing up the discussion, said that three solutions were possible: (1) option; (2) the possibility of repudiation in all cases; (3) repudiation possible only if the person did not thereby become stateless. In his opinion, the Commission should adopt the second solution.

40. Mr. CORDOVA, Special Rapporteur, recalled that the Government of the United Kingdom had proposed, in its comments, that paragraph 3 should allow the countries which were being asked by the existing draft to bind themselves to apply the *jus sanguinis*, some similar discretion as under paragraph 2 namely, that nationality thus acquired should be dependent on the degree of connexion which the person concerned had maintained with the country whose nationality was conferred upon him. He saw no difficulty in amending paragraph 3 in accordance with the proposal of the Government of the United Kingdom.

It was so agreed.

41. Mr. LAUTERPACHT said that in two cases the United Kingdom did not apply *jus soli*: in the case of children born to diplomatic agents, and in the case of children born in enemy-occupied British territory to parents who were nationals of the occupying power. The latter case was a potential cause of statelessness. He doubted whether, assuming that the United Kingdom were otherwise in favour of the principle of the total elimination of statelessness, it would be disposed to oppose the Convention on account of that peculiarity of English law.

42. Mr. CORDOVA, Special Rapporteur, said that the Norwegian Government had pointed out, in its comments, that the last phrase of paragraph 3 was inconsistent with Norwegian municipal law, which gave precedence to the nationality of the mother in the case of a child born out of wedlock. Norwegian law was therefore at variance with the principle, accepted by the Commission, that the nationality of the father prevailed.

43. The CHAIRMAN said that the Norwegian comments referred to a general principle which was applied in all the Scandinavian countries. The Commission should endeavour to make allowances for such peculiarities.

44. Mr. CORDOVA, Special Rapporteur, proposed that at the end of paragraph 3 some such words as "unless the law of this State provides to the contrary" should be added.

It was so agreed.

45. Mr. CORDOVA, Special Rapporteur, said that in a letter addressed directly to the members of the Commission, the World Jewish Congress had proposed that paragraph 3 should be supplemented by the following

provision: "If both parents are stateless, the person concerned shall acquire the nationality of the Party in whose territory he resided permanently, provided he has reached the age of eighteen and has resided in that territory for at least three years."

46. Mr. FRANÇOIS said that the conditions of residence till the age of eighteen years had been accepted by the Commission because such a condition implied a certain guarantee of assimilation. Accordingly, he did not consider the proposal of the World Jewish Congress acceptable.

47. Mr. LAUTERPACHT and Mr. PAL noted that the draft under consideration did not provide for the case where both parents were stateless; that was a weakness.

48. The CHAIRMAN pointed out that a draft dealing only with the reduction of statelessness could not provide for all cases.

49. Mr. CORDOVA, Special Rapporteur, said that the proposal of the Lebanese Government to the effect that article 2 should contain a more precise definition of the term "foundling", rightly drew attention to the position of adults whose place of birth was unknown.

50. Mr. LAUTERPACHT said that the Commission had never attempted to define the term "foundling". He doubted whether it was desirable to make any such attempt for what was in essence an exceptional case.

51. Mr. FRANÇOIS pointed out that in the practice of individual countries the interpretation of that term had never given rise to any difficulties.

52. The CHAIRMAN thought that in effect a comparison of the French and English versions precluded any misinterpretation.

Communication regarding observers

53. Mr. LIANG, Secretary to the Commission, informed the Commission that the Secretary-General of the United Nations had received a letter from the Japanese Government stating that it proposed to send two observers to the Commission's meetings.

The meeting rose at 1.15 p.m.

243rd MEETING

Wednesday, 9 June 1954, at 9.30 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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

Distribution of provisional summary records

1. In reply to a question asked by Mr. Lauterpacht at the end of the previous meeting, the CHAIRMAN said that the provisional summary records would be accessible to the Commission's members only.

Nationality, including statelessness (item 5 of the agenda (A/2456, A/CN.4/82 and Add.1, 2, 3 and 4) (*continued*))

2. The CHAIRMAN said that on 27 April 1954 the Economic and Social Council had adopted a resolution endorsing the Commission's work concerning statelessness.

DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)¹

Article 1 (*continued*)

3. The CHAIRMAN said that the discussion of article 1 would be concluded after the Special Rapporteur had produced a written draft embodying amendments.

Article 2

4. Mr. CÓRDOVA, Special Rapporteur, said the Lebanese Government had suggested that the term "foundling" (*enfant trouvé*) should be defined more clearly. There was indeed a discrepancy between the French and the English texts for the term "foundling" did not necessarily refer to a child. Since the intention of both conventions was to confer a nationality on a person who was ignorant of his place of birth or even of the

identity of his parents, and since that situation required a remedy even if the person concerned happened to be an adult, the term "foundling" might be replaced by the word "person"; the French text could be amended accordingly.

5. Mr. SCELLE proposed that article 2 might be left as it stood, but that a second paragraph should be added to it reading: "The same rule shall apply in the case of a person, wherever resident, whose place of birth is unknown."

6. The CHAIRMAN approved Mr. Scelle's idea, but suggested that it should be mentioned in the commentary instead of forming the subject of a second paragraph.

7. Mr. SCELLE objected that a matter of substance was involved; the clause should therefore appear in the body of the convention, not in the commentary.

8. After a further exchange of views, the CHAIRMAN put Mr. Scelle's proposal to the vote.

The proposal was rejected by 9 votes to 3.

9. The CHAIRMAN said the Special Rapporteur would prepare a revised draft of article 2.

Article 3

10. Mr. CÓRDOVA, Special Rapporteur, referred to the comments by the Governments of Norway and Denmark; they did not, he thought, contain any arguments warranting an amendment to article 3.

11. Mr. LAUTERPACHT drew attention to the comments of the United States Government concerning the "serious possibilities of abuse". He hardly thought that the clause could lend itself easily to abuse. There was perhaps an element of exaggeration in the implied suggestion that parents whose children might otherwise become stateless would arrange for a birth to take place on a United States vessel or aircraft in order to enable them to acquire American nationality. That was probably a case in which a country that was otherwise willing to co-operate in the elimination of statelessness might feel inclined to agree to a change in its laws. It would not be necessary for the United States to change its laws generally in respect of birth on an American ship or aircraft; such change would be required only if the child were otherwise stateless.

12. The CHAIRMAN proposed that article 3 should be left as it stood.

It was so agreed.

Article 4

13. Mr. CÓRDOVA, Special Rapporteur, referred to the Belgian and United States Governments on article 4.

14. The CHAIRMAN suggested that the emphasis of the Belgian comment was on the question of option.

15. Mr. CÓRDOVA, Special Rapporteur, said that according to the United States Government article 4

¹ *Vide supra*, 242nd meeting, para. 1 and footnotes.

might operate to confer double nationality on a person born in the territory of a State which was not a party to the convention. He suggested that article 4 should be amended to read: "Whenever article 1 does not apply on account of a child having been born in the territory of a State which is not a party to this convention, if otherwise stateless, it shall . . ."

16. Mr. LAUTERPACHT said that double nationality, though perhaps undesirable in some cases, was not a disaster; it was perhaps not necessary to take undue trouble in order to avoid it. The comments of the United States Government were not really justified, for article 4 was supplementary to article 1.

17. The CHAIRMAN agreed that it was therefore not necessary to add the words "if otherwise stateless" to article 4.

18. Mr. CORDOVA, Special Rapporteur, agreed in principle, but pointed out that if something was implicit it was still better to make it explicit. If, therefore, the United States Government was likely to construe article 4 as having the effect of increasing cases of dual nationality, it was desirable to meet the objection by inserting the three words in question.

19. Mr. PAL could not agree. Article 1 applied whenever a child would be otherwise stateless, and article 4 covered the case where article 1 could not apply because a child had been born in the territory of a State which was not a party to the convention, but where all the other conditions of article 1 were fulfilled.

It was decided by 5 votes to 2, with 1 abstention, not to insert the words "if otherwise stateless" in article 4.

20. Mr. CORDOVA, Special Rapporteur, drew attention to the United States comment that article 4 discriminated unfairly against women.

21. The CHAIRMAN suggested that the concluding sentence should be amended to read: "The nationality of the father shall prevail over that of the mother, unless the law of the country whose nationality is being acquired provides otherwise."

It was so agreed.

Article 5

22. Mr. CORDOVA, Special Rapporteur, referred to the Belgian comments on article 5. The gist of these comments was that an illegitimate child should follow the status of that parent with respect to whom affiliation had been established, even if the child were thereby to become stateless. That was exactly the type of situation the Commission was trying to avoid by means of the draft convention.

23. The CHAIRMAN suggested that article 5 required no amendment.

It was so agreed.

Article 6

24. Mr. CORDOVA, Special Rapporteur, said the Government of Honduras suggested that the provisions of article 6, paragraph 3, should only apply to natural-born citizens and that it should be open to a State to deprive of nationality a naturalized person who stayed abroad unduly long. He proposed the following tentative redraft of paragraph 3, which took into account the suggestion made by Honduras:

"Persons who are nationals of a country by birth shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or any other similar ground. Naturalized persons may lose their nationality on the foregoing grounds provided that, if they were originally nationals of one of the contracting parties, they shall recover that original nationality."

25. Mr. LAUTERPACHT pointed out that the Honduran Government's proposal for an addition to article 3 was combined with a proposed new paragraph 4 stating: "Naturalized persons who lose their nationality in this way shall recover that of their country of origin." That was a useful provision.

26. Mr. CORDOVA, Special Rapporteur, said that such a provision would only apply if both the countries concerned were signatories to the convention.

27. Mr. FRANÇOIS stated that the comments by the Honduran Government deserved careful consideration, because it was a common occurrence for a naturalized person to return to his country of origin. Many States would certainly hesitate to adopt article 6 unless a compromise of the type suggested by the Honduran Government were adopted.

28. Mr. CORDOVA, Special Rapporteur, pointed out that the matter of naturalized persons returning to their country of origin had also been raised by the Governments of the Philippines, Norway, Denmark, and the United States. It was certainly desirable to satisfy the wishes of those countries so as to encourage them to sign the conventions.

29. Mr. LAUTERPACHT said that there was some intrinsic merit in the argument that a naturalized person returning to his country of origin for good should not continue to enjoy his adoptive nationality. There were elaborate provisions on that point in the United States immigration legislation.

30. Mr. FRANÇOIS pointed out that the Honduran Government's proposal concerned naturalized persons only.

31. Mr. CORDOVA, Special Rapporteur, said the conventions were based on an extension of the *jus soli* rule to countries which normally adhered to the *jus sanguinis* rule. The Commission had to abide by the principle that a person born in a particular country was and remained a national of that country; but naturalized persons were in a different category.

32. Mr. LIANG, Secretary to the Commission, in reply to an earlier remark by Mr. Lauterpacht, pointed out that prolonged residence abroad did not deprive a natural-born United States citizen of his nationality but only of diplomatic protection, contrary to what might be inferred from the wording of the comments by the United States Government. According to the 1952 Act a natural-born citizen of the United States could not be deprived of his citizenship in peace time. A naturalized citizen of that country might lose his citizenship in consequence of protracted residence abroad.

33. The CHAIRMAN said that under the former Swedish Nationality Act, natural-born Swedish nationals staying for more than ten years away from Sweden had had to make a formal application to retain their Swedish nationality. The legislation had been amended. It seemed to him strange that there should be two categories of nationals of a country, one of them, that of naturalized persons, being alone liable to deprivation of nationality.

34. Mr. LAUTERPACHT said that the Commission had not fully made up its mind on the subject and that it was therefore not wise to give directions to the Special Rapporteur at that stage.

5. Faris Bey el-KHOURI said that the Commission had discussed the subject at length at its fifth session,² and its decision had been that under no circumstances should situations be created giving rise to statelessness. It was therefore desirable to leave article 6 as drafted. The Commission could not be expected to conform with the nationality legislation of the several countries; its function was rather to recommend certain principles, to the General Assembly and to the Member States.

36. Mr. AMADO doubted whether any amendment to article 6 was really called for. The comments made by Governments really amounted to statements that their legislation was at variance with the conventions, and it was significant that the Norwegian Government's comments on article 6 ended with the words "whether the consequence of the loss of nationality is that he will become stateless or not, is an irrelevant factor." Clearly, such comments by Governments showed that they were not thinking along the same lines as the Commission. Article 6 fulfilled the purpose which had gathered the Commission together, and it should be adopted as it stood.

37. Mr. HSU agreed with the distinction between natural-born and naturalized persons and felt that it should be reflected in the draft Convention on the Reduction of Statelessness and not in the draft Convention on the Elimination of Statelessness.

38. The CHAIRMAN pointed out that the Norwegian Government, after drawing attention to the divergencies of its legislation from the provisions of the conventions, had nevertheless declared its readiness to consider those

conventions and, if necessary, to amend its legislation accordingly.

39. He added that the discussion of article 6 would be resumed after the Special Rapporteur had prepared a fresh draft.

Article 7, paragraph 1

40. Mr. CORDOVA, Special Rapporteur, said that the Governments of the United States of America and Honduras had raised important points in connexion with that paragraph. The Government of the United States pointed out that existing federal legislation did not conform entirely to the principle embodied in article 7 of either draft convention, and provided in several cases, such as treason and desertion, for deprivation of nationality "by way of penalty", regardless of whether such deprivation rendered the individual stateless. Treasonable conduct was clearly more hostile to the country of which the person was a national than voluntary service with a foreign country and should therefore be taken into account. Moreover, deprivation of nationality on those grounds could only apply to naturalized persons. The Honduran Government felt that article 7 should refer "specifically to nationality at birth".

41. To cover those points he proposed that some such term as "natural-born" should be introduced before the word "nationals" and the words "except on the ground of treason, desertion or" inserted before the words "that they voluntarily enter..."

42. Mr. SALAMANCA said that the second half of the paragraph beginning with the words "except on the ground that..." might be deleted, as States should be left free to deal with offences by naturalized citizens under municipal law.

43. Mr. LAUTERPACHT said that article 7 was one of the most important in the draft conventions.

44. The British Nationality Act contained provisions for the deprivation of nationality in respect of naturalized persons, but there was no compelling reason to believe that, if there were prospects of the draft Convention on the Elimination of Future Statelessness becoming part of international law, the United Kingdom would necessarily attach decisive importance to maintaining that provision of its law. The instances in which it had been applied were extremely rare. The practical effects of its application were insignificant. The punishment for acts of disloyalty both in time of peace and in time of war was such as, in comparison, to make deprivation of nationality no more than a symbolic act of repudiation of the person concerned. As a rule, after he had served his sentence, he could not be deported, for, in the meantime, he would have lost the nationality of his country of origin.

45. Mr. CORDOVA, Special Rapporteur, supported the idea that States should not have recourse to deprivation of nationality as a penalty; most States had considerably more effective means of dealing with such offences as treason. If the Commission agreed to delete the existing

² See *Yearbook of the International Law Commission, 1953*, vol. I, 218th meeting, paras. 31-68, and 221st meeting, paras. 49-51.

exception, there should be no need to mention treason and desertion.

46. Mr. HSU said that treason should be distinguished from voluntary service with a foreign country. A traitor was criminally liable under domestic legislation, whereas service with a foreign country affected relationships between States.

47. Mr. LAUTERPACHT proposed, in order to facilitate discussion, that the second half of the paragraph, from the words "except on the ground that . . ." should be deleted.

48. Mr. FRANÇOIS felt that Mr. Lauterpacht's proposal was inconsistent with the views expressed at the fifth session³ of the Commission. The exception contained in paragraph 1 was of importance to many States, and the comments received from governments had contained no objection to it. He would oppose any attempt to remove it.

49. Mr. LAUTERPACHT said that the differences between the two draft conventions were minor ones. The exception was itself a minor one and was further restricted by the reference to an express prohibition by the State of the individual concerned. If the exception were retained it would be necessary to mention treason and desertion which were of far greater consequence. Governments in their comments had merely indicated in what way their national legislation differed from the provisions of article 7.

50. Mr. SPIROPOULOS supported the point of view expressed by Mr. François. Voluntary service with a foreign State could in certain cases be profitable to the State of which the person was a national. Article 7 did not compel a State to deprive one of its citizens serving voluntarily with a foreign State of his nationality, but merely gave it the right to do so; it was important to distinguish between deprivation of nationality as a penalty and as an administrative measure. In the case of treason it would be a penalty, while voluntary service with a foreign State would initiate an administrative process. In practice there was little danger of complication as a person serving voluntarily with a foreign State would find it relatively easy to acquire the nationality of that State; however, voluntary service with a foreign State should not *ipso facto* result in loss of nationality. With that point in mind he proposed that in the second phrase of the paragraph the word "and" be substituted for the word "or".

51. Mr. LAUTERPACHT said it was hardly relevant to argue that the draft convention did not compel States to deprive their citizens of nationality in cases of voluntary service with foreign countries, but only empowered them to do so. Surely the whole object of the draft was to prohibit States from taking certain measures. He had proposed the deletion of the exception for reasons of logic, but would defer to the wishes of the majority.

52. Faris Bey el-KHOURI said that those questions had been raised at the Commission's previous session and the article had been adopted as it stood. Every State should be free to apply the exception or not as it thought fit. He would oppose any modification of the paragraph in question.

53. The CHAIRMAN said that under Swedish law a Swedish subject serving voluntarily with a foreign country did not lose his nationality unless he acquired the nationality of that country by virtue of his service. There would consequently be no need to amend Swedish legislation to bring it into line with the draft convention.

54. Conceivably, certain States might wish to deprive their citizens of nationality, but it was important to make a distinction between entering the service of a foreign State and merely rendering services to a foreign State. If the article under consideration was intended to cover voluntary service with foreign States in the broadest sense, the proposal made by Mr. Spiropoulos to substitute "and" for "or" in the second part of the paragraph should not be adopted.

55. Mr. CORDOVA, Special Rapporteur, said that loss of nationality as a penalty was quite distinct from loss of nationality by virtue of administrative measure. If the principle was accepted that a stay abroad could by administrative process be assimilated to a renunciation of nationality, voluntary service with a foreign country was an even more blatant case of implied renunciation.

56. In reply to a question from Mr. Pal, the CHAIRMAN confirmed that the question of the adoption of article 7 remained open and that the Special Rapporteur would submit a new draft of paragraph 1.

Article 7, paragraph 2

57. Mr. CORDOVA, Special Rapporteur, referred to the comments submitted by the Governments of the United States of America and Lebanon. They had pointed out that according to their legislation the deprivation of nationality was not carried out by judicial authority, but the person concerned was at all times entitled to apply to a judicial authority for a review. He therefore proposed that the phrase in paragraph 2 "by a judicial authority acting in accordance with due process of law" should be replaced by the phrase "in accordance with due process of law, which should always provide for recourse to a judicial authority".

It was so agreed.

Article 8

58. Mr. CORDOVA, Special Rapporteur, said that, in view of certain comments made by governments, it might be necessary to clarify the term "political grounds". The United States Government in particular was unable to accept the term if it covered such offences as treason or desertion, while Belgium felt that activities designed to overthrow the State or its institutions were sufficient grounds for deprivation of nationality.

³ *Ibid.*, 221st meeting, paras. 58-106 and 222nd meeting, paras. 1-100.

59. Mr. SPIROPOULOS proposed the deletion of the words "or group of persons", for the words "any person" were sufficient. He also feared that if the article were left as it stood, reasons other than those enumerated might be invoked to deprive a person of his nationality. He would not, however, press the point.

60. Mr. CORDOVA, Special Rapporteur, said that it was proposed in a letter received from the World Jewish Congress that after the words "of their nationality" the phrase "nor shall they refuse their nationality" should be inserted. The proposal might be acceptable if it were made clear that the person in question would become stateless if nationality were refused.

61. The CHAIRMAN pointed out that the grant of nationality was a discretionary act of an administrative nature, and hence governments could not be under a duty to grant it.

62. Mr. LAUTERPACHT said that the draft conventions did imply certain obligations for States to confer nationality, particularly article 1. However, as the draft conventions were concerned primarily with deprivation of nationality as a cause of statelessness, the proposal of the World Jewish Congress probably fell outside the scope of the convention. It was difficult to conceive how a person could be rendered stateless by a refusal to grant him nationality. For either he was already stateless or he was an alien. In neither case was there any question of rendering him stateless.

63. Mr. CORDOVA, Special Rapporteur, agreed that the Commission should deal both with deprivation and grant of nationality.

64. Mr. PAL said that the Commission should deal with such questions, but only in so far as statelessness was a possible consequence.

The meeting rose at 1.15 p.m.

244th MEETING

Thursday, 10 June 1954, at 9.30 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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/2456, A/CN.4/82 and Add. 1, 2, 3 and 4)
(*continued*)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (*continued*)¹

Article 8 (*continued*)

1. The CHAIRMAN recalled that, towards the end of its previous meeting, the Commission had been considering a suggestion from the World Jewish Congress for the inclusion in article 8 of the phrase "and shall not refuse their nationality..." [on racial, ethnical, religious or political grounds]. He was not in favour of the suggestion, for a provision of that nature not only restricted the discretionary powers of States in the matter of naturalization, but also exceeded the scope of the draft.

2. Mr. CORDOVA, Special Rapporteur, said that there were several reasons in favour of adopting the suggestion, the strongest being the right of a person to express his chosen political views so long as, in doing so, he committed no offence against the law. Although, in fact, most Governments granted or refused their nationality without giving any reasons, it would nonetheless be useful to insert, at the end of the article, the words: "nor shall they refuse it on political grounds". It would be extremely difficult to define the meaning of "political grounds"; some countries, such as the United States, regarded treason not as a political crime but as an ordinary offence.

3. Mr. LAUTERPACHT agreed with the Special Rapporteur that the Commission had to keep always in mind the essential aim of the draft conventions, which was to prevent States from making persons stateless.

4. Mr. SCELLE suggested that the words "political grounds" should be replaced by "political opinions". The latter, according to a generally accepted principle of criminal law, could not constitute an offence. After the proclamation of the Four Freedoms, it would be a most unwarranted retrograde step not to mention the political factor together with the racial, ethnic and religious factors; at times, in the name of security of the State, some quite harmless activities were described as political.

¹ *Vide supra*, 242nd meeting, para. 1 and footnotes.

5. Mr. GARCIA-AMADOR feared that, in view of the diversity of legitimate political opinions, the application of such a criterion might ultimately give States the right to deprive certain persons of their nationality on account of political activities which it was as legitimate to carry on as it was to have political opinions.

6. Mr. SALAMANCA said that, since it appeared impossible to define the term "political grounds" accurately it might perhaps be best not to alter the original draft of article 8.

7. Mr. PAL was of the same opinion; each State could punish political activities which contravened its domestic legislation; the only purpose of the conventions being to ensure that such penalties did not involve deprivation of nationality.

8. The CHAIRMAN said that he too could think of a wide range of activities that might be described as political; demographic questions might, for example, be considered political. Not wishing to restrict the political scope of the draft conventions, he was in favour of maintaining the original text.

9. Faris Bey el-KHOURI said that it was not the Commission's functions to define the expression "political grounds" which was in fact very differently construed in different States; he nevertheless supported the Special Rapporteur's proposal that refusal of nationality should be mentioned in article 8.

10. The CHAIRMAN called for a vote on the amendment proposed by Mr. Córdova and supported by Faris Bey el-Khoury, as well as on the amendment proposed by Mr. Scelle.

There were 5 votes in favour and 5 against each amendment. The votes being equally divided the amendments were not approved and article 8 was adopted in the following form:

"The parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious or political grounds."

Article 9

11. The CHAIRMAN noted that no amendments to article 9 had been proposed by Governments.

Article 10

12. Mr. CORDOVA, Special Rapporteur, said that notwithstanding the objections expressed in the Belgian comments it was certainly essential to establish a special agency to ensure the application of the conventions.

13. He recalled that, in preparing draft provisions relating to a special tribunal, the Commission had taken good care not to encroach upon matters essentially within the domestic jurisdiction of States; the objections raised by the Government of the United Kingdom and those of the United States therefore seemed to him groundless.

14. Mr. LAUTERPACHT agreed with the Special Rapporteur. Possibly the objections of the United Kingdom did not stem from any reluctance to assist in making the convention as effective as possible but from the apprehension of an undue multiplication of international agencies. He noted, however, that with reference to article 10, the Government of the United Kingdom had pointed out that the International Court of Justice might usefully act as an appellate jurisdiction. The proposed tribunal might make an award having wide repercussions and affecting very large numbers of persons. That being so some provision for appeal might not be out of place.

15. Mr. CORDOVA, Special Rapporteur, pointed out that the conventions and the future agency were concerned with stateless persons who did not come under the jurisdiction of the Court, and that in the existing drafts no appeal from the decisions of the special tribunal had been provided for.

16. Mr. LIANG, Secretary to the Commission, explained that paragraph 4 offered the choice between two different procedures in disputes between States, whereas paragraph 2 provided for a tribunal concerned exclusively with individuals.

17. Mr. LAUTERPACHT inquired what would happen if a dispute between a State and an individual were brought before the International Court of Justice.

18. Mr. FRANÇOIS pointed out that the International Court of Justice had no jurisdiction in conflicts between States and individuals.

19. Mr. SALAMANCA pointed out that the possibility of the same case coming before two different judicial bodies simultaneously was remote; if the contingency arose it would be covered by the generally established rule of *litis pendentia*.

20. Mr. PAL pointed out, in reply to Mr. Salamanca, that the legislation of every country contained provisions concerning *litis pendentis* and the respective authority of the various courts. The system provided for so far by the Commission did not contain any such provision. The phrase which the Special Rapporteur proposed to be added at the end of paragraph 4 would not solve the problem which would arise if the tribunal and the International Court of Justice were simultaneously asked to deal with the same case. The convention should perhaps state that in such a case the International Court had sole jurisdiction.

21. Faris Bey el-KHOURI considered it preferable that all actions should be brought before the special tribunal in the first instance, with the possibility of an appeal from its decisions to the International Court of Justice.

22. The CHAIRMAN thought that the Commission, in view of the objections raised by certain States, including the United States of America, which was an important country of immigration, should perhaps reconsider the whole question of the establishment of a special tribunal. The objection of these countries might jeopardize the ratification of the conventions as a whole.

23. With regard to the division of jurisdiction as between the International Court of Justice and the special tribunal, he said it was not possible to provide for appeals from the one to the other. The jurisdiction of the two bodies was quite distinct. If the International Court of Justice were to be asked to give a ruling on a point of law arising from a case the substance of which had been submitted to the special tribunal, the latter would, in theory, have to suspend giving its decision pending the judgement of the International Court.

24. Mr. FRANÇOIS said that the object of paragraph 4 was to prevent States parties to the convention from claiming that a dispute between two States fell within domestic jurisdiction. That paragraph did not, however, provide for the case of a stateless person who did not enjoy the protection of any State; furthermore, if the Commission wished to give States the right of action before the special tribunal, paragraph 2 would have to be amended.

25. Any appeal from one jurisdiction to another was impossible, as the statute of the Court did not empower it to deal with a dispute between a State and the agency referred to in paragraph 1.

26. Mr. LAUTERPACHT remarked, in reply to the Chairman, that the first nine articles of the draft conventions were much more drastic and more novel than article 10, the purpose of which was merely to ensure respect of the convention. If a State accepted the first nine articles and rejected the tenth its attitude might justifiably lend itself to criticism. Moreover, private persons would only have access to the tribunal through the agency referred to in paragraph 1, which sifted their claims. He was in favour of the principle, agreed to by the Commission after lengthy discussion at its fifth session,² of establishing a special tribunal.

27. The CHAIRMAN said that in those matters, feelings carried at least as much weight as logic. Many States would be reluctant to entrust to an international tribunal cases which at the moment fell within their own jurisdiction.

28. Mr. LAUTERPACHT inquired what solution the Commission would adopt if it dropped the idea of a special tribunal. Would there be no body competent to deal with disputes arising out of the application of the convention?

29. The CHAIRMAN said that he did not contemplate the disappearance of the agency provided for under paragraph 1, which would be able to defend the interests of stateless persons before national authorities. Furthermore, the International Court might undertake to interpret the conventions in accordance with its own statute.

30. Mr. CORDOVA, Special Rapporteur, hoped that the Commission would uphold the principle of setting up the tribunal.

31. It would be difficult to accept Mr. Lauterpacht's proposal that the parties should be empowered to appeal to the International Court against decisions of the tribunal, as the Court was not empowered to determine disputes between States and the agency to be set up under paragraph 1. Preferably, it should be provided that a decision by either body was final.

32. Mr. SCELLE remarked that there was nothing to prevent the tribunal and the Court from giving conflicting decisions. Under Article 36, paragraph 2, of the Court's Statute a State party to that instrument could not be prevented from referring directly to the Court a decision of the tribunal which it deemed contrary to its interests. It might be possible to overcome that difficulty by replacing the special tribunal by a special division of the Court.

33. Mr. CORDOVA, Special Rapporteur, thought that a State might request the Court to interpret the convention, but that the Court would be unable under its statute to apply the provisions of the convention for the purpose of settling disputes between a private person and a State.

34. Mr. SCELLE said that it was impossible to make a clear distinction between the application of the convention and its interpretation. It might well happen that another State, party to the statute of the Court but not to the convention, considered its interests prejudiced by a decision of the tribunal regarding the nationality of a person, and raised the matter before the Court which would undoubtedly consider itself competent.

35. Mr. LAUTERPACHT said that article 10 as it stood implied dual jurisdiction, without any logical reason. It would be better to specify that only the tribunal was competent.

36. Mr. CORDOVA, Special Rapporteur, replying to Mr. Scelle, remarked that if on the one hand a State was not a party to the convention, it could not be considered by the Court as concerned in the settlement of a dispute arising out of the application of the convention. There would not be a "legal dispute" within the meaning of Article 36, paragraph 2, of the statute of the Court. On the other hand, States parties to the convention could clearly by that convention waive the right to apply to the International Court of Justice in a particular case, for States were free at any time to restrict by treaty the scope of a previous treaty. The best solution of the problem might be to delete paragraph 4 altogether.

37. Mr. LAUTERPACHT agreed with Mr. François that, if the Commission wished to give States the right to apply to the tribunal, paragraph 2 would have to be amended. If the Commission decided to delete paragraph 4 altogether, it would no longer need to concern itself with the possible function of the International Court in that respect.

² See *Yearbook of the International Law Commission, 1953*, vol. I, 218th meeting, paras. 96-108; 219th meeting, paras. 45-64; 220th meeting, paras. 1-22; 223rd meeting, paras. 4-79; 224th meeting, paras. 1-52; 231st meeting, paras. 84-96; and 232nd meeting, paras. 45-87.

38. Mr. PAL felt that any interested third State should have the possibility of applying to the tribunal.

39. The CHAIRMAN invited the Special Rapporteur to redraft article 10 in the light of the views expressed by the members of the Commission.

The meeting rose at 12.55 p.m.

245th MEETING

Friday, 11 June 1954, at 9.30 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Present:

Members: Mr. R. CORDOVA, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. G. SCELLE.

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/2456, A/CN.4/82 and Add. 1, 2, 3 and 4) (continued)

DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (continued)¹

Article 10 (continued)

1. The CHAIRMAN noted the absence of several members of the Commission and invited those present to conclude discussion of article 10 of the draft convention.

2. Mr. CORDOVA, Special Rapporteur, said that the Commission had agreed to delete paragraph 4. It had also agreed to give jurisdiction exclusively to the proposed tribunal. To cover that point he proposed that the phrase "any dispute between them concerning the interpretation or application of the convention" should be inserted in paragraph 2 before the words "upon complaints presented..."

It was so agreed.

3. Mr. CORDOVA, Special Rapporteur, said that the World Jewish Congress had pointed out in its letter that there already existed an organization within the framework of the United Nations which could assume the functions of the agency referred to in paragraph 1, namely, the Office of the High Commissioner for Refugees, and that it would consequently be undesirable to set up a new agency which would only duplicate the work already being done by the existing body. He agreed that the view of the World Jewish Congress was of interest from the point of view of the budget of the United Nations.

4. The CHAIRMAN said that the proposed tribunal was intended to have quasi-judicial functions, while those of the High Commissioner for Refugees were essentially different and strictly defined by the General Assembly. Furthermore the mandate of the High Commissioner for Refugees was prolonged on an *ad hoc* basis, so that it would be necessary, if it were decided to invest the Office of the High Commissioner for Refugees with the functions referred to in paragraph 1, to add "as long as it exists".

5. Mr. LAUTERPACHT pointed out that the High Commissioner for Refugees had no competence to deal with stateless persons who were not at the same time refugees.

6. Mr. CORDOVA, Special Rapporteur, said the proposal of the World Jewish Congress was not acceptable. If the mandate of the proposed agency was very different from that of the High Commissioner for Refugees, it would be difficult for the United Nations to finance it as it was not likely that all Member States would be parties to the convention.

7. Mr. LAUTERPACHT said that paragraph 161 of the Commission's report covering the work of its fifth session² should allay the fears of the Special Rapporteur.

8. Mr. SCELLE said it was regrettable that millions of *de jure* and *de facto* stateless refugees were deprived of protection. The High Commissioner for Refugees disposed of practically no financial resources. Article 10 reflected an attempt to set up an effective organ, and it was his belief that the United Nations should accept its responsibility and finance it. Article 10 contained important provisions and should, in his opinion, be considered in conjunction with paragraph 161 of the Commission's report on its fifth session.

² Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456); also in Yearbook of the International Law Commission, 1953, vol. II.

¹ *Vide supra*, 242nd meeting, para. 1 and footnotes.

Final clauses

9. Mr. LAUTERPACHT referred to the proposal of the Government of the United Kingdom in its comments on the draft conventions for the insertion of an additional article in the final version of the convention, extending its application to territories for the international relations of which a given State was responsible. It was for the Commission to decide if it wished to draw up the final clauses of the convention or leave that task to the General Assembly. Preferably, the United Kingdom proposal should not be considered at the present stage, though he did not wish to imply that he did not attach great importance to the question of final clauses as such.

10. Mr. CORDOVA, Special Rapporteur, said that there was a proposal, which appeared to have the support of the Government of the United States of America,³ that the results of the Commission's work should be drafted in the form of a recommendation. He was in favour of submitting the Commission's work in the form of a draft convention as being more likely to lead to effective international action. The Commission should therefore assume responsibility for drafting the final clauses and submit to the General Assembly a document which would be complete. He agreed that it might not be easy to draft the final clauses and proposed that a drafting sub-committee should be set up for that purpose.

11. Mr. LIANG, Secretary to the Commission, said that the model final clauses worked out by the Legal Department of the United Nations Secretariat had only a formal character. If it was necessary to attach final clauses to a convention, they should have a bearing on the substance of the convention. He recalled that when the Sixth Committee had considered the draft convention on arbitral procedure, it had regretted the absence of final clauses. The Commission should formulate its own final clauses in the light of the *Handbook on Final Clauses* prepared by the Legal Department.

12. The CHAIRMAN invited the Commission to agree to draft the final clauses to the draft conventions and proposed that a special sub-committee, composed of himself, the Special Rapporteur and Mr. Lauterpacht be set up for that purpose.

It was so agreed.

Article 10 (resumed from para. 8)

13. Mr. GARCÍA-AMADOR inquired, in view of the provisions of article 10, paragraph 2, what exactly would be the result of a decision by the tribunal, and to what extent a decision rendered by it would be binding. A decision by the tribunal did not of itself restore nationality; that would require an administrative act on the part of the State concerned.

14. Mr. CORDOVA, Special Rapporteur, said that a decision of the tribunal should not only be binding on

³ Cf. the first paragraph of the United States comments on the draft conventions, in *Yearbook of the International Law Commission, 1954*, vol. II.

the State with regard to which a claim had been made, but should be of a declaratory nature and consequently binding on all governments.

15. Mr. LAUTERPACHT thought that the question whether the decision of the tribunal restored nationality or bound the State in question to restore it was an interesting point of jurisprudence, but one which should not be discussed at that stage; nor was it desirable to discuss the Special Rapporteur's view that a decision taken by the tribunal in a given case should be binding on all other States in similar cases.

16. Mr. SCALLE supported Mr. Lauterpacht's view. A decision by the tribunal was purely declaratory and did not operate to confer nationality. If it was intended to give the decision of the tribunal absolute value and make it binding on all the signatories of the convention, it would be necessary to include a clause containing an express stipulation to that effect.

17. The CHAIRMAN said that two ways of interpreting the tribunal's competence had been suggested: either that the tribunal's decision in a given case would remain valid for all similar cases, or that it would be binding only on the parties involved, unless otherwise provided for.

18. Faris Bey el-KHOURI said the proposed tribunal was comparable to a court of justice. Courts were not empowered to make general rulings, but could only give judgement on specific cases. If the tribunal's decision was to be binding *erga omnes*, an express provision to that effect would have to be inserted.

19. Mr. CORDOVA, Special Rapporteur, felt that the General Assembly would expect the Commission to discuss the problem. He would like to see a phrase inserted to the effect that a decision rendered by the tribunal in any particular case should be binding on all the signatories of the convention.

20. Mr. LAUTERPACHT did not think the proposal introduced by the Special Rapporteur necessary. If in the future another party to the convention had occasion to question the tribunal's decision, the case would again be referred to the tribunal, which would in all probability merely confirm its decision. There was no need to add a specific provision along the lines suggested.

21. The CHAIRMAN said that the Special Rapporteur was willing to withdraw his proposal and hence the discussion on that point was at an end. He regretted that he was unable to put the matter to the vote as in the absence of a number of the members the Commission lacked the necessary quorum. Accordingly, discussion would be purely exploratory and the Commission could not take a decision.

Article 1 (resumed from the 243rd meeting)

22. Mr. LAUTERPACHT requested that in the Special Rapporteur's amended draft of paragraph 2 of

article 1⁴ the phrase "... and provided that, on attaining that age, the person does not opt for the nationality he would have acquired at birth, had paragraph 1 of this article not been applied" be replaced by the phrase "and provided that, on attaining that age he may opt for another nationality", or "unless on attaining that age he does not opt for another nationality". The passage was not intelligible as it stood.

23. Mr. LIANG, Secretary to the Commission, suggested that the most satisfactory wording might be obtained by inserting after the word "eighteen" the phrase "... and on condition that he does not opt for another nationality".

24. Mr. CORDOVA, Special Rapporteur, said that in article 1 the Commission had attempted to reconcile the two recognized ways of acquiring nationality, *jus soli* and *jus sanguinis*. The Commission wished to extend *jus soli* to *jus sanguinis* countries, but to make it acceptable to the latter it was thought desirable to introduce the concept of option.

25. Mr. LAUTERPACHT suggested that paragraph 2 of article 1 might be subdivided so as to contain two provisions: one authorizing States to make the granting of their nationality subject to a residence qualification; and another acknowledging the right of the individual to exercise an option.

26. Mr. CORDOVA, Special Rapporteur, said that provision would then be made to read "the national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen. On attaining that age, that person may opt..."

27. The CHAIRMAN said that perhaps the text might read: "until the age of eighteen without exercising, on reaching that age, an option for another nationality".

28. Mr. CORDOVA, Special Rapporteur, said that the Commission was not at that stage concerned with the person who acquired a nationality by naturalization.

29. Mr. HSU said it had to be made clear that the exception only concerned persons who not only opted for a nationality, but also actually acquired that nationality.

30. Mr. LAUTERPACHT pointed out that according to article 1, paragraph 1, the convention applied to persons "who would otherwise be stateless". If a person was eligible for a nationality other than that of his place of birth, he was not "otherwise stateless".

31. Mr. HSU asked if the Commission was not to acknowledge the right of a person to refuse the nationality of his place of birth even if it meant his remaining stateless.

⁴ The amended draft read as follows:

"2. The national law of the party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provided that, on attaining that age, the person does not opt for the nationality he would have acquired at birth, had paragraph 1 of this article not been applied."

32. The CHAIRMAN proposed that the text should read: "until the age of eighteen without, on attaining that age, opting for and acquiring another nationality".

33. Mr. CORDOVA, Special Rapporteur, said that article 6 clearly laid down that "renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality". The central purpose of the convention was to extend the *jus soli* rule, and that meant imposing a nationality on certain persons. He felt there was not room in the convention for voluntary statelessness.

34. Mr. HSU suggested that article 6 might be amended.

35. Mr. LAUTERPACHT felt that the case of a person wanting to remain stateless was not of great practical importance and that the Commission should proceed with its discussion.

36. The CHAIRMAN said that the final version of article 1, paragraph 2, would be prepared by the Drafting Committee.

37. Mr. CORDOVA, Special Rapporteur, said that one of the proposed amendments to article 1, paragraph 3, specified that a person should acquire the nationality of one of his parents provided that such parent had the nationality of one of the Parties. The convention could clearly only confer the nationality of one of the States which were parties to it and not that of a State that was not a signatory. Another amendment took into account the United Kingdom suggestion that the residence qualification provided for in paragraph 2 should be continued in paragraph 3 as well.⁵

38. He also discussed a revised draft of the second sentence of article 1, paragraph 3, reading: "The nationality of the father shall prevail over that of the mother unless, in the case of a child born out of wedlock, the child is under the care of the mother, and, according to her national legislation, a child born out of wedlock follows the mother's nationality". That provision had been introduced in order to allow for the fact that in the Scandinavian countries, in cases of children born out of wedlock, the nationality of the mother always prevailed.

39. The CHAIRMAN pointed out that the condition that the child should be under the mother's care was based on the reasoning that, where the mother had custody, the child should not have a nationality different from hers.

40. Mr. CORDOVA, Special Rapporteur, said that was an unnecessary complication of the text; besides, the laws of the Scandinavian countries did not expressly

⁵ With these amendments, the first sentence of paragraph 3 would read:

"3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents, if such parent has the nationality of one of the parties and provided further that the person complies with the requirement of residence set forth in paragraph 2 of this article."

stipulate that the child should be in the mother's care.

41. The CHAIRMAN thought that, in the light of the discussion, the text of the additional phrase might read: "unless, in the case of a child born out of wedlock, the national legislation of the mother gives the child her nationality".

It was so agreed.

Article 2 (resumed from the 243rd meeting)

42. Mr. CORDOVA, Special Rapporteur, read the additional paragraph suggested for article 2: "An adult whose place of birth is unknown shall also be presumed to have been born in the territory of the party where he was first resident."

43. Mr. LAUTERPACHT said that such a provision would be extremely difficult to apply in the case of a child taken by his parents from one country to another during infancy, and spending excessive periods of time in those countries. It was not quite clear how the words "was first resident" were to be construed in such cases. He suggested that the proposed additional paragraph should be dropped altogether.

44. Mr. HSU said that the reason for the redraft was that the term "foundling", which ordinarily referred to a child, might be taken by the uninitiated to mean a child only. It was advisable to specify that the provisions of article 2 applied to adults as well.

45. The CHAIRMAN said that there appeared to be a misunderstanding. The French text did not exclude adults: an adult who had been an *enfant trouvé* in childhood would be entitled to the benefit of the provisions of article 2. He therefore suggested the adoption of article 2 without amendment.

Article 6, paragraph 3

(resumed from the 243rd meeting)

46. Mr. LAUTERPACHT referred to the redraft of article 6, paragraph 3: "Born nationals 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. Naturalized nationals may lose their nationality on the ground of staying in their country of origin for the length of time prescribed by the law of the Party which granted their naturalization." He had doubts as to the desirability of incorporating into the convention, in that respect, the distinction between two kinds of citizens. With regard to naturalized persons, assuming that the principle adopted by the Special Rapporteur was accepted, it was difficult to see why importance should be attached to prolonged residence in the country of origin only.

47. The CHAIRMAN agreed with Mr. Lauterpacht.

48. Mr. CORDOVA, Special Rapporteur, said he, too, agreed with Mr. Lauterpacht. Nevertheless, one object of the provision under discussion was to enable certain contracting parties to maintain in their domestic

legislation an already existing distinction between natural-born and naturalized citizens. It was clear that a State which was a party to the convention would never be obliged to discriminate against naturalized persons if it was incompatible with the principles of its municipal legislation to do so.

49. Mr. LAUTERPACHT said that, if it specified that natural-born nationals should not lose their nationality on the ground of departure or stay abroad, the draft convention would probably be unacceptable to the United States inasmuch as the legislation of that country provided for the deprivation of nationality for natural-born Americans who stayed abroad in time of war. There was no reason to discourage the acceptance of the convention by provisions such as were being proposed.

50. Mr. CORDOVA, Special Rapporteur, said that the Commission would probably have to consider a provision for the suspension of all or most of the provisions of the convention in case of war.

51. Mr. LAUTERPACHT pointed out that it was undesirable to restrict loss of nationality to the case of naturalized persons who returned to their country of origin. The relevant provisions of United States legislation provided for the deprivation of American citizenship of naturalized Americans who stayed abroad for an excessively long time, the only difference between the person returning to his country of origin and that going to another country being that the period of absence specified was different.

52. Mr. CORDOVA, Special Rapporteur, agreed to the deletion of the words "country of origin".

53. The CHAIRMAN said that, as two of the members present at the beginning of the meeting had been obliged to leave since, there were less than seven members present, so that no actual vote could be taken; technically, there was one vacant seat and hence the quorum for voting was seven. There were, however, sufficient members present for purposes of discussion, and he suggested that they should in any case carry on with the drafting of the articles which could be approved at the next meeting when there would be the necessary quorum of seven.

Article 7 (resumed from the 243rd meeting)

54. Mr. CORDOVA, Special Rapporteur, submitted his redraft of article 7, paragraph 1: "The parties shall not deprive their nationals of nationality by way of penalty, if such deprivation renders them stateless, except on the ground of treason, desertion or that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State."

55. Mr. LAUTERPACHT pointed out that in the United Kingdom, treason was not considered a ground for the deprivation of nationality. If the traitor was in the country, he was liable to the death penalty and it

would be pointless to provide for deprivation of nationality as well. On the other hand, if the traitor was abroad, to deprive him of nationality was of somewhat nominal advantage.

56. Mr. HSU felt that there was no necessity for introducing the concepts of treason and desertion into the relevant provision.

57. Mr. CORDOVA, Special Rapporteur, stressed that the convention on the reduction of statelessness was an attempt to secure the co-operation of States which would not be prepared to accede to the convention on elimination of statelessness. It was an effort to diminish the evil of statelessness. Admittedly, it was desirable to eradicate the evil altogether, but that would probably be impracticable in the case of some countries which had strong views on certain issues and might refuse to sign a convention on elimination of statelessness. Accordingly, the convention on the reduction of statelessness was taking the wishes of those countries into account, and he hoped that they would accede to it.

58. The CHAIRMAN said he fully agreed with that policy.

59. Faris Bey el-KHOURI said that the terms used in the amendment required definition. It would be necessary to determine whether "desertion" was concerned with wartime cases or was intended to cover also desertion from the armed forces in peacetime. With regard to treason, it was unfortunately all too common for a revolutionary régime to regard as traitors all persons who did not agree with it. It would be most undesirable if it were suggested that such a régime could deprive all its political opponents of their nationality.

60. Mr. CORDOVA, Special Rapporteur, said that the redraft of article 7, paragraph 2, had been settled at a previous session,⁶ and there was no need to discuss it further. The final text would read: "In the case to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which will always provide for recourse to a judicial authority."

Article 8 (resumed from the 244th meeting)

61. The CHAIRMAN read the proposed redraft of article 8: "The parties shall not deprive any person of his nationality, so as to render him stateless, on racial, ethnical, religious or political grounds."

62. Mr. LAUTERPACHT pointed out that the Commission had already voted against the addition of the words: "so as to render him stateless."

63. The CHAIRMAN confirmed Mr. Lauterpacht's observation.⁷

The meeting rose at 1.15 p.m.

⁶ *Vide supra*, 243rd meeting, para. 57.

⁷ *Vide supra*, 244th meeting, para. 10.

246th MEETING

Monday, 14 June 1954, at 3 p.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Present :

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

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)
(continued)

REPORT ON THE ELIMINATION OR REDUCTION OF PRESENT STATELESSNESS (A/CN.4/81)

GENERAL DEBATE AND BEGINNING OF DISCUSSION OF THE DRAFT CONVENTION ON THE REDUCTION OF PRESENT STATELESSNESS

1. The CHAIRMAN said that at its previous meeting the Commission had failed to obtain a quorum for voting and hoped that every effort would be made by members to be present at meetings. He proposed that the Commission consider the Special Rapporteur's third report on the elimination or reduction of statelessness, containing proposals regarding the elimination or reduction of present statelessness (A/CN.4/81).¹

2. Mr. CORDOVA, Special Rapporteur, recalled that his first report on the elimination or reduction of statelessness (A/CN.4/64)² had contained a recommendation that the Commission should discuss the problem of present statelessness which was of capital importance both to the United Nations and to individual Governments. At its fifth session, the Commission had been unable to consider his second report on the elimination or reduction of statelessness (A/CN.4/75),³ and he had therefore taken it as a basis for the report he was submitting to the Commission at its current session. The latter report contained, as Part I, a "Protocol to

¹ Reproduced in *Yearbook of the International Law Commission, 1954*, vol. II.

² See *Yearbook of the International Law Commission, 1953*, vol. II.

³ *Ibid.*

the Convention on the Elimination of Future Statelessness, for the elimination of present statelessness", which he had been able to simplify and shorten in the light of criticism received concerning a similar protocol appended to the second report (A/CN.4/75).

3. Statelessness presented a very serious problem. There were in Europe some 400,000 refugees known to be stateless and at least another 400,000 in the Middle East. In fact he believed the figures were considerably higher both for *de facto* and *de jure* stateless persons. The distinction between the two categories was difficult to establish and placed the Commission before a very delicate problem.

4. Criticism of his report included the argument that in most cases the protocol would be applicable to adult persons without any link whatsoever with the State conferring its nationality, and that it would be easier for Governments to deal with cases of children not yet born. The protocol dealt with three different categories of stateless persons: those who were born in the territory of one of the parties to the protocol before the entry into force of the Convention on the Elimination of Future Statelessness; those who were born in the territory of a State not a party to the protocol; and, finally, those who, not having been born in the territory of any of the parties nor having parents possessing the nationality of any of the parties, nevertheless resided in the territory of one of the parties. All the proposals were based on the assumed readiness of Governments to make certain amendments to their existing legislation.

5. A further objection which had been raised was that no matter how undesirable the stateless alien might be he would nevertheless have to be accepted by the State. If, however, that principle were rejected the whole purpose of the protocol, the elimination of statelessness, would not be attained. Inasmuch as an undesirable stateless alien residing in the country was not likely to be deported, the eventual grant of nationality would be a formality having for the State no directly practical consequence. States might be allowed to retain the right to legislate with a view to refusing nationality to undesirables, but such a provision would be acceptable only if the object was the reduction of statelessness, not its elimination.

6. Mr. Weis of the Office of the High Commissioner for Refugees had expressed the view that as it was hardly realistic to assume that existing statelessness could be eliminated or even reduced to any great extent, it was very important to give stateless persons some form of protection and to improve their legal status.⁴

7. While agreeing with the need to provide protection, he (Mr. Córdova) believed that such action did not fall within the Commission's terms of reference. The Commission should restrict itself to principles and to devising juridical solutions.

8. He had given much consideration to the possibility of conferring on stateless persons a kind of "inter-

national nationality" as suggested by Mr. Scelle.⁵ The stateless alien would receive the protection not of a nation, but of an international body such as the United Nations. In theory, there could be few objections to the proposal, particularly in view of the modern tendency to restrict national sovereignty. There were, however, two practical objections: firstly, stateless persons on whom the United Nations might confer "international nationality" would still find themselves in every country in an inferior situation as compared to nationals; and secondly, it would not be easy to define their rights and obligations, particularly in the matter of military service.

9. An entirely new approach to the matter had been suggested by Mr. Lauterpacht and Faris Bey el-Khoury. Mr. Lauterpacht⁶ had advanced the idea that nationality should be granted to stateless persons who had had their residence in the territory of one of the parties for ten years, subject to certain qualifications. Faris Bey el-Khoury⁷ had proposed that the party in whose territory a stateless person resided should grant to that person a certificate of registration describing him as a "protected subject" or "protected citizen". Such a certificate would entitle the person in question to the protection of the State pending the final settlement of his case.

10. While he agreed with the principle of granting stateless persons some form of protection, he rejected the idea of "a provisional nationality", as such a proposal did not solve the problem, but merely postponed its solution. With regard to the proposed formula of "protected citizen", it would be necessary to determine the scope of the rights and duties attaching to that status. He was in favour of granting stateless persons obtaining that status all civil rights with the exception of political rights, while their children should have full nationality with unrestricted civil rights. That compromise should reassure Governments which feared that a large number of stateless persons might exercise an undue influence on the political situation of the country. That danger hardly existed where children were concerned, as they would probably have been assimilated.

11. In the light of the suggestions of Mr. Lauterpacht and Faris Bey el-Khoury he had drafted an alternative convention on the elimination of present statelessness and also another alternative convention on the reduction of present statelessness (part III and part IV, respectively, of the present report A/CN.4/81).

12. Another important but delicate question was that of *de facto* stateless persons whose circumstances were frequently more tragic than those of *de jure* stateless persons. They had not been formally deprived of their nationality, but were neither in a position to make effective use of it, nor officially able to renounce it. He therefore proposed that *de facto* stateless persons

⁵ *Ibid.*, para. 21.

⁶ *Ibid.*, para. 29.

⁷ *Ibid.*, para. 30.

⁴ Cf. A/CN.4/81, para. 15.

should be treated as juridically stateless on the condition that, to qualify for the benefit of the convention, they renounced the nationality which was still theirs in theory.

13. It could be said that the Commission was not competent to deal with the problem of *de facto* statelessness, but, in his opinion, the argument was not a valid one. Article 15 of the Universal Declaration of Human Rights stated that everyone had the right to a nationality and in its resolution 116 D (VI) the Economic and Social Council had interpreted it as signifying "an effective right to a nationality".⁸ He believed that the interpretation given by the Council was correct, and that consequently the Commission should consider the matter.

14. Mr. HSU was glad that the Commission was discussing the problem of present statelessness. He was impressed by certain suggestions contained in the report before the Commission, and congratulated the Special Rapporteur on introducing the delicate problem of *de facto* statelessness. He was sure that many members would be interested in that aspect of the problem and hoped that a new article referring to it would be added to the draft Convention on the Elimination of Future Statelessness, similar to that introduced into the draft Convention on the Elimination of Present Statelessness.

15. He had certain doubts about the terms "protected subject" and "protected citizen" which would have to be carefully defined. The "protected" status proposed for stateless persons was of an intermediate nature and not in fact necessarily that of either a "citizen" or a "subject". It had further been implied that stateless persons enjoying the benefits of some such "protected" status would be liable to military service. If that "protected" status did not include the exercise of political rights the proposal, he felt, was hardly fair.

16. He was interested in Mr. Scelle's proposal and suggested that the Commission should devise a compromise solution granting stateless persons a "protected" status within a particular country, and the protection of an international body such as the United Nations, outside the frontiers of their country of residence.

17. Mr. LAUTERPACHT paid a tribute to the work accomplished by the Special Rapporteur. He pointed out, however, that the problems of existing statelessness did not lend themselves to complicated solutions and in that respect the draft submitted was too detailed; what was more serious, some of the proposals it contained were unpractical. The draft Convention on the Elimination of Present Statelessness was so drastic and so unlikely to be accepted by governments that it might even jeopardize the fate of the draft Conventions on the Elimination or Reduction of Future Statelessness. The main problem was not the formulation of a general

rule of international law in the matter of statelessness; it was rather the solution, by reference to broad humanitarian considerations, of a practical problem of some magnitude.

18. The introduction of the concept of *de facto* statelessness complicated the matter still further. It was not an easy concept and was insufficiently explained in the report. He thought that it would be very difficult in practice to make a clear distinction between *de facto* and *de jure* statelessness, and if the problem of *de facto* statelessness was to some extent urgent, it was not extremely urgent. What criteria would a State have for deciding that a person, though having the nationality of a friendly State, was in fact stateless? What criteria would a tribunal have for deciding that question and imposing on a State the duty to grant to such persons the very substantial rights contemplated in the proposal? It was not correct to say that the *de facto* stateless represented the bulk of stateless persons, as the overwhelming majority of stateless persons had been formally deprived of their nationality. He was therefore opposed to complicating the existing draft conventions by the addition of the problem of *de facto* statelessness.

19. With regard to the draft Convention for the Reduction of Existing Statelessness submitted by the Special Rapporteur,⁹ he suggested that it might well be replaced in its entirety by the following three articles drafted by himself:

" Article I

"The parties agree to confer their nationality upon stateless persons who have been resident within their territory for a period of ten years or more provided that such persons fulfil the conditions which the law provides for acquisition of nationality by naturalization.

" Article II

"The parties may, instead of granting nationality to the persons referred to in article I, confer upon them the status of protected citizens assimilating them in respect of all rights, except those of a political character, to their own nationals. Such persons shall comply with all obligations, including the duty of allegiance, resting upon other nationals. The parties agree that any State which has acted upon the provisions of this article shall be entitled to grant to such persons international protection to the extent to which it is entitled to grant it to its nationals.

" Article III

"The effects of status conferred under the preceding articles shall extend to the children of the persons concerned and to their wives, if the latter so desire."

⁸ Resolutions adopted by the Economic and Social Council during its sixth session from 2 February to 11 March 1948, p. 18 (United Nations publication, Sales No. 1948.I.5).

⁹ Part IV of A/CN.4/81.

A convention in the form in which he now submitted it would be simpler, and therefore perhaps more acceptable to governments.

20. Mr. CORDOVA, Special Rapporteur, said that, in view of the fears expressed that the protocols in annex I of his third report (A/CN.4/81) might not be acceptable to States, he would be prepared to adopt a different method of dealing with present statelessness. For that purpose he submitted the draft alternative Convention on the Reduction of Present Statelessness reproduced in annex II of his third report. He was willing to accept drafting changes to allow for the remarks made by Mr. Hsu, Mr. Lauterpacht and Mr. Scelle; nevertheless it was difficult to give the United Nations responsibility for the international protection of stateless persons while leaving their protection in the different countries to the States where these persons resided.

21. He added that although *de jure* stateless persons might be more numerous than *de facto* ones, the latter were in a much worse position: it was absolutely essential to give them an effective nationality.

22. Mr. SCELLE said that the discussion was somewhat academic, for the draft conventions themselves were just as hypothetical as the protocols: he did not think for a moment that Governments would be prepared to make the fundamental changes in their nationality legislation necessary to embody in it the principles laid down in the draft conventions and protocols. The concept of nationality was a very subjective one: each country had its own ideas on nationality, largely based on sentiment, and it was practically impossible to change those ideas. The suggestion that Governments should restore their nationality to persons who had been deprived of it by juridical decisions would encounter even stronger opposition, as it implied an impairment of the internal sovereignty of States.

23. Whereas the international sovereignty of States was the subject of much justified criticism on the part of international lawyers, the internal sovereignty of States had never been seriously challenged. It was unfortunately only too true that, as international law now stood, a State was free to deal as it pleased with its own nationals. And there was an even worse position than statelessness *de jure* and statelessness *de facto*: it was what he would term "internal statelessness"—namely, the case of persons deprived of their nationality, but prevented from leaving their country of origin. The only remedy would have been the old-fashioned process of humanitarian intervention, as applied in the 19th century when the United States, for example, had protested to Romania against the anti-Jewish pogroms. But that remedy had fallen into disuse.

24. It was clear that if too much was asked of the States, there would be very few signatories to the conventions and still fewer ratifications.

25. He went on to explain that his proposal did not commit Governments to any positive action of any kind. Stateless persons would remain stateless, but would be linked to a legal order—namely, that of the United

Nations; they would receive a juridical status under the auspices of the Economic and Social Council of the United Nations. As all jurists knew, once considerations of sentiment were put aside, nationality was no more than the linking of an individual to a certain particular legal order. It was, therefore, not at all paradoxical to speak of an international nationality, as he had done. It would be to the everlasting credit of the United Nations to enable many millions of persons to lead a normal life.

26. Mr. Lauterpacht's proposal would encounter an almost insurmountable obstacle: States only granted their nationality or their protection to persons of whom they approved. Most stateless persons would not benefit from a remedy on the lines of naturalization.

27. The problem of determining to whom the stateless persons owed allegiance in so far as military service was concerned could be solved by incorporating them in a United Nations security force.

28. He would be prepared to accept any proposal agreed upon by the majority as he considered that some decision should be taken.

29. Mr. CORDOVA, Special Rapporteur, said that to a large extent Mr. Scelle's criticisms applied to all the work of the Commission on future statelessness, and not only to the work on present statelessness. He agreed that it would be difficult to enlist the support of Governments for the Commission's proposals, but it was better even to build castles in the air than to ignore the terrible problem of statelessness.

30. He felt that the modern tendency to impose military obligations on foreigners resident in a country was justified, and that, in view of that tendency, stateless persons would in all probability be asked to serve in the armies of the host countries; it was therefore clear that there would be no question of conferring on them rights without corresponding duties. It would be difficult to reconcile the suggestion of Mr. Lauterpacht and Faris Bey el-Khoury on the one hand with those of Mr. Scelle on the other; for his part, he would prefer the stateless persons to be absorbed in the communities in which they lived.

31. Mr. SCELLE said that, at one time, foreigners in Belgium were compelled to serve in the national guard which was responsible for internal security, but were not required to serve in the army: a somewhat similar system could be adopted for stateless persons. States no longer had the right to resort to war and it was to be hoped that the day would come when an international police force (in which stateless persons could serve) would replace national armies.

32. Mr. AMADO agreed with Mr. Lauterpacht that the Commission should concentrate on the draft conventions which were concerned with its main aim, namely, that of eliminating—or at least reducing the occurrence of—future statelessness, and not insist on the draft protocols concerning the secondary issue of present statelessness.

33. Mr. LAUTERPACHT said he wished to make it clear that unlike Mr. Scelle, he was not at all pessimistic concerning the prospects of the proposed conventions for the elimination or reduction of future statelessness; the differences between the two were not substantial. The attitude of the Governments of the United Kingdom and Norway towards the draft Convention on the Elimination of Future Statelessness showed there was no warrant for regarding it as utterly impracticable. No draft convention that was rational and in accordance with basic principles of international law could be considered as fruitless; on the contrary it was bound to become the starting point of beneficent changes. For that reason he deprecated the view underlying Mr. Scelle's proposal that, as the proposed conventions were in any case impracticable, the Commission was at liberty to consider a purely ideal solution such as proposed by Mr. Scelle.

34. With regard to the status of *de facto* stateless persons, it seemed to him that the 1951 Convention relating to the status of refugees¹⁰ dealt with most problems by giving the persons concerned a treatment for most purposes similar to that of nationals within their countries of residence, while at the same time affording them a substantial measure of freedom in international travel.

35. With regard to military service, he quoted the case of France, where the National Assembly had recently adopted a resolution, probably as a reaction to a parallel measure in the United States, to compel all aliens residing in France for more than a year to serve in the French army. Australia had adopted a similar measure.

36. He did not share Mr. Scelle's view that as nationality was obviously a matter of national sentiment, the notion of its regulation by international law was impracticable. Nationality was rapidly emerging from the stage when it was considered only in the light of sentiment; a more rational approach had, in particular, led to nationality being treated as a proper subject for international regulation, as evidenced by The Hague Convention on the subject. Some of the ideas incorporated in The Hague Convention of 1930 on certain questions relating to the conflict of nationality laws had been widely followed both by States which had ratified it and by others.¹¹ Doctrines such as the subordination of the nationality of married women to that of their husbands, which had previously been regarded by some States as fundamental and immutable principles of national law, had been changed by those very States—in some cases with a thoroughness going beyond that of the measures contemplated in The Hague Convention. The same applied to the question of expatriation and loss of nationality of origin as the result of naturalization.

37. Finally, he suggested, as a practical proposal, that his proposal for granting stateless persons naturalization

after ten years' residence should be combined with that of giving them the status of protected persons if the State concerned so preferred.

38. Mr. CORDOVA, Special Rapporteur, said that as in most countries foreigners could be naturalized after five years' residence, it seemed to him that Mr. Lauterpacht's proposal, by suggesting a ten-year period, would be a retrograde step. The stipulation of a residence qualification should be omitted so that stateless persons could obtain a nationality without delay.

39. In the draft alternative Convention on the Reduction of Present Statelessness (annex II of third report, A/CN.4/81) article 1, paragraph 2, laid down that: "The national legislation of the party may exclude from the application of paragraph 1 only those stateless persons who are undesirable or whose admission as protected subjects might constitute a threat to the internal or to the external security of the party." It was therefore possible, under that provision, for a State to exclude from the benefit of naturalization any person it had good reasons to regard as undesirable.

40. The CHAIRMAN inquired from the Special Rapporteur whether it was his intention to drop the proposals contained in annex I of his third report (A/CN.4/81).

41. Mr. CORDOVA, Special Rapporteur, said that was so, and that he would only proceed with the draft alternative Convention on the Reduction of Present Statelessness reproduced in the second column of annex II of his third report (A/CN.4/81). He would like to have some time to study Mr. Lauterpacht's proposal and compare it with his draft convention in order to see how he could incorporate Mr. Lauterpacht's ideas and perhaps follow his advice and simplify the draft.

42. The CHAIRMAN noted that the protocols contained in annex I of the third report (A/CN.4/81) had been discarded.

43. Mr. CORDOVA, Special Rapporteur, pointed out that the three articles drafted by Mr. Lauterpacht contained no reference to a special agency or to a tribunal.

44. Mr. LAUTERPACHT stressed that his draft convention was no more than an abridged version of Mr. Córdova's. Perhaps a fourth article might be added providing for an agency and a tribunal, although he felt some doubts as to the advisability of such a provision. The convention on existing statelessness had to be made as simple and untechnical as possible.

45. Mr. CORDOVA, Special Rapporteur, drew attention to article 3 of the draft convention on the reduction of present statelessness (A/CN.4/81, annex II) which laid down that "Descendants of protected nationals shall obtain full citizenship, including political rights, on reaching the age of majority". That was an important difference from Mr. Lauterpacht's draft, which, in its article III, laid down that "The effects of status conferred under the preceding articles

¹⁰ United Nations publication, Sales No. 1951.IV.4.

¹¹ The text of the Convention may be found on p. 172 of *A Study of Statelessness* (United Nations publication, Sales No. 1949.XIV.2).

shall extend to the children of the persons concerned and to their wives, if the latter so desire". That was tantamount to depriving the children of stateless persons of political rights in all cases in which States availed themselves of the right given to them by article II of Mr. Lauterpacht's draft, which provided: "The parties may, instead of granting nationality to the persons referred to in article I, confer upon them the status of protected citizens assimilating them in respect of all rights, except those of a political character, to their own nationals. . ."

46. Another difference was that Mr. Lauterpacht's draft convention contained no provision similar to article 4 of the draft Convention on the Reduction of Present Statelessness contained in document A/CN.4/81, annex II, covering *de facto* stateless persons. That provision relating to *de facto* stateless persons he was not prepared to give up and he would defend it until it was adopted or else defeated by an actual vote of the Commission.

47. The CHAIRMAN said that Mr. Lauterpacht's draft was a substitute for the Special Rapporteur's and the Commission could not vote on the new proposed draft unless members were given time to consider its implications.

48. Mr. CORDOVA, Special Rapporteur, invited the members of the Commission to compare the draft Convention on the Reduction of Present Statelessness (A/CN.4/81, annex II) to Mr. Lauterpacht's draft; he drew attention especially to the fact that, whereas the latter made its benefits subject to a ten-year residence qualification, his own draft did not contain such a provision, but enabled contracting States to exclude undesirable persons from the benefit of the provisions of the convention.

49. Mr. LAUTERPACHT inquired whether it was suggested that a stateless person residing in a country for ten days should acquire the nationality of that country.

50. Mr. CORDOVA, Special Rapporteur, said that he agreed that an applicant for naturalization should prove a connexion with the country of his adoption, but he felt that a ten-year period was far too long compared to that of five years which was considered sufficient for naturalization in most countries. It was true that there were some countries like the United States which considered that a person was entitled to naturalization as of right after satisfying the residence qualification; most of them always reserved the right of the authorities to reject an application for naturalization. But whatever system prevailed, it was true to say that a period of ten years' residence was in excess of what most countries considered satisfactory evidence of permanent settlement and presumed assimilation.

51. Faris Bey el-KHOURI said he did not think that it was impossible to eliminate statelessness; if the relevant convention were adopted by States and its provisions carried out by them in good faith, the problem of future statelessness would be disposed of.

Existing statelessness was a temporary problem, for the children of persons now stateless would not be stateless if the Commission's proposals were adopted; as the present generation died out, the whole problem of statelessness would be solved.

52. Until such time as the stateless persons were granted a nationality, it was desirable to solve the interim problem by giving them the status of protected persons.

53. He felt that the ten-year residence qualification was most unfair, but was inclined to leave it to the States concerned to provide for such periods as their municipal law stipulated for the grant of naturalization.

54. Stateless persons were not all in the same category; there should be more than one remedy for statelessness so that in each case the remedy corresponded to the cause of the evil. Some persons had become stateless through failure to avail themselves of an option within the legally specified time limit, others because they had failed to register; those persons should be given the right to opt or to register. Certain other persons had been made stateless through deprivation of nationality by way of penalty and, in their case, a full and general pardon was the answer to the problem.

55. Mr. CORDOVA, Special Rapporteur, said, in conclusion, that he would follow the plan he had suggested earlier in the meeting, namely, to drop the draft protocols on present statelessness (A/CN.4/81, annex I) as well as the draft alternative Convention on the Elimination of Present statelessness (A/CN.4/81, annex II on the left column) and concentrate on the draft alternative Convention on the Reduction of Present Statelessness (A/CN.4/81, annex II, right column) and Mr. Lauterpacht's proposed draft convention.

The meeting rose at 6 p.m.

247th MEETING

Tuesday, 15 June 1954, at 9.30 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Present:

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

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)
(continued)

REPORT ON THE ELIMINATION OR REDUCTION OF PRESENT STATELESSNESS (A/CN.4/81) (continued)

DRAFT CONVENTION ON THE REDUCTION OF PRESENT STATELESSNESS (continued)

1. The CHAIRMAN invited the Commission to continue the study of the draft Convention on the Reduction of Present Statelessness as contained in the third report of the Special Rapporteur (A/CN.4/81, annex II, second column).¹ He recalled that at the 246th meeting of the Commission Mr. Lauterpacht had also submitted a shorter draft on the same question.²

2. Mr. LAUTERPACHT said that if the Special Rapporteur maintained his draft, he would agree to take it as a basis for discussion and propose his own draft as an amendment to it.

3. Reduction of existing statelessness was very different from the elimination or reduction of statelessness in the future. In the latter case the Commission's task was to develop international law and to formulate, with some completeness, the new rules. The documents so drafted might require a measure of rigidity—it was impossible to eliminate statelessness without some such measure of completeness—even at the risk of initial repudiation by Governments. With regard to existing statelessness, however, the Commission was faced with a *de facto* situation; its purpose was to help certain persons by inducing Governments to adopt a more humanitarian attitude towards them, and by providing those Governments with a legal basis for their action. To achieve that aim, the Commission should avoid lengthy and involved documents.

4. The CHAIRMAN inquired what would happen in the case of a country where a fixed period of time was not laid down by law as a condition for naturalization, but where the law merely stipulated the condition of a minimum period of residence.

5. Mr. LAUTERPACHT replied that in such a case article 1 of his text would refer to that minimum period.

6. Mr. CORDOVA, Special Rapporteur, wished to retain as it stood only the draft contained in the second column of annex II of his third report (A/CN.4/81). In that connexion he referred to paragraph 39 of that report. His draft of article 1, paragraph 1, as supplemented by article 2, was identical in substance with the first sentence of Mr. Lauterpacht's draft article II.

¹ In *Yearbook of the International Law Commission, 1954*, vol. II.

² *Vide supra*, 246th meeting, para. 19.

Mr. Lauterpacht's amended version of article I coincided with article 2 (iii), as proposed in the third report. And Mr. Lauterpacht's draft article III corresponded to article 3 in that document, in which he (Mr. Córdova) was prepared to insert a clause regarding the wife of a stateless person.

7. Mr. Lauterpacht's draft contained nothing to the effect that the stateless person had the right to acquire a nationality or the status of a protected subject; nor did it contain any reference to the tribunal mentioned in article 5 as given in the third report. Article 1, paragraph 2, as it stood in that document, contained a reservation intended to allay the fears of Governments and make it easier for them to ratify the convention. The Commission would also have to decide if the scope of the convention should be extended to cover *de facto* statelessness.

8. In conclusion he said that it was premature to submit the draft convention to Governments for approval. The Commission should merely circulate the draft convention to Governments and obtain their views.

9. Mr. LAUTERPACHT pointed out that annex II of the third report, which was the only part of the document retained by the Special Rapporteur, only dealt with the status of "protected subjects", and did not refer to any obligation for the States to confer their nationality on a stateless person or even to a possibility of their doing so.

10. The CHAIRMAN thought that none of the provisions contained in the Special Rapporteur's draft corresponded to article I of Mr. Lauterpacht's draft.

11. Mr. CORDOVA, Special Rapporteur, remarked that under article 2 (iii) of his draft a stateless person's right to naturalization was subject to the same conditions as those applied to foreigners.

12. The CHAIRMAN pointed out that article I in Mr. Lauterpacht's text had the advantage of giving a stateless person who fulfilled certain conditions, the right to naturalization without any discrimination.

13. Mr. CORDOVA, Special Rapporteur, said that on that point his text was identical in substance with that of Mr. Lauterpacht.

14. The CHAIRMAN said the Commission's study of the proposals made by the Special Rapporteur and Mr. Lauterpacht might to some extent be duplicating the work of the Economic and Social Council with regard to refugees and stateless persons, referred to in paragraphs 15-18 of the third report (A/CN.4/81).

15. Mr. CORDOVA, Special Rapporteur, did not think that the Council's and the Commission's work overlapped. The Commission's main task was to formulate rules of law to prevent statelessness, while the Council's object was to improve the circumstances of stateless persons. It was true that if the Commission succeeded in eliminating statelessness in law, the practical problem of the plight of stateless persons would be solved at the same time.

16. Mr. LIANG, Secretary to the Commission, recalled that on 28 July 1951 the United Nations Conference of Plenipotentiaries held at Geneva had adopted the convention relating to the status of refugees, but referred back to the appropriate United Nations bodies for study a protocol providing for the extension of some of the provisions of the convention to stateless persons.³ On 26 April 1954 the Economic and Social Council had decided (resolution 526 (XVII) A)⁴ to call a second conference of plenipotentiaries to adopt, for the protocol relating to the status of stateless persons, a text revised in the light of the comments received from Governments. The second conference of plenipotentiaries would probably be held in September 1954. He also drew attention to part B of resolution 526 (XVII) which defined the Commission's terms of reference with regard to statelessness.

17. Faris Bey el-KHOURI preferred Mr. Lauterpacht's text as it required the States concerned to confer their nationality on persons who satisfied the residence qualifications; the Special Rapporteur's draft article 2 (iii) gave States, in the matter of the naturalization of stateless persons, the same discretionary powers as those applicable to aliens generally.

18. The CHAIRMAN inquired if the Convention relating to the status of refugees, certain clauses of which the Economic and Social Council proposed to extend to stateless persons, included the right to work which, for all practical purposes, was one of the most important rights of nationals.

19. Mr. CORDOVA, Special Rapporteur, said in reply that the convention in question extended to refugees the treatment granted to the nationals of the most favoured nation.

20. Mr. PAL preferred Mr. Lauterpacht's draft because it required the contracting parties to confer their nationality on stateless persons; under Mr. Córdova's draft, Governments could discriminate against them.

21. Mr. LAUTERPACHT thought it reasonable for Governments to require stateless persons to satisfy the same standards of morality, education, etc. as those applied to other applicants for naturalization. To avoid misinterpretation it might be provided expressly that Governments should not discriminate in any way against stateless persons.

22. Mr. CORDOVA, Special Rapporteur, thought that the Commission would probably meet considerable opposition if it began by proposing that signatory States should confer their nationality on stateless persons without any reservations whatsoever. If, in addition, a stateless person, to become naturalized, had also to fulfil all the conditions imposed on aliens generally, he would probably have to wait ten or fifteen years. Furthermore, in Mr. Lauterpacht's draft the grant of the status of protected subject remained at the arbitrary

discretion of States. It was preferable that, with the exception of political rights, a State should be under a duty to grant to a stateless person immediately all individual rights including the right to work, and that it thereafter should give him the possibility of obtaining naturalization in accordance with existing laws.

23. Mr. SALAMANCA thought that the work of the Commission and of the conference of plenipotentiaries which was being convened by the Economic and Social Council should be co-ordinated.

24. Mr. SCELLE noted that Mr. Lauterpacht proposed that States should be under a duty to grant naturalization to stateless persons, and Mr. Córdova was prepared to accept that. But in the various countries all aliens had a right to be naturalized if they fulfilled the necessary conditions, and they could appeal to the courts if the administrative authorities denied them that right.

25. Mr. LAUTERPACHT thought on the contrary that the State frequently had discretionary powers in the matter and was free to refuse naturalization even if the applicant fulfilled all the conditions prescribed by law.

26. Mr. SCELLE remarked that the adoption of Mr. Lauterpacht's proposal would in that respect place stateless persons in a privileged position as compared with other aliens.

27. Secondly, the Commission should decide if it wished to extend the scope of the convention to *de facto* stateless persons. He, personally, was in favour of that solution which was both bold and novel.

28. Thirdly, Mr. Lauterpacht's draft contained no reference to the tribunal referred to in Mr. Córdova's draft article 5, paragraph 2. The Commission should settle those important points without delay.

29. He agreed with Mr. Salamanca that the work of the Commission might partially duplicate the work of the Economic and Social Council. It was indeed true that the position of stateless persons could not in practice be improved without modifying their legal status.

30. If the Commission was of the opinion that the status of protected subjects should include the right to work, it should say so expressly.

31. Mr. CORDOVA, Special Rapporteur, remarked that a stateless person's right to work was implied in article 2 (i) of his draft.

32. The CHAIRMAN wished to give his personal opinion. There was a considerable difference between future statelessness and existing statelessness. The cause of the former was frequently some legislative provision and it was very proper to attempt to apply purely legal remedies. The latter case, on the contrary, presented certain social, racial and political aspects in the broadest sense of those terms; for the solution of the problems involved it would be necessary to consider the situation in various regions and carefully follow its evolution. The Office of the High Commissioner for Refugees of the United Nations was at the moment engaged in that

³ See Final Act of the Conference (United Nations publication, Sales No. 1951.IV.4), p. 7.

⁴ Official Records of the Economic and Social Council, Seventeenth Session, Resolutions, Supplement No. 1, E/2596.

work. Statelessness was only one aspect of a much vaster problem, and if it brought hardship to a great number of persons, the reasons were only partly legal. To what extent, for example, did such legal considerations affect the fate of the million refugees in Hong Kong or the Arab refugees from Palestine? If the Commission kept to its intention, the conference of plenipotentiaries meeting in September might have before it several drafts, among which there would be one satisfactory draft offering a legal solution but which it would not be easy to put into effect. It was indeed much more difficult to solve a problem if it involved legal questions; the question of the right to work, for example, could be much more easily solved at the purely practical level. For the reasons he had given, he abstained from voting on the Convention for the Reduction of Present Statelessness, whichever draft was finally adopted.

33. Mr. AMADO said he had been impressed by the Chairman's remarks. The Commission, having been asked to deal with the legal problem of statelessness, had been surprised two years previously to receive from the Special Rapporteur a draft convention on the essentially political problem of existing statelessness. The Commission had agreed in principle to study the question but he was not at all sure that it might not be necessary to reverse that decision. As a member of his country's delegation to the General Assembly, he had often heard members of the delegation express doubt whether a particular item or proposal really fell within the scope of the Commission's terms of reference.

34. Mr. CORDOVA, Special Rapporteur, said that when in 1949 the Commission had begun to discuss statelessness⁵ it had decided not to limit its work to future statelessness but rather to consider the problem in its entirety. The resolution later adopted by the Economic and Social Council (resolution 526(XVII) (A))⁶ also referred to "statelessness" without further qualification, and Mr. Hudson's report (A/CN.4/50)⁷ as well as the Secretary-General's study of statelessness (E/1112, E/1112/Add.1)⁸ dealt both with future and with existing statelessness. When, two years before, the Commission had appointed him Special Rapporteur on the question, he had followed the same course. The Commission had been unable to consider his report at its fifth session, but he had understood that the Commission, in requesting him to prepare a third report, had confirmed its intention of attempting to solve the painful problem of statelessness.

35. Mr. LAUTERPACHT agreed that there was a great difference between the elimination of future statelessness and the reduction of existing cases of statelessness; the latter was first and foremost a political

problem. Nevertheless, it was within the Commission's terms of reference to draft rules of law which would improve the status of persons who were at present stateless. The draft to be adopted should be as simple as possible, so as not to discourage governments, but the Commission should not abandon a task it had been pursuing for two years. Accordingly, the time had come to discuss the Special Rapporteur's draft article by article and he hoped that Mr. Córdova would concur with his view that the effective reduction of existing statelessness by naturalization should be considered first.

36. Faris Bey el-KHOURI said, with reference to the remarks of the Chairman and Mr. Amado, that the draft protocols and conventions contained in annexes I and II of document A/CN.4/81 were not intended to solve the problem of political refugees, a problem which came under the jurisdiction of other bodies, such as the Economic and Social Council and possibly of the Security Council. He hoped that that point would be explicitly mentioned in the final text.

37. Mr. PAL said that the remarks made by the Chairman and Mr. Amado had drawn his attention to the fundamental difference between existing cases of statelessness and the problem of future statelessness. Contrary to the opinion of Mr. Lauterpacht, he did not think that existing statelessness came within the Commission's terms of reference. When considering future statelessness, the Commission had been dealing with the case of human beings yet unborn, concerning whom no question of responsibility arose. If the Commission wished to deal also with existing statelessness, it would inevitably have to consider the cause of statelessness and even remark on the measures taken by certain Governments, a course which the Commission should avoid. Accordingly he thought that the draft convention on the reduction of existing statelessness should be dropped.

38. Mr. AMADO stressed that it had not been his intention to bring about a last-minute failure of the draft; he would not object to its adoption. The Commission, having started the study of statelessness, had in a sense been carried away by the subject and even tackled the problem of existing statelessness. That problem was not outside the scope of its terms of reference but it was a secondary issue. When submitting the draft conventions to Governments, the Commission should stress that point.

39. Mr. SCELLE said that to abandon the draft on the reduction of existing statelessness would be an admission of failure on the Commission's part. The question of statelessness was not, in its legal aspects, exclusively a matter of municipal law. The Conference for the Codification of International Law held at The Hague in 1930 had agreed on the principle that every individual should have a nationality, and should have no more than one nationality; and article 15 of the Universal Declaration of Human Rights embodied the same principle. That principle was the ethical foundation on which the Commission had to build a rule

⁵ *Yearbook of the International Law Commission, 1949*, p. 45.

⁶ *Vide supra*, footnote 4.

⁷ Reproduced in *Yearbook of the International Law Commission, 1952*, vol. II.

⁸ *A Study of Statelessness* (United Nations publication, Sales No. 1949.XIV.2).

of positive law. Under its terms of reference the Commission was to deal with questions of nationality including statelessness and the Commission had to fulfil its duty to the utmost limits. The Commission should not be daunted by the fact that the study of existing statelessness had political implication: law was no more than a set of binding rules or forms for the orderly conduct of political activity; it was a sort of technique of political conduct. It was a fact that Governments were in a position to act arbitrarily; that being so, the Commission should endeavour to find a solution. There was an international legal order above national legal systems, and the Commission should define its principles and make them acceptable to Governments. For the Commission to fail in that duty would be tantamount to encouraging arbitrary behaviour in international relations. He urged the Commission to face squarely the difficulty it had encountered.

40. Mr. SPIROPOULOS shared Mr. Amado's fears. The Commission should not of course be deterred by the political implications of the problem of existing statelessness, but it had to be careful not to link the draft conventions on future statelessness to the draft conventions on present statelessness. It often occurred that the General Assembly rejected a set of drafts because of a single provision which appeared unacceptable. If the Commission wanted its work to have more than a theoretical value, it should draft a separate instrument which could be adopted or set aside without reference to the other draft conventions.

41. The CHAIRMAN agreed that the Commission could give legal form to a political idea. But it was necessary in such an event to clarify that political idea, and he was not altogether satisfied with the drafts which were being discussed by the Commission. Mr. Lauterpacht's draft, for example, would, if adopted, give a privileged status to stateless persons in the matter of naturalization.

42. Mr. LAUTERPACHT replied that it was quite true that to impose a duty on States to grant their nationality to stateless persons while the naturalization of other aliens remained subject to discretion was to place stateless persons in a privileged position. However, there was nothing unduly startling in that result, for, unlike aliens, stateless persons had no nationality at all. In their case, the perpetuation of their statelessness constituted a hardship. There was no such hardship in leaving the naturalization of other aliens to the discretion of the State where they resided for they already had a nationality.

43. The CHAIRMAN invited the Commission to begin the study, one by one, of the articles of the Special Rapporteur's draft Convention on the Reduction of Present Statelessness (A/CN.4/81, annex II, second column).⁹

Article 1

44. Mr. CORDOVA, Special Rapporteur, said he had

made some amendments to his draft. In the first place, he suggested that article 1, paragraph 1, should be amended to read: "The party in whose territory a stateless person habitually resides *at the time of entry into force of this convention* shall grant him the legal status of 'protected subject' upon application."

45. He pointed out that the Commission could not consider article 1, paragraph 1, without taking into account article 2, which enumerated the rights and duties of a "protected subject". States would be no doubt reluctant to grant political rights to stateless persons whose connexion with the host country was not sufficiently strong.

46. With regard to article 1, paragraph 2, of the draft, he said that the comments by Governments on the conventions relating to future statelessness showed that many States were jealous of their right to deprive of nationality any of their citizens whom they considered dangerous to their internal or external security. Hence those States could not be expected to grant their nationality to stateless persons whom they considered similarly dangerous.

47. Mr. LAUTERPACHT said that, in the first place, the definition of the words "habitually reside" was likely to give rise to great difficulties. Secondly, it seemed illogical to insert the words "at the time of entry into force of this convention", for a stateless person who fulfilled the residence qualification after the entry into force of the convention ought not to be excluded from the benefit of its provisions. Finally, the reservation contained in article 1, paragraph 2, of the Special Rapporteur's draft might indeed make the convention more acceptable to Governments but might at the same time make it somewhat ineffectual.

48. He therefore suggested that article 1 should be redrafted along the following lines: "The parties agree to confer their nationality upon stateless persons who have been resident within their territory for the minimum period which their law prescribes as a condition of naturalization, provided that such persons fulfil the other conditions which the law lays down for the acquisition of nationality by naturalization". Such a clause would exclude all possibility of arbitrary discrimination against stateless persons. The Commission, pursuant to its terms of reference, should endeavour first and foremost to give a stateless person the normal status of a national of the host country. Only failing that should the Commission consider the alternative of granting him the status of a "protected subject".

49. Mr. CORDOVA, Special Rapporteur, asked with reference to the beginning of Mr. Lauterpacht's draft article II,¹⁰ whether the words "The parties may..." were to stand. They gave the impression that the host State retained the right not to confer upon a stateless person the status of a "protected subject".

⁹ Cf. *supra*, para. 1 and related footnotes.

¹⁰ *Vide supra*, 246th meeting, para. 19.

50. Mr. LAUTERPACHT explained that, as he construed his draft, it implied an obligation for the host State to confer the status of "protected subject" under article II upon those stateless persons to whom it had not granted its nationality under article I of his draft.

The meeting rose at 1 p.m.

248th MEETING

Wednesday, 16 June 1954, at 9.30 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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) (continued)

REPORT ON THE ELIMINATION OR REDUCTION OF PRESENT STATELESSNESS (A/CN.4/81) (continued)

REVISED DRAFT OF CONVENTION ON THE REDUCTION OF PRESENT STATELESSNESS

Article I

1. The CHAIRMAN invited the Commission to discuss a revised draft of article I of the alternative Convention on the Reduction of Present Statelessness¹ prepared by the Special Rapporteur :

"1. The party in whose territory a stateless person habitually resides shall, on his application, grant him the legal status of 'protected subject'.

"2. The national law of the party may exclude from the application of paragraph 1 stateless persons

who constitute a danger to public order or national security."

2. At a previous meeting, Mr. Lauterpacht had submitted an amended draft² of article I which he had proposed to modify still further.

3. Mr. LAUTERPACHT proposed that article I should read :

"The parties agree to confer their nationality upon stateless persons who have been resident within their territory for a minimum period which their law prescribes as a condition of naturalization and provided that such persons fulfil the other conditions which the law lays down for acquisition of nationality by naturalization."

4. He also wished to make a general remark concerning the character of the Commission's work on the articles under discussion; he believed that the Commission should pursue the study of the articles, but not that it should do so in terms of drafting a convention. The work in which it was engaged was neither codification nor progressive development of international law. It was not the Commission's business to draft conventions. He believed that it would be acting in keeping with its terms of reference if it submitted two or three articles to the General Assembly and left it to the Assembly to take what action it deemed advisable.

5. Mr. CÓRDOVA, Special Rapporteur, agreed with Mr. Lauterpacht and said that he had not intended that the articles in question should be drafted in the form of a convention. The question under consideration required more detailed study and he therefore proposed that, before being submitted to the General Assembly and the Economic and Social Council, the text of the articles should be circulated to Governments, who should be invited to comment thereon.

6. Mr. LAUTERPACHT thought that as soon as the Commission reached final conclusions on the articles it should consider its work relating to the particular topic completed and not spend any more time on it. The General Assembly and the Economic and Social Council would be free to request the Governments to give their views if they so desired.

7. The CHAIRMAN agreed that there was no need for the Commission to wait for an endorsement of its views; it should proceed with its work as a drafting committee.

8. Mr. CÓRDOVA, Special Rapporteur, pointed out that a diplomatic conference on the status of stateless persons was to meet at Geneva in September and that there was consequently no time to submit the articles to the General Assembly or the Economic and Social Council. If the question was placed on the agenda of the Economic and Social Council, Governments would have insufficient time to study it before the September conference. Governments should also be given the

¹ Cf. *supra*, 247th meeting, para. 1 and related footnotes.

² *Vide supra*, 247th meeting, para. 48.

possibility of asking the Commission to pursue its work along present lines.

9. Mr. LIANG, Secretary to the Commission, said that the Council was to meet at the end of June and that it would probably be difficult to add an item to its agenda at such short notice.

10. Mr. HSU wondered if it would be proper to submit the results of the Commission's work direct to the diplomatic conference for information.

11. Mr. CORDOVA, Special Rapporteur, said that if the articles were drafted in the form of a convention, there would be a possibility of suggesting alternative drafts. If, on the other hand, the Commission favoured the proposal made by Mr. Lauterpacht, it would give itself greater freedom of work.

12. Mr. SPIROPOULOS said it was important to decide what form the articles should take. The Commission could draft them in the form of a convention or in the form of a recommendation. The only difference between the two would be that a convention would require, in addition, a preamble and final clauses. He would be equally prepared to accept either of the two solutions.

13. Mr. CORDOVA, Special Rapporteur, said that a question of responsibility was involved. If the articles were embodied in a convention the Commission would bear the responsibility for the final document. If on the other hand a vaguer form of presentation was adopted, and the Commission merely said that the question had been studied, its responsibility would be less. In that case Governments would commend the Commission for undertaking the work and at the same time approve its cautious approach.

14. Mr. FRANÇOIS inquired if it was in accordance with the Statute of the Commission to draft proposals which did not actually involve codification or the progressive development of international law.

15. Mr. LIANG, Secretary to the Commission, said that it would not be proper for the Commission to submit its proposals to the diplomatic conference through the Secretary-General, because, as he had pointed out before, the treatment of stateless persons did not come strictly within the Commission's scope.

16. Mr. Lauterpacht's proposal that the Commission should merely draft suggestions was not sufficiently clear. The proposals made by the Commission could be considered as contributing to the development of international law; inasmuch as it would be too late for the proposals to be considered by the Economic and Social Council in June, he was inclined to support Mr. Hsu's suggestion.

17. Mr. LAUTERPACHT felt that the question was being unnecessarily complicated. The Commission's work on present statelessness was not strictly either codification or development of international law and he proposed that it should merely be said in the general report covering its sixth session that the item had been

considered; that the drafting of the convention was neither codification nor development of international law; and that the Commission had formulated articles which would be submitted to the General Assembly or the Economic and Social Council for suitable action. There was nothing in the Commission's statute to prevent it from adopting that course.

18. Mr. HSU did not think it was possible to maintain that the work of the Commission fell in between codification and development of international law. Recommendations made by the Commission, in whatever form they were presented, were necessarily a contribution to the development of international law.

19. Mr. CORDOVA, Special Rapporteur, said that if the text of the articles was included in the general report there would be no problem; if, however, the Commission required action to be taken, it would be necessary to communicate the proposal to Governments.

20. Mr. LAUTERPACHT disagreed with the Special Rapporteur and suggested that the issue should be put to the vote.

21. Mr. CORDOVA, Special Rapporteur, said that the General Assembly might consult the Governments and refer the proposals back to the Commission for further study. In that case the proposals should contain some such phrase as: "for any action considered necessary by the General Assembly".

22. Mr. LAUTERPACHT agreed with the Special Rapporteur.

23. The CHAIRMAN invited the Commission to take as a basis for discussion a revised draft of the alternative convention on the reduction of present statelessness as prepared by the Special Rapporteur. Mr. Lauterpacht had proposed a new draft of article I in which he had substituted a "minimum period" of residence for his original proposal of "a period of ten years or more".³

24. Mr. CORDOVA, Special Rapporteur, said that the draft of article I as proposed by Mr. Lauterpacht was already covered by article V of his (the Special Rapporteur's) revised draft, which read:

"The parties shall confer their nationality upon stateless persons provided that they fulfil the conditions which are provided by law for the acquisition of nationality by aliens by way of naturalization."

He therefore took it that Mr. Lauterpacht wished article V of the Special Rapporteur's revised draft to be renumbered article I.

25. The essential difference between the two approaches was that in Mr. Lauterpacht's opinion a stateless person should be granted "protected status" only if he failed to qualify for naturalization, while in his (Mr. Córdova's) opinion a stateless person should

³ *Vide supra*, paras. 1 and 3.

be granted "protected status" until a nationality was conferred on him.

26. He hoped that Mr. Lauterpacht's draft of article I was not intended to replace article I, but article V of his revised draft.

27. Mr. SPIROPOULOS agreed with the Special Rapporteur that stateless persons should enjoy "protected status" until they obtained a nationality; it was more logical than to grant them the "protected status" once they had been refused a nationality.

28. Mr. LAUTERPACHT proposed that his draft of article I should be substituted for the Special Rapporteur's draft of article I. He did not wish to be repetitive, but if the Commission's aim was the elimination of statelessness, it was only logical that it should concern itself first with nationality, and secondly with "protected status".

29. The CHAIRMAN thought that it would be easier to establish the order of the articles once agreement had been reached as to their content.

30. Mr. GARCÍA-AMADOR pointed out that inasmuch as Mr. Lauterpacht's draft article II as proposed at a previous meeting⁴ also contained amendments to the Special Rapporteur's draft article I it would be desirable to discuss paragraphs 1 and 2 of the Special Rapporteur's draft article I simultaneously.

31. Mr. CORDOVA, Special Rapporteur, said that Mr. Lauterpacht's draft article II dealt with the question of restricted nationality which was covered by paragraphs 1 and 2 of his own draft. The ideas contained in the two drafts coincided, as he had based his own idea of restricted nationality on proposals originally made by Mr. Lauterpacht and Faris Bey el-Khouri. The difficulty was one of presentation. His provision concerning stateless persons who constituted a danger to public order or national security was, he thought, justified, in that it reduced to some extent the burden which the Commission wished to impose upon States. The grant of nationality was dealt with in article V of his revised draft.

32. Mr. LAUTERPACHT proposed that paragraph 1 of article I of the Special Rapporteur's revised draft be preceded by the phrase: "Unless nationality is conferred in conformity with article V".

33. Since "protected status" differed little in practice from that of full nationality, it was perfectly proper that a stateless person should wait before nationality was granted him.

34. Mr. SCALLE said the position of a stateless person might be more favourable than that of an ordinary alien with regard to the acquisition of nationality. He agreed with the Special Rapporteur that it was more logical to grant first "protected status" and then nationality, and suggested that agreement might be more likely if the order of the articles in the Special Rapporteur's revised draft were modified.

35. Mr. AMADO was on the whole inclined to agree with Mr. Lauterpacht's proposal, but if the Commission decided to retain the order of the Special Rapporteur's draft, article V should be allowed to stand.

36. Mr. SPIROPOULOS thought there was no real difference between the views expressed by the Special Rapporteur and Mr. Lauterpacht. He proposed that the phrase: "As long as a stateless person does not acquire a nationality under article V" should be inserted at the beginning of article I, paragraph 1.

37. Mr. LAUTERPACHT said that the proposal made by Mr. Spiropoulos tended to give a stateless person protected status almost immediately. He was unable to agree with that suggestion.

38. Mr. CORDOVA, Special Rapporteur, said that Mr. Lauterpacht, if he had understood him correctly, expected a State to confer nationality subject to the fulfilment by the applicant of certain statutory conditions, but had added that if the State did not wish to confer nationality on the person, it could confer "protected status". In that case the person would never get a nationality.

39. Faris Bey el-KHOURI felt that the country of residence of a stateless person should immediately grant the person concerned "protected status", which the person would retain until his case was settled either by normal naturalization procedure, by a decision of the United Nations, or in conformity with conventions drafted by the Commission. If that principle was agreed, only the question of drafting the relevant clauses remained, which could be referred to a drafting sub-committee.

40. The CHAIRMAN regretted that Mr. Lauterpacht had withdrawn his proposals as they contained a number of valuable suggestions.

41. Mr. SCALLE thought that a stateless person was entitled to immediate protection and should not be left without protection pending the fulfilment of the statutory conditions prescribed by the host country.

42. Mr. LAUTERPACHT preferred the text of his own amendments, and would vote against the view put forward by the Special Rapporteur, for a State should not be expected to grant all the rights of citizenship to a stateless applicant immediately.

43. The CHAIRMAN put to the vote paragraph 1 of article I of the revised draft of the convention on the reduction of present statelessness as proposed by the Special Rapporteur.

Paragraph 1 of article I was approved in principle by 7 votes to 4, with 1 abstention.

44. Mr. CORDOVA, Special Rapporteur, said that, by limiting the granting of the status of "protected subject" to those stateless persons "habitually" resident in the territory of a contracting party, the convention excluded stateless persons who were only temporarily in the country. That provision met in some

⁴ *Vide supra*, 246th meeting, para. 19.

measure the criticism of those who felt a certain residence qualification necessary. Furthermore he was prepared to consider any practical suggestion for clarifying the provision by saying, for example, "resident for one year".

45. Mr. GARCÍA-AMADOR suggested that a further condition should be stipulated for the grant of the status of "protected subject" to stateless persons: they must have applied for naturalization in the country of residence. It should be remembered that certain stateless persons were only accidentally, as it were, resident in the host countries; their intention was to proceed later to some other country and ultimately to settle there. In his own country, Cuba, there were quite a number of stateless persons merely waiting for immigration visas to the United States. It was not fair to ask Cuba to give stateless persons a status which was in some respects better than that of Cubans—in that it implied the full rights of nationals without all the corresponding duties—when it was clear that the persons in question had no intention of settling permanently in Cuba.

46. Mr. CORDOVA, Special Rapporteur, said that a similar problem had arisen in his own country, Mexico. However, he did not think that many stateless persons could enter the United States because they were generally not eligible for immigration visas. Besides, it was not possible to prevent persons residing in Mexico or Cuba from going to the United States if they were able and willing to do so. Whether the persons concerned had been originally nationals of an European country or stateless, the situation was exactly the same.

47. Mr. PAL said that, having voted for the principle that stateless persons should be granted the status of "protected subjects" on application, the Commission should not qualify that right by making it conditional upon their applying for actual naturalization. He would further suggest that the term "habitually" should be deleted. A stateless person was in a totally different position from a foreign resident, in that he could not return to his country of origin. A stateless person's place of residence was always an accidental one. Besides, the term "habitually resident" was currently employed in connexion with such matters as the acquisition of domicile and to use it in article I suggested that the grant of the status of "protected subject" to stateless persons was dependent upon certain qualifications implied by the usual connotation of the term in municipal law.

48. Mr. CORDOVA, Special Rapporteur, agreed with Mr. Pal; he therefore altered his draft of article I, paragraph 1, by deleting the adverb "habitually".

49. Mr. GARCÍA-AMADOR said that he would not press for an amendment along the lines he had suggested because he felt there was not enough support for the idea that stateless persons should be required to apply for naturalization in order to benefit from protection pending a decision on their application.

50. Mr. HSU said that the term "protected subject" had a generally accepted connotation. It had perhaps certain implications inconsistent with the idea that the members of the Commission had in mind. He would suggest the more neutral term "protected person".

51. Mr. CORDOVA, Special Rapporteur, said that what he had in mind was a status to all intents equivalent to that of a national except in the matter of political rights. The stateless person would be given a legal connexion with his host country without becoming an actual citizen.

52. The CHAIRMAN asked Mr. Scelle whether the French term *un protégé* would correspond to "protected person".

53. Mr. SCELLE said that the term *un protégé* aptly described the situation, for a person benefiting from the provisions of article I would not be *un citoyen* or *un national* of his host country. It would be quite in order to say in French *une personne protégée*, but he preferred the shorter and more generally accepted term *un protégé*.

54. The CHAIRMAN said that he took it that the Commission approved article I, paragraph 1, subject to the substitution of the term "protected person" for the term "protected subject".

It was so agreed.

55. Mr. SCELLE suggested that article I, paragraph 2, of the revised draft should be deleted altogether. To say that "the national law of the party may exclude from the application of paragraph 1 stateless persons who constitute a danger to public order or national security" was to remind Governments that they could act arbitrarily against certain individuals.

56. Mr. CORDOVA, Special Rapporteur, said that the purpose of article I, paragraph 2, was to reassure States becoming parties to the convention that they were under no obligation to grant protection to persons they might consider dangerous to their internal or external security. A country could not expel a stateless person for he had nowhere to go; but it would be asking too much of a country that it should grant its protection to a person whom it considered a "security risk".

57. The CHAIRMAN put to the vote the proposal that paragraph 2 should be deleted from article I.

The proposal was not adopted, 3 votes being cast in favour, and 3 against with 6 abstentions.

58. The CHAIRMAN said that accordingly article I, paragraph 2, would stand as drafted in the revised version submitted by the Special Rapporteur.

Article II

59. Mr. CORDOVA, Special Rapporteur, introduced the redraft of article II:

"The protected persons mentioned in article I shall:

- (i) Enjoy the rights to which nationals of the party concerned are entitled, with the exception of political rights;
 - (ii) Have the same obligations as nationals of the party;
 - (iii) Enjoy the diplomatic protection of the party according to international law."
60. Mr. FRANÇOIS asked what was implied by the somewhat vague term "political rights".
61. Mr. CORDOVA, Special Rapporteur, said that without having to venture very far into the field of constitutional law, he could say that the right to vote and eligibility for public office were political rights and that perhaps access to the civil service might also be considered as such.
62. The CHAIRMAN asked Mr. Scelle what the French term "*droits politiques*" implied.
63. Mr. SCELLE said that "*droits politiques*" comprised the right to vote and eligibility to public office but not necessarily access to the civil service.
64. Mr. AMADO said it was a serious question whether a protected person should be allowed to enter the liberal professions.
65. The CHAIRMAN said that in Swedish legal terminology there was an adjective derived from the noun "citizen" which was used in lieu of "political" when qualifying "rights" in similar contexts.
66. Mr. CORDOVA, Special Rapporteur, said that the only way to make the meaning completely clear would be to enumerate all the so-called political rights. Such a course was open to two objections: firstly, it made the text unduly cumbersome, and secondly, such an enumeration could never be exhaustive. Perhaps the difficulty could be solved by saying that the protected persons would enjoy "civil rights" and leave it to each country to define what rights were covered by the term.
67. Mr. AMADO said it seemed to him that, upon being granted the status of a protected person, a stateless person would acquire more rights in the host country than an ordinary foreign resident who had settled there with a valid permit.
68. Mr. SPIROPOULOS said that if in a country foreigners generally were barred from certain rights—like that of practising law—then a protected person would also be debarred therefrom because he was still an alien.
69. Mr. SCELLE agreed that a protected person, not being a national or a citizen of the country protecting him, could not engage in activities which were closed to aliens under municipal law.
70. The CHAIRMAN said the discussion raised the important practical issue whether a stateless person would be required to obtain a permit in order to work as was required of aliens in most countries.
71. Mr. CORDOVA, Special Rapporteur, said it was clear that stateless persons should have all those rights which were indispensable to life, including not only the right to own property but also the right to work. In certain countries aliens were only allowed to work on the basis of reciprocity; in other countries, yet other conditions were stipulated. But the essential difference between a stateless person and an ordinary alien was that the latter, if not satisfied with the treatment he received, could always return to his own country. It was therefore justifiable to treat a stateless person better than an ordinary alien in some respects.
72. With regard to access to the civil service, it should be remembered that a Government was not obliged to appoint any particular person—whether a citizen or not—to a vacancy. Hence there was really no need to go very deeply into the question; if a Government wished to appoint a stateless person to a chair in a university, for example, it was free to do so, just as it was free to reject the application of any particular candidate, whether that candidate had been granted the status of protected person or not.
73. The CHAIRMAN asked Mr. Lauterpacht whether in English legal terminology "civil rights" had a very precise meaning.
74. Mr. LAUTERPACHT said that "civil rights" was probably as indefinite a term as "political rights".
75. Faris Bey el-KHOURI said he did not approve of the draft submitted for article II. He felt that paragraphs (i) and (ii) could conveniently be replaced by a provision along the following lines: "The State in whose territory a stateless person resides shall determine the rights and the duties devolving upon him on the granting of protection according to the merits of each case." A State might wish to restrict the right of the persons concerned in connexion with the practice of certain professions. Again, for reasons of security, that State might wish to restrict their freedom to reside in certain areas of the country.
76. Mr. SPIROPOULOS said that although "political rights" was a difficult term to define, it was nonetheless the only one that could be used in the context.
77. Mr. LIANG, Secretary to the Commission, said that the term "civic rights" existed and might prove useful because it included such privileges as access to legal and medical professions. He did not possess full documentation on the point, but felt that the term might prove a good substitute for "political rights".
78. Mr. SCELLE said that *droits civiques* were those attaching to the status of citizen. That was clear from the etymology of the term, which was derived from the Latin *civis*, meaning a citizen. Hence civic rights would be similar to political rights.
79. The CHAIRMAN said that the tentatively suggested text for the beginning of article II was:
- "The protected persons mentioned in article I shall:

“(i) Enjoy the rights to which nationals of the party concerned are entitled, with the exception of civic rights.”

80. Mr. CORDOVA, Special Rapporteur, said that there was some analogy between the status of protected persons suggested by the convention and the position of women in those countries where they had not yet received political rights.

81. Mr. SCALLE said that in many countries where women had no vote they had access to the medical, legal and other professions; in some countries they had no vote and yet were not denied access to the legal profession. There was too much diversity in the matter for the analogy to serve as a basis for the definition of the term “political rights”.

82. The CHAIRMAN said that in Sweden admission to the medical profession was considered an administrative and not a political question. With regard to the legal profession, although he was not absolutely certain of the point, he believed that foreigners were not allowed to practise law in Sweden.

83. He added that, the issues involved having been elucidated, the matter of drafting a text of article II (i) might be left to the Drafting Committee.⁵

It was so agreed.

84. Mr. FRANÇOIS said that if the proposed text of article II (ii) were adopted, it would apparently lead to the stateless persons being placed in a worse condition than before; they were going to be compelled to serve in the armed forces of their host country as soon as they applied for the status of protected persons, whereas, under present conditions, they were under no such obligation.

85. Mr. CORDOVA, Special Rapporteur, said that no State would be obliged to impose military service on those stateless persons to whom it granted the status of protected persons. All that the draft convention did was recognize the right of a State to impose such duties if it saw fit to do so. For his part, as he had said before, he was in favour of imposing the duty of military service on foreign residents. There was a tendency—which might even amount to a new principle of international law—to impose that duty upon them. That had been done in the United States and in Mexico. The only alternative left to a foreigner not wishing to perform military service was to leave the country.

86. Mr. SPIROPOULOS said that the expulsion of an alien for refusal to serve would probably be inconsistent with existing obligations under establishment treaties. In any case, to require an alien to do military service seemed to him a violation of general international law.

87. The CHAIRMAN said that as he understood the United States legislation it did not require all aliens to

serve in the American armed forces but only those who had entered the country under an immigration visa.

88. Mr. LAUTERPACHT said he wished to correct the impression created by his earlier references to the legislation of the United States. He had never said that under international law a State was entitled to draft foreigners into its armed forces; on the contrary, he considered that the tendency in some countries to do so was contrary to international law. Under the law of the United States, an alien drafted into the armed forces could refuse to serve and if so ceased to be eligible for naturalization as a United States citizen. It had been reported that, considering the measure in question as an indirect threat of expulsion against Frenchmen living in the United States, the French National Assembly had adopted a resolution to the effect that foreigners residing in France for more than one year should serve in the French armed forces.

89. The CHAIRMAN construed article II (ii) as meaning that States were empowered but not bound to impose military service on protected persons.

90. Mr. CORDOVA, Special Rapporteur, said that whatever might be the objections to the conscription of aliens, such objections would not apply to a protected person, formerly stateless, who had no obligations—military or otherwise—towards any country other than that in which he resided.

91. Mr. HSU said that the provision that protected persons should have the same obligations as nationals should specifically except military service. He saw no justification for imposing such service. Any tendency to impose military service on foreigners seemed to him unjustifiable, and should not be endorsed by the Commission. He felt that the matter required more careful consideration.

92. Mr. AMADO inquired what had been agreed in the matter of political rights.

93. The CHAIRMAN said that an agreement in principle had been reached but that details had been left to the Drafting Committee.⁶

94. Mr. AMADO said that from his experience in Brazil as a Deputy and a Senator, he knew that one of the main problems was that of allowing stateless persons to practise the liberal professions. Any suggestion to allow foreigners to practise as doctors or lawyers invariably encountered such determined opposition on the part of the professional associations, that unless the proposed convention made some allowance for that professional hostility, its chances of being ratified were very slender. The best that could be done was to acknowledge only those rights which were essential to a stateless person's livelihood.

95. The CHAIRMAN said that the Commission should now discuss the proposal made by Faris Bey el-Khoury that the rights to be granted to the protected persons

⁵ Regarding the appointment of the Drafting Committee, see below, 250th meeting.

⁶ *Vide supra*, para. 83.

should be determined by the States granting them protection.

96. Mr. CORDOVA, Special Rapporteur, said that raised a very important issue. The Economic and Social Council had already dealt with the matter and the diplomatic conference to be held in September 1954 would probably give to stateless persons at least some of the rights recognized to refugees under the 1951 Convention relating to the status of refugees.⁷ Clearly, the Commission should treat those as minimum rights and perhaps go one step further and assimilate protected persons, formerly stateless, to foreign residents having the right to work, with the possible exception of the practice of certain liberal professions for which special qualifications were necessary. He would further suggest that protected persons should be granted those rights which were recognized by international conventions as well as those given by municipal law.

97. Faris Bey el-KHOURI said that the Commission should not impose on Governments duties which the latter would not be prepared to accept. It was essential to give the stateless persons protection, so that they could, for example, travel abroad with a passport issued by the protecting country; but to grant them the right to enter business or the professions was far too sweeping. Many States would object to such a provision and reject the proposed convention altogether. Moreover, each State had its own problem, so that it was not possible to place all States under the same obligations. Some countries in the Middle East conceded to refugees and stateless persons the right to work, while others only gave them identity cards and residence permits allowing them to live in their territory. If too much was asked of States, they would simply not accept the Commission's suggestions. It was therefore preferable to leave it to the individual States to determine, on the merits of each case, what rights they would grant to the persons taken under their protection.

98. Mr. LAUTERPACHT said that perhaps the Special Rapporteur would comment on Faris Bey el-Khouri's proposal.

99. Mr. CORDOVA, Special Rapporteur, said that, for his part, he thought that all rights other than political rights should be granted to the protected persons; still, the relevant text might perhaps be redrafted so as to meet, in some measure, Faris Bey el-Khouri's wishes.

100. Mr. LAUTERPACHT said that, to stipulate, in effect, that States should grant to protected persons the rights which they were prepared to concede amounted to a nominal statement.

101. Faris Bey el-KHOURI said that he could make his meaning clear by pointing to the example of British protected persons. They were distinct from British protected subjects whose status was a general one for all persons coming from a particular British protectorate.

British protected persons were non-British subjects who had been personally granted British protection and the British Government determined what the status of protected person implied in each particular case.

102. The CHAIRMAN said Faris Bey el-Khouri should put his suggestion in writing before it was discussed further.

103. Faris Bey el-KHOURI said it would hardly serve any useful purpose to state his proposal in precise terms for there did not seem to be enough support for it. He would only ask that the various articles and paragraphs should be put to the vote one by one.

104. The CHAIRMAN called for a vote on the principle of article II (i).

By 5 votes to none, with 7 abstentions, it was decided to approve the principle of article II (i).

105. Mr. HSU proposed that article II (ii) should be amended so as to state that protected persons would "have the same obligations as nationals of the party with the exception of military service".

106. Mr. CORDOVA, Special Rapporteur, suggested a compromise solution; a protected person should be bound by all the obligations to be prescribed by the municipal law of the State concerned, provided that they did not exceed those binding on nationals.

107. Mr. HSU said that the clause should be held over to the following meeting so that members could think it over.

108. Mr. SCELLE said that it was not wise to suggest that protected persons should be treated on a par with nationals. In law, a State could impose forced labour on its nationals, deport them to desolate regions or to distant islands, put them in concentration camps or otherwise ill-treat them without any other States having virtually any right to object, unless they decided to intervene, which was difficult under the Charter. If it was the Commission's intention to give a form of protection to persons who were at present stateless, it was imperative to give them a status which represented an improvement on the treatment of their nationals by certain States.

109. The CHAIRMAN said that it was highly improbable that a State indulging in such arbitrary measures would ever sign the convention, so that the problem was unlikely to arise in practice. The question before the Commission was that of drafting provisions to embody the principles agreed upon.

110. Mr. SCELLE said that it was essential to forbid States from committing arbitrary actions.

111. Mr. CORDOVA, Special Rapporteur, said that he did not think it was practicable or even desirable to give a protected person a better status than that of a national of the State granting him protection.

112. Mr. SCELLE said that the discussion showed how necessary it was to give stateless persons an inter-

⁷ Cf. *supra*, 247th meeting, para. 16.

national status rather than a purely national one. A purely national status would be entirely dependent on the discretion of States and it was hardly necessary to draft an international convention to provide for something which a State could do anyway.

113. He did not suggest that protected persons should have all the rights of nationals as he quite understood the objections that might be raised if they were allowed to enter the liberal professions.

114. He believed that the international sovereignty of States was an erroneous notion. But internally the principle of sovereignty remained unchallenged. The only mitigation of the absolute internal power of States was that afforded by humanitarian intervention, as exemplified by United States' protests against pogroms. To assimilate protected persons to nationals of the countries granting them protection would exclude the possibility of such humanitarian intervention in cases where States contravened the Universal Declaration of Human Rights.

The meeting rose at 1 p.m.

249th MEETING

Thursday, 17 June 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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) (continued)

REPORT ON THE ELIMINATION OR REDUCTION OF PRESENT STATELESSNESS (A/CN.4/81) (continued)

REVISED DRAFT OF CONVENTION ON THE REDUCTION OF PRESENT STATELESSNESS (continued)¹

Article II (continued)

1. The CHAIRMAN invited further debate on the redraft of article II, paragraph (ii), proposed by the Special Rapporteur.²

2. Mr. HSU proposed that paragraph (ii) should read : "Have the same obligations as the contracting party can lawfully impose upon aliens according to international law."

3. He was in favour of protected persons retaining the status of aliens. The Commission should bear in mind that those persons did not always fulfil the conditions required for naturalization. In such cases they should not be required to perform military service, other aliens not being required to do so either. If a protected person stayed for a long time in the country which had granted him protection he might properly be liable to military service, but under the Special Rapporteur's draft of article II, paragraph (ii), a person who had only just arrived from abroad might be required to take part immediately in a war waged by the host country against his country of origin.

4. Mr. CORDOVA, Special Rapporteur, said Mr. Hsu's text was too vague, for it was very debatable whether a government was entitled under international law to require aliens to perform military service.

5. Secondly, persons enjoying the status of protected persons could not be treated in the same way as aliens ; a protected person had all the rights of a national, including diplomatic protection, the only exception being political rights. The status of a protected person also differed from that of an alien in that the former did not possess another nationality. Furthermore, if a country was prepared to grant him its protection, it appeared reasonable to expect him in return to serve in that country's forces. He agreed, however, with Mr. García-Amador and Mr. Pal in thinking that it would be too much to expect of Governments to ask them to grant their nationality to stateless persons who did not have sufficiently strong connexions with the country concerned. He therefore proposed a new draft of article I which would restrict its application to stateless persons able to show, by prolonged residence and a formal application to the Government, that they had established sufficiently close ties with the host country. At the time of making the application, the stateless person would also expressly accept the obligation to serve in the protecting country's armed forces.

¹ Cf. *supra*, 247th meeting, para. 1, with related footnotes, and 248th meeting, para. 1.

² *Vide supra*, 248th meeting, para. 59.

6. Mr. HSU said he was prepared to amend his text by the addition of the phrase: "with the exception of military service, unless the protected person voluntarily asks to perform military service."

7. He said, in reply to Mr. Córdova, that he had made his proposal precisely because, according to Mr. Córdova, international law was not settled on the matter of military service by aliens. If a protected person did not enjoy political rights it would be wrong to make him liable to all the duties to which a national was liable. The Commission's aim was to assist stateless persons and not to impose further obligations on them. If the solution he proposed was considered unfair to States, they might perhaps be relieved of the duty to protect the stateless person outside their territory and an international organization might act as protector abroad.

8. The CHAIRMAN put to the vote the first amendment proposed by Mr. Hsu to the effect that article II, paragraph (ii) as submitted by Mr. Córdova should be replaced by the following: "Have the same obligations as the contracting party can lawfully impose upon aliens according to international law."

The amendment was rejected by 4 votes to 1, with 6 abstentions.

9. The CHAIRMAN put to the vote Mr. Hsu's second amendment to paragraph (ii), which would read: "Have the same obligations as nationals of the party, with the exception of military service."

The amendment was rejected by 6 votes to 1, with 4 abstentions.

10. The CHAIRMAN put to the vote the Special Rapporteur's draft paragraph (ii): "Have the same obligations as nationals of the party."

The paragraph was adopted by 5 votes to 2, with 4 abstentions.

Paragraph (iii) was adopted unanimously.

Article II, as a whole, was adopted unanimously.

Article III

11. The CHAIRMAN put to the vote the Special Rapporteur's draft article III, as amended by the latter in the light of comments³ made by Mr. Lauterpacht: "The status of 'protected person' conferred in accordance with the preceding articles, shall extend to the minor children of the persons concerned and to their wives, upon a declaration to this effect by the latter."

Article III was adopted unanimously.

Article IV

12. Mr. CORDOVA, Special Rapporteur, proposed the

following wording for article IV: "Children of protected persons shall acquire *ipso facto* the nationality (including political rights) of the protecting party on reaching the age of majority provided that they are resident in the territory of the party."

Article IV was adopted unanimously.

Article V

13. Mr. CORDOVA, Special Rapporteur, proposed the following draft for article V: "The parties shall confer their nationality upon stateless persons provided that they fulfil the conditions which are provided by law for the acquisition of nationality by aliens by way of naturalization."

Article V was adopted unanimously.

Article VI

14. Mr. CORDOVA, Special Rapporteur, proposed the following wording for article VI: "For the purpose of this convention the term 'stateless person' shall include *de facto* stateless persons. The latter shall, however, acquire the status of 'protected person' and the status of nationals only on the condition that they renounce the ineffective nationality they possess." He did not think it necessary to repeat the arguments he had advanced in support of article VI when introducing his report earlier in the debate.⁴

15. Mr. LAUTERPACHT agreed that it was not desirable to reopen the discussion on the substance of the matter; he pointed out, however, that the term "*de facto* statelessness" had never been clearly defined. To adopt it would mean to impose upon States the duty and to give them the right to decide that a person who was a national of State X was not really a national of that State; it meant that they would, accordingly, be under an obligation to treat that person as a protected person, in other words, a person assimilated in most respects to their own nationals.

16. He said he could support the draft as a whole if it took the form of mere suggestions for submission to Governments, and if article I made the grant of the status of protected person conditional on sufficiently long residence. In any case, he could not accept the text of article VI as drafted; he was in favour of drawing the attention of Governments to the large number of so-called *de facto* stateless persons, and to the desirability of extending to them the protection contemplated in the convention.

17. At the request of Mr. Córdova the CHAIRMAN called for a roll-call vote on draft article VI.

In favour: Mr. Córdova, Mr. Hsu, Mr. Salamanca.

³ Cf. article III of Mr. Lauterpacht's draft, *supra*, 246th meeting, para. 19.

⁴ *Vide supra*, 246th meeting, paras. 3, 12, 13, 21, 46. For opinions of other members on *de facto* statelessness, see *ibid.*, paras. 14, 18, 34 and 247th meeting, para. 27.

Against: Mr. Sandström, Mr. Amado, Mr. Lauterpacht, Mr. François, Mr. Pal.

Abstentions: Faris Bey el-Khouri, Mr. García-Amador, Mr. Scelle, Mr. Spiropoulos.

Article VI was rejected by 5 votes to 3, with 4 abstentions.

Article VII

18. The CHAIRMAN invited the debate on article VII of the Special Rapporteur's revised draft Convention on the Reduction of Present Statelessness:

"Article VII

"1. The parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before Governments or before the tribunal referred to in paragraph 2.

"2. The parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide any dispute between them concerning the interpretation or application of this convention and 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. 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 of the parties shall have the right to request the General Assembly to set up such agency or tribunal."

19. Mr. CORDOVA, Special Rapporteur, thought it absolutely essential that the agency which was to act on behalf of stateless persons and the special tribunal referred to in article 10 of the two draft conventions on *future* statelessness adopted by the Commission, should also have jurisdiction over the interpretation and application of the convention on the reduction of *present* statelessness and particularly in the matter of the grant of the status of protected person. He realized that some Governments would perhaps not be prepared to accept such a provision, but the Commission should nevertheless press for its inclusion. Moreover, by rejecting the article relating to *de facto* stateless persons, the Commission made article VII more acceptable to Governments.

20. Perhaps, instead of including the text of article VII, the Commission might merely state that the competence of the agency and of the tribunal provided for in the draft conventions on future statelessness would extend to the application of the convention on present statelessness.

21. Mr. LAUTERPACHT said that preferably the Commission, in its report, should simply draw the attention of Governments to the provisions of article 10 of the two draft conventions on future statelessness and

ask them to consider the possibility of extending all or some of the provisions of that article to the subject matter of the draft convention on present statelessness.

22. Mr. CORDOVA, Special Rapporteur, thought the Commission should go much further and make a positive recommendation to the Governments in that sense.

23. Mr. LAUTERPACHT said that, as the Special Rapporteur's draft was intended merely to be transmitted to Governments for study, it should not contain clauses relating to its application. He recalled that the Commission's main object in the matter of present statelessness was to provide some form of practical help to a number of unfortunate human beings; its approach should be very cautious.

24. Mr. SCELLE said that only article VII represented an improvement on the present state of international law. That article should therefore be maintained at all costs.

25. Mr. SPIROPOULOS supported Mr. Lauterpacht.

26. Mr. CORDOVA, Special Rapporteur, pointed out that the Governments would be completely free, when the time came, to accept any part of the draft convention while rejecting another. The Commission should, for its part, offer the practical means of solving the difficulties which might arise in connexion with the application of the convention.

27. Mr. AMADO said he would be prepared to accept article VII, but thought that the words "the parties undertake..." were somewhat too categorical.

28. Mr. PAL said that the difference of opinion between Mr. Lauterpacht and Mr. Córdova related to form rather than to substance. In any case, the whole text discussed by the Commission was just a series of suggestions.

29. Mr. SCELLE pointed out that if the Commission, after including in the two draft conventions concerning future statelessness an article 10 relating to the agency and the special tribunal, did not refer once again to those bodies in the draft convention on present statelessness, such an omission might be interpreted to mean that it was not the Commission's intention that the jurisdiction of the tribunal should extend to present statelessness. If so, the Commission would be going back on its view on a vital issue.

30. Mr. LAUTERPACHT, replying to Mr. Scelle, said that the obligations laid down by the draft convention in present statelessness were much more onerous than those stipulated in the draft conventions on future statelessness. If, for example, a State deprived one of its citizens of his nationality so as to make him stateless, that State would, if the person concerned had resided for the requisite period in its territory, be obliged under the articles just adopted by the Commission, to grant him its nationality or else the status of a protected person which was practically identical with nationality.

31. The CHAIRMAN, replying to a question by Mr. García-Amador, said that the Commission had decided in principle not to submit the text in question in the shape of a draft convention but rather as a series of suggestions.

32. Mr. CORDOVA, Special Rapporteur, said that method had been suggested by Mr. Lauterpacht and himself. No member of the Commission had spoken against the suggested method, but there had been no vote.⁵

33. The CHAIRMAN said that his own opinion on article VII would depend on the form in which the draft as a whole was to be transmitted. If it was only to be a series of suggestions, it was preferable merely to refer to article 10 of the two draft conventions on future statelessness, and to say that a similar article would offer one of the possible solutions to the problem of the application of a convention on present statelessness.

34. Mr. SCALLE said that if the whole draft was no more than a series of suggestions submitted to Governments for their consideration, it was all the more essential to include article VII.

35. Mr. HSU also favoured the inclusion of article VII. Admittedly, a convention on the reduction of present statelessness containing the provisions suggested by the Commission would impose upon Governments heavier obligations than would either of the conventions on future statelessness; but it should not be forgotten that the human beings whom the Commission was trying to help by means of the former convention were in a particularly sad plight.

36. Faris Bey el-KHOURI said it was preferable merely to indicate that the Agency and the Tribunal provided for in article 10 of the draft conventions on future statelessness would deal with the cases coming under the convention which was now being discussed by the Commission. Article VII as proposed by the Special Rapporteur might well give the impression that a different agency and a different tribunal were meant.

37. Mr. FRANÇOIS said that he did not agree with Mr. Pal that there was no appreciable difference of opinion between Mr. Lauterpacht and the Special Rapporteur. If the Commission were to adopt the text proposed by Mr. Córdova, Governments might gather the impression that the provision of a special tribunal having jurisdiction in the matter constituted an essential aspect of a convention on present statelessness. The Commission should inform Governments that it considered it very desirable that the jurisdiction of the special tribunal should extend to existing cases of statelessness. If, however, Governments were reluctant to accept the clause, care had to be taken not to make it impossible for them to accept the rest of the convention.

38. Mr. LAUTERPACHT emphasized the seriousness

of the commitments that would have to be assumed by States which adopted the Special Rapporteur's draft. It had been stated, for example, that there were 20,000 refugees in the Netherlands and 200,000 in France. Should those countries sign the convention they would be bound to grant all of them their nationality or the almost equivalent status of "protected person". Even if the conditions laid down by article I included several years' residence, most of the stateless persons concerned would satisfy that condition as soon as the convention entered into force. On the other hand, he was much impressed by the view that, once States had accepted obligations, it was proper and desirable that they should submit to the measures and safeguards which the convention in question provided for its application and fulfilment. For that reason, he was not prepared to vote against the article in question.

39. Mr. CORDOVA, Special Rapporteur, pointed out that article VII was all the more necessary in the convention because, in the absence of its provisions, the protected persons would have no agency or tribunal competent to defend them against arbitrary action.

40. Mr. PAL pointed out that, contrary to what he had thought at first, Mr. Lauterpacht's criticisms concerned the substance of the whole draft rather than article VII specifically. For his part, he did not share Mr. Lauterpacht's fears and remained in favour of including article VII.

41. It would be for States to decide in the final instance what degree of protection they would grant to stateless persons; the Commission should suggest the best means of doing so.

42. Mr. SCALLE said the draft convention did not contain anything likely to deter or discourage States. He feared, rather, that the attitude of Governments was influencing the Commission.

43. The CHAIRMAN put to the vote article VII, subject to minor drafting changes to be made later.

Article VII was adopted by 10 votes against none, with 2 abstentions.

44. Mr. CORDOVA, Special Rapporteur, suggested the insertion of the words "or the status of protected person" after the word "nationality" in article VII, paragraph 2.

It was so agreed.

45. Mr. CORDOVA, Special Rapporteur, said that it should be made clear in the final draft that the special agency and the tribunal were to be identical with those referred to in the draft conventions adopted earlier.

46. The CHAIRMAN said that the Drafting Committee would decide whether that point should be expressly mentioned in the report or form the subject of a separate article.

⁵ Cf. *supra*, 248th meeting, paras. 4-22.

MODE OF PRESENTATION OF THE ARTICLES ⁶

47. The CHAIRMAN asked the Commission to consider the question how the text just adopted was to be presented, whether in the form of a draft convention or of a series of suggestions to be transmitted to Governments and the General Assembly for study.

48. Mr. LAUTERPACHT thought that the text should simply be included in the report to the General Assembly and offered as a basis for discussion, for the question of existing statelessness was beyond the scope of the Commission's competence.

49. Mr. CORDOVA, Special Rapporteur, conceded that statelessness had important political, social, and demographic aspects. Nevertheless, it came within the scope of the Commission's competence. He therefore proposed that the text should be transmitted to governments and, after receiving their comments, the Commission could prepare a draft convention. That procedure was in keeping with the Commission's statute.

50. Mr. HSU suggested that the Commission should follow the same procedure it had followed in the case of the other draft conventions; he did not think that the matter was beyond the jurisdiction of the Commission.

51. Mr. AMADO considered that, in its report, the Commission should put on record both its misgivings and the conclusions which it had reached.

52. Mr. LAUTERPACHT said that, if the document was transmitted to the Governments, the Commission would have to discuss the problem anew when considering their replies. His personal view was that the problem came within the scope of the Economic and Social Council or that of the General Assembly. Nationality was a very general question and so far the Commission had only studied one of its aspects, that of statelessness. It was time that the Commission examined other aspects of the question if it wanted to proceed with the codification of international law.

53. The CHAIRMAN pointed out that a conference would be meeting in the near future to consider extending to stateless persons the benefit of the 1951 Convention relating to the status of refugees.⁷

54. Mr. LIANG, Secretary to the Commission, explained that when the Economic and Social Council requested the Commission to study the question of statelessness, it had made no distinction between existing and future statelessness. That distinction had appeared for the first time in the report prepared for the Commission by the first Special Rapporteur (A/CN.4/50).⁸ The Commission was certainly entitled to deal separately with present and future statelessness,

but it was hardly arguable that present statelessness did not come within its terms of reference.

55. Mr. CORDOVA, Special Rapporteur, pointed out that the Commission's object was to promote the progressive development of international law and its codification; for that purpose the Commission should use the various methods possible under its Statute, such as the circulation of questionnaires to Governments, as he proposed for the present case. If, as suggested by Mr. Lauterpacht, the Commission did no more than submit a report to the General Assembly, the latter would no doubt circulate it to Member States or make recommendations, and refer the replies or the provisions adopted back to the Commission.

56. Mr. AMADO recalled that under the Economic and Social Council's resolution the Commission was to proceed with the study of the problem of statelessness as a matter of urgency. It was therefore necessary to find a speedy solution. To circulate questionnaires to Governments under article 17, paragraph 2 (b), of the Statute would merely delay matters. The Commission should apply article 16, which was much more appropriate to the circumstances.

57. Mr. PAL thought that the Commission's Statute did not authorize it to discuss the matter which it was discussing. Only articles 16 and 17 could be cited to support a contrary view. But article 17 was only applicable in cases where proposals or a draft convention were submitted to the Commission, which was not the case. That left only article 16; but that article referred to the progressive development of international law, and he was doubtful if the work on which the Commission was at present engaged could be described as development of international law. In fact, international law as at present in force had not prevented statelessness, and the Commission was not proposing to modify it; it was not even asking States to amend their domestic legislation, but was only suggesting ways and means of remedying a serious situation. Accordingly, he supported the solution suggested by Mr. Lauterpacht.

58. Mr. LAUTERPACHT pointed out that the Economic and Social Council had not expressly instructed the Commission to deal with existing statelessness; even if it had done so, the Commission could have refused to carry out a study which in its opinion exceeded its terms of reference. The present study was not codification of international law, and he even doubted if it could be described as progressive development of international law. It would be an exaggeration to say, as was sometimes done, that all conventions constituted "special" international law. The Commission could, therefore, in reliance on article 23 of its statute, state that it was submitting to the General Assembly a proposal, the adoption of which the latter might recommend to Member States.

59. Mr. FRANÇOIS said that article 23 was in that part of the statute which dealt with the codification of

⁶ *Vide supra*, paras. 31-32 and footnote 5.

⁷ *Vide supra*, 247th meeting, para. 16.

⁸ *Yearbook of the International Law Commission, 1952*, vol. II.

international law; accordingly the Commission could only rely on articles 16 *et seq.*

60. Mr. CORDOVA, Special Rapporteur, reiterated his view that the Commission had always considered existing statelessness as coming within its terms of reference. It was true that, when it had begun the study of nationality including statelessness, it had not stated specifically that its study would be extended to present statelessness. Existing statelessness was, however, of greater consequence than future statelessness, and in all documents relating to the problem the Commission had studied both aspects without ever meeting any objections of a political nature. Moreover, the resolution of the Economic and Social Council spoke of statelessness in general. Though the study of existing statelessness was not perhaps exactly codification of international law, it did nevertheless lead to the formulation of new rules of conduct for States. By submitting the results of its deliberations in the form of a draft convention, the Commission would be contributing to the development of international law. Governments would be free to reject the draft or to abstain from all comment, and the Commission would then be able to consider its study of the problem at an end. As yet, the Commission was not warranted in reaching such a conclusion.

61. Mr. SPIROPOULOS also felt that the study of existing statelessness should not be discontinued. Perhaps the Commission's work relating to that particular question could not be described as development of international law in the strict sense of the term, but it contributed indirectly to its development. If the Commission thought it proper to continue the study of existing statelessness, it was entitled to do so.

62. The CHAIRMAN said that the Commission's statute did not provide for all eventualities; as Mr. Amado had said, it had to be interpreted liberally. The procedure provided for by article 17, paragraph 2, applied in the case of proposals or drafts submitted by organs of the United Nations. It could be extended to the matter under reference for it was the Economic and Social Council which had asked the Commission to study the question.

63. Mr. AMADO recalled that he had had a share in drafting the Commission's statute. Its article 15 specified that the expression "progressive development of international law" was used for convenience; in certain cases codification and development of international law were so inextricably bound up together that there was room for a very liberal interpretation.

64. Mr. SPIROPOULOS, replying to the Chairman, said that the procedure mentioned in article 16, which provided, *inter alia*, for the transmission of drafts to Governments, was the one which the Commission had followed as a general rule for five years; it was satisfactory in the present instance. The problem the Commission was studying did not strictly come within the scope of international law; it was rather concerned

with reconciling the provisions of municipal law relating to a particular question.

65. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the report on the Commission's sixth session should contain a passage along the following lines: "The Commission discussed the problem, came to the conclusion that it did not come strictly within its competence, but considered that it might be solved in conformity with [the articles adopted by the Commission]." The report would also state that the Commission considered it had completed its work relating to the particular topic.

The proposal was rejected by 6 votes to 4, with 2 abstentions.

66. Mr. LAUTERPACHT inquired whether the Special Rapporteur's proposal implied that the question of existing cases of statelessness would be on the agenda of the next session of the Commission.

67. Mr. CORDOVA, Special Rapporteur, said that would depend on the replies received from governments; in any case, the agenda for the next session had not yet been prepared.

68. Mr. SPIROPOULOS pointed out that if the Special Rapporteur's draft were adopted, the question would necessarily remain in abeyance and would have to be reconsidered the following year.

69. The CHAIRMAN called for a vote on the Special Rapporteur's proposal that the text of the articles adopted should be transmitted to Governments for study.

The proposal was adopted by 7 votes to 3, with 2 abstentions.

The meeting rose at 1 p.m.

250th MEETING

Friday, 18 June 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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)
(continued)

REPORT ON THE ELIMINATION OR REDUCTION OF PRESENT STATELESSNESS (A/CN.4/81) (continued)

MODE OF PRESENTATION OF THE ARTICLES (continued)

1. The CHAIRMAN asked the Commission how the draft articles on the reduction of present statelessness adopted by the Commission should be described.

2. Mr. CÓRDOVA, Special Rapporteur, suggested that the draft articles might be submitted as "proposals", as "a basis for discussion by Governments" or as "tentative proposals".

3. Mr. SCELLE preferred the formula: "remarks on the reduction of present statelessness submitted to governments for their consideration".

4. The CHAIRMAN agreed with Mr. François that the best solution would be: "proposals relating to the reduction of present statelessness". If that were agreed the Commission would be in a position to vote on the draft articles as a whole, provided agreement was reached with regard to the reservation made for the word "habitually" in paragraph 1 of article I which read: "The party in whose territory a stateless person habitually resides shall, on his application, grant him the legal status of 'protected person'."

RESUMED CONSIDERATION OF THE ARTICLES (resumed from the 249th meeting)

*Article I*¹

5. Mr. CÓRDOVA, Special Rapporteur, proposed that in paragraph 1 of article I the word "habitually" be

deleted and the words: "during a period of two years" inserted after the word: "resides". He had rejected the idea of a three-year period of residence laid down by the 1951 Convention relating to the status of refugees; he thought that the Commission might attempt to go further than the Convention. Mr. Pal and several other members were in favour of granting stateless persons the status of a protected person immediately. The proposal had met with a number of objections and it was in the light of those objections that he had finally suggested a period of two years.

6. Mr. AMADO thought the proposal for two years' residence unrealistic; the period was too short.

7. Mr. SCELLE, on the contrary, found the period of two years too long. What was the point of leaving the stateless person without a legal status for two years? If he had applied for the status of a protected subject, it could be assumed that he intended to remain in the country. He would not oppose a two-year period but was of the opinion that a six-month residence qualification would be ample.

8. Mr. FRANÇOIS suggested that the Commission should adopt the same period as that laid down by the 1951 convention relating to the status of refugees, which was three years.

9. Mr. CÓRDOVA, Special Rapporteur, said that Mr. Lauterpacht, for example, was in favour of fixing the residence period at five years. He (the Special Rapporteur) had proposed the idea of habitual residence in order precisely to avoid compelling the Governments to accept any fixed period; his proposal would leave Governments a certain margin for fixing the period of residence in accordance with their own requirements. Financial assets or property in the country, or marriage to a national of that country, should constitute sufficient evidence of the intention of the stateless person to remain in the country. He preferred to retain the idea of habitual residence, and had merely proposed the two-year period as a compromise solution.

10. Faris Bey el-KHOURI agreed with the Special Rapporteur. The word "habitually" should be retained, and paragraph 1 of article I adopted as it stood.

11. Mr. LAUTERPACHT drew attention to the fact that the status of a protected person was almost identical with that of a naturalized citizen; it differed from it in that it did not confer the right to vote or to sit in parliament. The Special Rapporteur's proposal of a two-year period of residence tended to give persons with the status of a protected person equal rights after two years with naturalized persons, who might have had to wait five or ten years for naturalization. The present proposal appeared to go further than the 1951 convention relating to the status of refugees in that it required Governments to waive, with respect to stateless persons, the conditions stipulated by their naturalization laws.

12. Mr. CÓRDOVA, Special Rapporteur, did not think it right to identify the status of a protected

¹ *Vide supra*, 248th meeting, paras. 1 and 43-58.

person with that of a naturalized citizen. Mr. Lauterpacht was forgetting that an alien applying for naturalization possessed a nationality, while the Commission's task was to eliminate statelessness. He agreed that it was undesirable to grant naturalization immediately, and for that reason had suggested, as a first step, the status of protected person. After two years' residence it would be clear whether the person intended to remain in the country or not.

13. Mr. PAL reminded the Commission that it was dealing with existing cases of statelessness and not with future cases. It would surely be wrong to work on the assumption that persons who were at present stateless had deliberately given up their nationality in the hope of obtaining more favourable terms under a convention which the Commission might or might not bring into being in some remote future.

14. Mr. GARCÍA-AMADOR believed that the essential point to be borne in mind with regard to article I was not the length of the stateless person's residence, but his intention to remain in the country. Residence might well be the result of forced circumstances and therefore to some extent an accident. If the Commission wished to grant a stateless person first the status of a protected person and then nationality, it would be necessary to know that the person applying for the status of protected person was intending to stay in the country. It was illogical to grant that status to a person who wished to reside abroad. He therefore proposed that the following phrase be added to the end of paragraph 1 of article I: "provided that such a person declares his intention of becoming a national of that party in accordance with article V of the Convention". Article V, he recalled, had already been adopted by the Commission without modification.²

15. Mr. SCELLE said that if Mr. García-Amador's proposal related merely to a declaration of intention to remain in the country he was prepared to support it, particularly as it might become possible to abolish the suggested two-year period of residence or at least to reduce it. He agreed that the period of residence provided no proof of the stateless person's intention to remain in the country.

16. Mr. PAL thought Mr. García-Amador's proposal would serve no useful purpose. There was nothing to prevent a stateless person who had made a declaration to the effect that he wished to remain in a country from changing his mind. Furthermore, if it was intended to grant him the status of protected person as soon as he applied for it, his application together with the obligations subsequently imposed upon him again made the declaration a useless formality.

17. Faris Bey el-KHOURI said that most stateless persons were anxious to revert to their original nationality; they were not interested in obtaining the nationality of the country in which they resided. It would therefore be wrong to oblige them to make a

declaration of intent to reside in the country, particularly as the grant of the status of protected person was a temporary measure. He repeated that States should only be obliged to grant stateless persons the status of protected person; they should be left free to determine the rights and obligations they wished subsequently to grant or impose upon them. If more precise and detailed obligations were imposed upon States, they would meet with considerable opposition.

18. Mr. AMADO thought that if the Commission accepted Mr. García-Amador's proposal, the granting of protection would become the object of a bargain between the State and the stateless person. Protection should be granted as an act of generosity. Mr. García-Amador had said that the reason underlying his proposal was that a number of countries were being used by stateless persons as stepping stones towards other countries. Inasmuch as that proposal introduced into the idea of protection the element of a bargain he would vote against it.

19. The CHAIRMAN said that four proposals had been made regarding paragraph 1 of article I:

- (1) That the word "habitually" be retained;
- (2) That a residence period of two years be substituted for the idea of habitual residence;
- (3) That a residence period of three years be substituted for the idea of habitual residence;
- (4) That the phrase: "provided that such person declares his intention of becoming a national of that party in accordance with article V of the Convention" be added at the end of paragraph 1 of article I.

He invited the Commission to vote on each of the amendments in turn.

Proposal 1 was rejected by 3 votes to 2, with 7 abstentions.

Proposal 2 was withdrawn by the Special Rapporteur.

Proposal 3 was rejected by 3 votes to 1, with 8 abstentions.

Proposal 4 was rejected by 5 votes to 1, with 6 abstentions.

20. Mr. SCELLE apologized to Mr. García-Amador for having first supported his proposal and then voted against it, but the arguments advanced by Mr. Amado had compelled him to change his opinion. He felt that the grant of protection should not be the object of a bargain and was also against the proposal of fixing any definite period of residence.

21. He questioned the view expressed by Faris Bey el-Khouri that stateless persons were always anxious to revert to their original nationality; in his opinion a great number of them were most anxious to abandon it.

22. Mr. CORDOVA, Special Rapporteur, explained that he had abstained from voting on the grounds that the application of a stateless person for the status of protected person and the duties subsequently imposed on him gave sufficient proof of his intention to remain

² *Vide supra*, 249th meeting, para. 13.

in the country. He would then be in a position to qualify for naturalization. He should not, however, be denied the possibility of changing his mind with regard to continued residence in the country.

23. The CHAIRMAN said that all the four proposals having been rejected or withdrawn, paragraph 1 of article I was adopted with two modifications: the word "habitually" was deleted and the word "person" substituted for the word "subject".

24. Mr. LAUTERPACHT inquired if, the word "habitually" having been deleted, the State would be obliged to grant the status of protected person even after one day's residence.

25. Mr. CORDOVA, Special Rapporteur, explained that the Commission had already voted on paragraph 1 of article I, which had been adopted in principle; a reservation had merely been made with regard to the word "habitually". Some members had expressed the desire that a definite period of residence should be included and he had proposed two years, a proposal which had since been rejected.

26. The CHAIRMAN agreed with the Special Rapporteur that paragraph 1 of article I had already been adopted in principle and invited the Commission to vote on the text of paragraph 1 of article I.

Paragraph 1 of article I was adopted by 7 votes to 1, with 4 abstentions.

27. The CHAIRMAN said that at a previous meeting³ the Commission had adopted article I, paragraph 2, without modification.

Article II

28. The CHAIRMAN recalled that article II had been adopted subject to the redrafting of the reference to political rights by the Drafting Committee.⁴

Article III

29. The CHAIRMAN said that article III had been adopted at a previous meeting.⁵

Article IV

30. Mr. CORDOVA, Special Rapporteur, proposed that the words "including political rights" should be deleted from article IV, as previously adopted,⁶ because certain categories of persons, such as minors, might not enjoy political rights while remaining full nationals.

It was so agreed.

³ *Vide supra*, 248th meeting, paras. 57 and 58.

⁴ *Vide supra*, 248th meeting, para. 104 and 249th meeting, para. 10.

⁵ *Vide supra*, 249th meeting, para. 11.

⁶ *Ibid.*, para. 12.

Article V

31. The CHAIRMAN said that article V had been adopted without modification.⁷

Article VI

32. The CHAIRMAN recalled that article VI had been deleted.⁸

Article VII

33. The CHAIRMAN pointed out that article VII had been adopted with the amendment that in the last line of paragraph 2 the words "...or the status of a protected person" should be inserted after the words "...denied nationality".⁹

Consideration of a new article VI

34. Mr. CORDOVA, Special Rapporteur, proposed a new article VI which provided that the status of protected person of a contracting party would end if the person concerned acquired the nationality of the host country under article V, or the nationality of some other State, or alternatively obtained the status of protected person elsewhere. The new article could be numbered VI because it came logically after article V which concerned the naturalization of stateless persons. The text would be along the following lines:

"Article VI

"The status of 'protected person' of a party shall not be lost unless:

- (a) The person concerned acquires the nationality of the party under article V or that of another State; or
- (b) That person acquires the status of protected person of another party under article 1."

35. The CHAIRMAN inquired whether such an explicit provision was indispensable.

36. Mr. CORDOVA, Special Rapporteur, said it had to be made clear that once a stateless person had been granted protection, he could no longer be deprived of it except upon his obtaining full nationality, or again, upon his changing over from the protection of one State to that of another.

37. Mr. FRANÇOIS said that such an article was indeed essential. If the protected person became naturalized elsewhere it was not right that he should retain also the protection of the original host country.

38. Mr. SCELLE said that loss of protection on the acquisition of a nationality, or upon being granted the protection of another State, was probably automatic;

⁷ *Ibid.*, para. 13.

⁸ *Ibid.*, paras. 14-17.

⁹ *Ibid.*, paras. 18, 43 and 44.

it was, however, preferable to make the position clear. Besides, it was important to lay down that when a stateless person moved from the territory of one contracting party to that of another, the second host country had to grant him protection in lieu of the first.

39. Mr. AMADO said that, as article I made the grant of the status of protected person conditional upon residence in the host country, it followed that, upon giving up residence in that country, the person concerned could no longer claim protection.

40. Mr. SPIROPOULOS gave the example of a stateless person residing in a country and obtaining that country's protection; the individual in question would then go to another country and settle there permanently. It would follow that he had lost his residence in the original host country. It did not follow, however, that he would have lost the status of protected person of the original host country, because article I did not require continuous residence as a condition of protection. The position therefore was that he would continue to be protected by the original host country while residing in the territory of the other State. The proposed article VI would dispel any doubts on that point.

41. It was naturally open to question whether a stateless person granted protection by a host country should continue to be eligible for the benefit of that protection if he went to live in another country for a very long period—say, ten years—without acquiring the nationality of the second host country or having any intention to do so. Was protection to continue indefinitely in such a case?

42. Finally, he wondered whether provision might not be made for the withdrawal of protection if the protected person did not fulfil his military obligations.

43. Mr. AMADO still believed the new article to be unnecessary. Should the protected person go to another country and apply for naturalization there, or again, request the protection of the new host country, there would be occasion for the scrutiny of his personal documents and he would doubtless have to renounce his earlier protection in order to obtain a new one or the nationality of the country where he finally settled.

44. Mr. SCALLE said that the new article VI was essential in order to deal with the problem of diplomatic protection, which was a delicate political question even where actual nationals were concerned. It was best therefore that an article of the type suggested by Mr. Córdova should be included in the draft in order to define clearly under whose diplomatic protection the formerly stateless person would be at all material times.

45. Mr. HSU wished to know whether prolonged residence abroad would entail loss of protection.

46. The CHAIRMAN said that, as he construed Mr. Córdova's proposal, the answer was in the negative.

47. Mr. CORDOVA, Special Rapporteur, said it had been the guiding principle of the Commission that no person should be deprived of his nationality unless he

acquired another one. It was necessary to adhere to that principle as closely as possible if statelessness was going to be reduced. A similar principle was imperative in the case of protection; no person should be deprived of the status of a protected person of one country without acquiring the protection of another. Moreover, the grant of protection should in no way prevent the formerly stateless person from travelling; it could not signify enforced residence in the protecting country as though the protected person were a prisoner there.

48. Mr. HSU wondered whether it was fair to expect a country to go on protecting indefinitely a person who had been out of its territory for many years. It should be remembered that the Commission was at the moment discussing the reduction of statelessness and not its elimination and therefore should not ask too much of States.

49. Mr. SALAMANCA said that, as he construed the proposed article VI, a stateless person who had been granted protection by a contracting party would thereupon be able to travel all over the world on a passport issued by the protecting State until he found a country where he decided to get naturalized.

50. Mr. SPIROPOULOS said that it was not necessary to go into excessive detail. The Commission was simply adopting a set of general principles for submission to the General Assembly and to the governments.

51. Mr. CORDOVA, Special Rapporteur, said that he had been won over by the arguments in favour of providing for loss of protection in the case of a protected person who stayed too long away from the protecting country. He therefore suggested a new text of article VI:

“The status of ‘protected person’ of a Party shall not be lost unless:

- (a) That person acquires the nationality of the party under article V or that of another State; or
- (b) Acquires the status of ‘protected person’ of another party under article I; or
- (c) Resides abroad for a period of five years without the permission of the protecting party.”

He hoped that the new clause (c) would satisfy all the members of the Commission.

52. The CHAIRMAN put the Special Rapporteur's draft article VI to the vote.

Article VI was approved by 6 votes to none, with 6 abstentions.

53. The CHAIRMAN put to the vote the entire text of the Convention on the Reduction of Present Statelessness as finally drafted by the Special Rapporteur.

The text of the draft convention was approved by 5 votes to none, with 7 abstentions.

54. Mr. LAUTERPACHT explained his abstention. The proposals just voted by the Commission would, if adopted, amount almost to the complete elimination

of existing statelessness by the naturalization of persons at present stateless or by the grant of a status of protected person which was to all intents and purposes equivalent to that of nationals of the host country, the only difference being their exclusion from political rights.

55. He thought it most unlikely that the proposals just approved by the Commission would be adopted by Governments. By adopting what he regarded as sweeping proposals, the Commission had not rendered any great service to stateless persons. It would have been preferable for the Commission to adopt a less ambitious draft calculated to encounter less opposition and hence serve a more practical purpose.

56. He added, however, that he had abstained from voting, instead of casting an adverse vote, for four main reasons. Firstly, he was in full accord with the general humanitarian aims pursued by the proposed articles. Secondly, those articles gave effect to the legal principles involved in the abolition of statelessness. Thirdly, it was his view that States could accept the principles approved by the Commission without sacrificing any really vital interest—although he had serious doubts as to whether Governments would be prepared to act accordingly. Fourthly, the proposals which the Commission had adopted represented the considered opinion of the majority of its members. So when the time came for the approval of the final report embodying the proposals just approved, he intended to vote for it.

57. Faris Bey el-KHOURI still thought that it should be left to the States themselves to determine the rights and duties that would devolve upon those to whom they were to grant the status of protected person. Unless that were done, the draft convention would not be accepted by any Government. That was why he had abstained.

58. The CHAIRMAN said that he could not fully endorse the sweeping proposals just adopted, and hence had abstained.

59. Mr. GARCÍA-AMADOR shared Mr. Lauterpacht's views: although he had abstained from voting on the draft convention, he would reconsider his position when the Commission's report was put to the vote.

60. Mr. AMADO said he had abstained because the convention was too good to be practicable. It did not seem to him to have any prospects of being translated into reality.

APPOINTMENT OF DRAFTING COMMITTEE

61. The CHAIRMAN said that the Drafting Committee which would prepare the final text would be composed of the Special Rapporteur, Mr. Lauterpacht and Mr. Scelle. Mr. François, in his capacity of General Rapporteur, was an *ex-officio* member of the Drafting Committee.¹⁰

DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (A/2456, A/CN.4/82 and Add. 1, 2, 3, 4, and 5) (resumed from the 245th meeting)

62. The CHAIRMAN announced that the Commission had yet to discuss the comments by the Government of Canada (A/CN.4/82/Add.5).

63. Mr. LAUTERPACHT said that the Commission had not considered separately the comments by each individual country but rather had examined those that appeared relevant to its discussions in connexion with the various articles as the latter were examined one by one. There was no reason to deal in a different manner with the Canadian comments, valuable though they were, which had been received too late to be discussed together with those of other Governments. It was for the Special Rapporteur to consider the Canadian comments and examine whether they warranted any alteration to the texts adopted.

64. The CHAIRMAN said that if there were no remarks on the part of members of the Commission concerning the Canadian comments, the Commission could deal with the outstanding points left over from previous discussions of the conventions for the elimination and reduction of future statelessness.

Article 1 (resumed from the 245th meeting)

65. Mr. CORDOVA, Special Rapporteur, said that, in the light of comments made by Governments, he had redrafted article 1, paragraphs 2 and 3, of the draft Convention on the Reduction of Future Statelessness:

“2. The national law of the party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provided that, *on attaining that age, the person does not opt for the nationality he would have acquired at birth, had paragraph 1 of this article not been applied.*”

“3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents, *if such parent has the nationality of one of the Parties and provided further that the person complies with the requirement of residence set forth in paragraph 2 of this article.* The nationality of the father shall prevail over that of the mother *unless otherwise provided by the law of the party.*”

66. Article 1 of the draft Convention on the Elimination of Future Statelessness remained unaltered and consisted of a single paragraph reading:

“A child who would otherwise be stateless shall acquire at birth the nationality of the party in whose territory it is born.”

67. An identical clause formed paragraph 1 of article 1 of the draft Convention on the Reduction of Future Statelessness.

¹⁰ See also below, para. 76.

68. The redraft had been discussed in the course of an earlier meeting¹¹ of the Commission and certain alterations had been informally agreed upon by those members of the Commission who had been present, but in the absence of a quorum no official vote had been taken. It was now necessary to approve formally the texts in question of article 1, paragraphs 2 and 3, of the Convention on Reduction of Future Statelessness reading (as informally agreed upon):

“2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provided that *on attaining that age he does not effectively opt for another nationality.*”

“3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents, if such parent has the nationality of one of the parties and provided further that the person complies with the requirements of residence set forth in paragraph 2 of this article. The nationality of the father shall prevail over that of the mother *unless, in case of a child born out of wedlock, the national legislation of the mother gives to the child her nationality.*”

69. He drew particular attention to the change made in the last sentence of paragraph 3. Mr. François had pointed out that it would have been ambiguous to say that “the nationality of the father shall prevail over that of the mother unless otherwise provided by the law of the party”. It was not clear which contracting party the provision referred to, whether it was the State to which the father belonged or that of the mother. The new text made it clear that the provision only applied to a child born out of wedlock and concerned the case in which the national legislation of the mother gave such a child her nationality exclusively. The new text met Mr. François’ objection while at the same time allowing for the Scandinavian practice of invariably granting the nationality of the mother to a child born out of wedlock.

70. Mr. PAL said that he was not fully satisfied with the wording of article 1, paragraphs 2 and 3. Paragraph 2 made it possible for a State to make preservation of its nationality dependent on a person being normally resident in its territory until the age of eighteen and further on the condition that on attaining that age the person concerned did not effectively opt for another nationality. Paragraph 3 stated that a person who, owing to the operation of paragraph 2, did not retain at eighteen the nationality of his State of birth, would acquire the nationality of one of his parents. It seemed to him that if the person concerned could effectively opt at eighteen for a nationality other than that of his place of birth, that person would no longer be “otherwise stateless” and the convention did not apply to him. Moreover, if a person had a right to opt for a given

nationality, the eventuality provided for in paragraph 3 for granting him the nationality of one of his parents would never arise.

71. Mr. LAUTERPACHT suggested that it might be advisable to subdivide paragraph 2 so as to lay down, firstly, that a State could make the preservation of its nationality dependent upon a person being normally resident in its territory until the age of eighteen; and secondly, that the person concerned was not obliged to accept the nationality of his place of birth if he could effectively opt for another nationality.

72. Mr. CORDOVA, Special Rapporteur, said that the aim of article 1 of the Convention on Elimination of Future Statelessness, which corresponded to article 1, paragraph 1, of the Convention on the Reduction of Future Statelessness, was to grant a nationality *jure soli* to all so that no person would remain stateless. However, the Commission had considered the position of a person who had *jure sanguinis* a nationality other than that of his place of birth, and some allowance had been made for that contingency. The result had been the introduction into the Convention on the Reduction of Future Statelessness of paragraphs 2 and 3 of article 1.

73. Mr. LAUTERPACHT gave the example of a child born in State “A”: article 1, paragraph 1, made him a national of State “A”. While he was still a minor his parents became naturalized in another State “B”; the minor then had a right to opt for the nationality of State “B” and it was therefore necessary to provide for that eventually by means of the final provision of article 1, paragraph 2.

74. Mr. PAL said that the whole convention only applied, as stated in its article 1, to persons who would otherwise be stateless. A person entitled under existing laws to a nationality because his parents had acquired it did not come within the scope of the convention at all.

75. Mr. CORDOVA, Special Rapporteur, said that, by the operation of article 1, the nationality of his place of birth was conferred *jure soli* upon a child who was not entitled to any other nationality because he had been born in a *jus sanguinis* country. The case suggested by Mr. Lauterpacht did not seem to him likely to occur in practice; if a child’s parents were naturalized, the child would benefit from that naturalization—in which case he was not “otherwise stateless”. In the rare instances in which a child of less than eighteen did not benefit from the naturalization of his parents, article 1, paragraph 1, would give him the nationality of his place of birth.

76. The CHAIRMAN said that the point should be referred to the Drafting Committee. He announced that, upon the proposal of Mr. Lauterpacht, Mr. Pal had been co-opted to the Drafting Committee.

77. The CHAIRMAN then called for a vote on article 1 of the two draft conventions.

Article 1 of the draft Convention on the Elimination

¹¹ *Vide supra*, 245th meeting, paras. 22-41.

of *Future Statelessness (A/2456)* was adopted unanimously without change.

Article 1, paragraph 1, of the draft *Convention on the Reduction of Future Statelessness (A/2456)* was adopted unanimously.

Article 1, paragraphs 2 and 3, of the draft *Convention on the Reduction of Future Statelessness*, as informally agreed upon by the members of the Commission,¹² were adopted unanimously.

Articles 2 and 3

(resumed from the 245th meeting)

78. The CHAIRMAN then called for a vote on articles 2 and 3 of the drafts as originally proposed for both conventions (A/2456).

Articles 2 and 3 were adopted without alteration.

Article 4

(resumed from the 243rd meeting)

79. Mr. CORDOVA, Special Rapporteur, announced that article 4 of both conventions (A/2456) had been altered so that the last sentence reading "The nationality of the father prevailing over that of the mother" would be supplemented by the phrase "unless, in case of a child born out of wedlock, the national legislation of the mother gives to the child her nationality".

80. The CHAIRMAN called for a vote on article 4.

The text of article 4, as amended, of both conventions was approved.

Article 5

(resumed from the 243rd meeting)

81. The CHAIRMAN then called for a vote on article 5 of both conventions (A/2456).

Article 5 was approved unchanged.

Article 6

(resumed from the 245th meeting)

82. Mr. CORDOVA, Special Rapporteur, announced that no changes had been suggested in respect of article 6, paragraphs 1 and 2, of both draft conventions (A/2456).

83. With regard to paragraph 3 of the draft *Convention on the Reduction of Future Statelessness*, however, a new text had been prepared which, while protecting natural-born citizens from deprivation of nationality on the ground of departure, stay abroad, or failure to register, yet empowered States to withdraw the benefit of their nationality from naturalized persons on the said grounds. The amended text now read:

"3. *Born nationals* 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. *Naturalized nationals* may lose their nationality on the ground of staying in their country of origin for the length of time prescribed by the law of the Party which granted their naturalization."

84. Mr. HSU suggested the term "natural-born nationals" instead of "born nationals", because the former term was in common use.

85. Mr. LAUTERPACHT said, with reference to the first sentence of paragraph 3, that it did not seem reasonable to him to compel a State to continue to recognize as a national even a natural-born person who stayed away from his country of origin for a very long term and even refused to comply with the minor formality of registering at a consulate.

86. With regard to naturalized persons who stayed away from the country of their adoption, it seemed to him that there should be no distinction between a naturalized person returning to his country of origin and his settling permanently in the territory of a third State.

87. Mr. FRANÇOIS stressed the difference between the case of a naturalized person returning to his country of origin and that of one going to another country. If a German who had become a naturalized American returned to Germany, it was reasonable to assume that he still felt a German; but if he went to live in Holland, there appeared to be no reason why he should not continue to be considered as an American. Besides, in practice, experience had shown that the most serious difficulty arising in those cases was the problem of a person returning to his country of origin and claiming there the protection of the country where he had become naturalized.

88. Mr. CORDOVA, Special Rapporteur, said that in the draft *Convention on the Elimination of Future Statelessness*, the Commission had to exclude all possibility of deprivation of nationality on the ground of departure or stay abroad, whether in the case of naturalized persons or of natural-born nationals. But in so far as the *Convention on the Reduction of Future Statelessness* was concerned, the aim was to limit rather than to abolish altogether cases of statelessness. The comments by Governments had shown that the latter were anxious to reserve the right to deprive naturalized persons of their nationality if they severed their connexion with their country of adoption.

89. Mr. LAUTERPACHT still believed that even with regard to a natural-born national who stayed away from his country of origin for a very long period without even going to the trouble of registering, a State could not be compelled to maintain him in his nationality. He therefore proposed an amendment to article 6, paragraph 3, so that it would read: "3. Persons shall not lose their nationality so as to become stateless on the ground of departure, stay abroad, or any other similar ground, provided that they register or make act signifying their intention to retain their nationality."

90. Mr. CORDOVA, Special Rapporteur, said that it

¹² *Vide supra*, para 68.

was quite illogical for the Commission, after refusing to admit that reason justified deprivation of nationality, to go on to accept such a serious consequence for the neglect of the minor formality of registration.

91. Mr. PAL said that, as he construed article 6, paragraph 3, the intention was to place natural-born and naturalized citizens on exactly the same footing except for the possibility of deprivation of nationality in the case of a naturalized person returning to his country of origin. If the suggestion made by Mr. Lauterpacht were adopted, it would be necessary to make the first sentence of article 6, paragraph 3, common to both natural-born and naturalized citizens. The final sentence would only apply to naturalized persons returning to their country of origin.

92. Mr. FRANÇOIS said that in the Netherlands a statutory provision existed for depriving Netherlands nationals of nationality if they stayed away from their country for over ten years without registering. The provision in question had led to much unnecessary hardship and injustice; so much so that recently it was made applicable only to persons of Netherlands origin born outside the kingdom. Persons born in Netherlands territory were no longer under a duty to register every ten years. Even so, the provision had proved unfortunate in its practical effects; many people had been deprived of their nationality through inadvertence, while others, who had no real links with the Netherlands, were extremely careful to register every ten years so as not to lose the benefit of their nationality. He could safely say that the opinion of responsible circles in his country would be in favour of an international convention laying down that nationality should not be lost through prolonged stay abroad.

93. The CHAIRMAN said that a very similar situation had arisen in Sweden. Formerly, Swedish nationals who lived abroad for over ten years without registering at Swedish consulates were deprived of their nationality. In practice, many persons had omitted to satisfy the formality through inadvertence or ignorance and had consequently lost their nationality and had had to apply for its restoration. The provision in question had caused so much hardship that it had finally been repealed.

94. Mr. LAUTERPACHT said he had been impressed by the remarks made by the foregoing speakers on the practical experience of their own countries. The laws of the United Kingdom contained some provision for remedying the situation where the omission to register was due to inadvertence. However, in view of what had been said concerning the purely nominal character of registration he could not insist on his view.

95. The CHAIRMAN then called for a vote on the principle of the revised paragraph 3 of article 6 of the draft Convention on the Reduction of Future Statelessness.

The principle of paragraph 3 was adopted by 8 votes to 1, with 1 abstention.

96. The CHAIRMAN announced that the Drafting Committee would prepare a final draft of article 6 as approved in principle by the Commission.

The meeting rose at 1 p.m.

251st MEETING

Monday, 21 June 1954, at 3 p.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

Nationality, including statelessness (item 5 of the agenda) (A/2456, A/CN.4/82 and Add. 1, 2, 3, 4 and 5) (continued)

DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (continued)

1. The CHAIRMAN invited debate on the Drafting Committee's revised articles 6 to 10 of the two draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future Statelessness (A/2456). He recalled that the Commission had not taken a final decision concerning those articles at its 245th meeting.

Article 6 (continued)

2. Mr. CÓRDOVA, Special Rapporteur, said that the members of the Commission had not raised any objection to article 6, paragraph 3, of the draft Convention on the Reduction of Future Statelessness as proposed by him, reading:

“3. Natural-born nationals shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any similar ground. Naturalized nationals may lose their nationality on the ground of staying in their country of origin for the length of time prescribed by the law of the Party which granted their naturalization.”

The paragraph as drafted above was approved and article 6 as amended was adopted.

3. Mr. ZOUREK said he opposed article 6 because it was based on an absolutely one-sided conception of nationality.

Article 7 (resumed from the 245th meeting)

Paragraph 1

4. Mr. CORDOVA, Special Rapporteur, said that, in their comments, several Governments had expressed the desire to retain the right to deprive their nationals of their nationality in cases of treason or desertion. At its 245th meeting,¹ however, the Commission had provisionally decided not to include in article 7 the clause proposed by him which provided for deprivation of nationality for those two reasons. He still believed that such a clause should be included. The Commission had agreed that a State should be entitled to deprive naturalized nationals of nationality on the ground of their staying too long in their country of origin. Hence it would be illogical not to admit deprivation of nationality on the ground of treason or desertion, at least so far as naturalized persons were concerned, and perhaps even in the case of natural-born nationals.

5. Mr. LAUTERPACHT said the Commission had already decided the substance of the question at its 245th meeting.

6. Mr. CORDOVA, Special Rapporteur, said that at that meeting the Commission had not taken a final decision.

7. Faris Bey el-KHOURI said that the Special Rapporteur had agreed not to insert the clause under reference. There was no internationally recognized definition of treason. As for desertion, it could in principle only be committed by nationals.

8. Mr. ZOUREK said that the existing draft of article (A/2456) was unrealistic and should be revised. Sometimes a person severed all links with his country and refused to comply with his obligations as a citizen. Accordingly he proposed that article 7 should be amended so as to provide for deprivation of nationality in cases of treason and desertion.

Mr. Zourek's proposal was rejected, and article 7, paragraph 1, as contained in document A/2456 was approved, by 5 votes to 1, with 7 abstentions.

¹ *Vide supra*, 245th meeting, paras. 54-60.

Paragraph 2

9. Mr. CORDOVA, Special Rapporteur, introduced the new draft of article 7, paragraph 2, amended in the light of the comments made by several Governments:

“2. In the case to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which will always provide for recourse to a judicial authority.”

10. Mr. LAUTERPACHT proposed the addition of the words: “in addition to any other procedure” after the words “will always provide”.

11. Mr. CORDOVA, Special Rapporteur, said that his draft appeared to him to cover all eventualities.

12. Mr. LAUTERPACHT proposed that it should be left to the Drafting Committee to prepare the final draft of the paragraph in question.

It was so agreed.

Article 8 (resumed from the 245th meeting)

13. Mr. CORDOVA, Special Rapporteur, said that the Commission had provisionally decided² not to include a provision forbidding States to deprive their nationals of nationality on racial, ethnic, religious or political grounds only in cases where such a measure would result in the person concerned becoming stateless. For that reason, the draft as appearing in document A/2456 had been left unaltered.

14. Mr. ZOUREK agreed with the idea expressed in article 8 but thought it should not be inserted because in view of the other provisions of the convention it was superfluous. In reply to a question by the Chairman he said that if other members did not ask for a formal vote, he would not press for one.

Article 8 (A/2456) was adopted.

Article 9 (resumed from the 244th meeting)³

15. Mr. ZOUREK said he approved the adoption of article 9 for the reasons explained at the previous session.

Article 9 (A/2456) was adopted.

Article 10 (resumed from the 245th meeting)

16. Mr. CORDOVA, Special Rapporteur, recalled that the Commission had agreed earlier⁴ to delete paragraph 4 of the article and to insert in the middle of paragraph 2 of article 10 of both conventions, after the words “to decide”, the words “any dispute between them concerning the interpretation or application of this convention”. That amendment was intended to broaden the competence of the proposed tribunal.

² *Vide supra*, 245th meeting, paras. 61-63.

³ *Vide supra*, 244th meeting, para. 11.

⁴ *Vide supra*, 245 meeting, para. 2.

17. Mr. ZOUREK said that already at the previous session he had expressed doubt as to the possibility of setting up new bodies within the framework of the United Nations. He drew attention to the Belgian Government's comment that the establishment of the tribunal was undesirable.⁵ Such provisions did not really relate to conflicts of law in the matter of nationality; in practice they would imply a partial surrender of State sovereignty and would be inconsistent with the fundamental principles of existing international law. He therefore proposed that article 10 should be omitted altogether.

18. Mr. CORDOVA, Special Rapporteur, pointed out that the Commission was only preparing draft conventions which the General Assembly and subsequently the States would be free to adopt or reject; it was wrong to speak of inconsistency with international law.

19. The CHAIRMAN put Mr. Zourek's proposal to the vote.

The proposal having been rejected by 11 votes to 1, with 1 abstention, article 10 was adopted as drafted in document A/2456 subject to the amendment referred to by the Special Rapporteur.

Final clauses (resumed from the 245th meeting)

20. The CHAIRMAN invited comment on the final clauses to the two conventions as drafted by the special sub-committee.

21. At the Special Rapporteur's request, Mr. LAUTERPACHT explained a number of points with reference to these drafts. The first article of both drafts read:

"Accession

"This convention, after having been approved by the General Assembly, shall be open to accession by any State in accordance with the requirements of its constitutional law and practice."

22. The article called for two comments. Firstly, the General Assembly's approval was stipulated so that the text could be regarded as established. That would dispense with the necessity of signature or some other formal means of establishing the text. It was not necessary to interpose signature followed by ratification. Secondly, the procedure contemplated for creating the obligations laid down in the convention was accession. Accession, in the generally accepted sense of the term, was equivalent to the ratification of a signed convention. As accession did not in municipal law necessarily require ratification, the Sub-Committee had felt that it would be the simplest method of accepting the obligations provided for in the drafts.

23. Mr. GARCÍA-AMADOR took issue with Mr. Lauterpacht's interpretation of the term "accession". In his opinion, accession, in international law, required

ratification. In order to simplify matters the Commission might propose the procedure of acceptance; the latter procedure, which had been virtually unknown before the establishment of the United Nations, was much simpler than ratification and had the same practical effect.

24. Mr. LIANG, Secretary to the Commission, agreed that in United Nations terminology accession not only did not exclude subsequent ratification, but actually required it. The 1946 convention on the privileges and immunities of the United Nations had been opened to accession by Members, subject to ratification.

25. Mr. LAUTERPACHT had no serious objection to the procedure of acceptance, which had indeed once been popular in the United Nations and which required no ratification. Nevertheless, the term had not a generally accepted connotation and appeared to be falling into disuse.

26. Mr. ZOUREK expressed surprise that the Sub-Committee should have considered such an uncommon procedure. It was true that in the past the United Nations had employed it in exceptional cases; the modern tendency, however, was to revert to the traditional practice of signature followed by ratification or, after a certain period, accession to a treaty already in force. That had been the practice followed in the case of the 1948 convention on the prevention and punishment of the crime of genocide and the 1952 convention on the political rights of women.

27. Mr. GARCÍA-AMADOR did not think that the procedure of acceptance was falling into disuse. It was true that in 1948 the Sixth Committee had on one particular occasion not employed it; but at the eighth session of the General Assembly the United Kingdom delegation had submitted a draft protocol in which the term was revived.

28. Mr. LAUTERPACHT thought that both terms might be used: "accession or acceptance".

29. Faris Bey el-KHOURI pointed out that accession should be preceded by the formalities provided for by the constitutional practice of States, which meant that it could only take place after ratification. It would therefore be necessary to say "This convention shall be open to signature..."

30. Mr. PAL failed to see any reason for saying in the proposed final clause, article 10, "after having been approved by the General Assembly". Article 10 was one of the final clauses of a draft convention; when the latter was adopted by States, it became a clause in their convention. It was difficult to see why it should be necessary for States to provide for the approval by the General Assembly. Even assuming that the States would not accept the draft unless and until it was approved by the General Assembly, it would follow that they would wait for such approval before signing the draft. In forwarding the draft to the States, the General Assembly might perhaps assure them of its approval thereof. But it would in no circumstances be necessary or even

⁵ See annex to the report of the Commission on the work of its sixth session, *Yearbook of the International Law Commission, 1954*, vol. II.

justified to put the words in question into the convention itself.

31. In answer to Faris Bey el-Khourri and Mr. Zourek, he (Mr. PAL) pointed out again that under the procedure which he proposed the intermediate stage of a signature, which was not binding, would be dispensed with. The procedure had been employed on many occasions and offered definite practical advantages.

32. Mr. LIANG, Secretary to the Commission, pointed out that article 23, paragraph 1(c), of the Commission's Statute did not mention "approval". The General Assembly's approval of a report by the Sixth Committee containing a draft convention did not, *ipso facto*, give rise to any obligations on the part of Member States. It was a frequent occurrence in the practice of the United Nations for a draft convention adopted by the General Assembly to be opened for signature and ratification. As Mr. Zourek had mentioned, that had been done in the case of the convention on the prevention and punishment of the crime of genocide. The Commission had to report to the General Assembly and was not entitled to invite Governments to adopt its drafts.

33. Mr. SCELLE said that the General Assembly's approval would indeed lend more weight to the draft conventions and would be calculated to induce Governments to approve, accept or accede to them; he regarded the three terms as synonymous. The question was whether it was the Commission's intention to give the General Assembly broader legislative powers. He considered that the most important part of the first of the draft final clauses was the last phrase: it was indeed essential that States should be legally bound.

34. Mr. CORDOVA, Special Rapporteur, said it was important to have the General Assembly's approval; the Commission's members were experts, not government representatives, and although a representative's vote did not commit his Government, the Assembly's approval was yet a useful diplomatic method of transmitting the drafts to Governments.

35. Mr. HSU supported Mr. Lauterpacht and Mr. Córdova in their efforts to simplify the procedure. Still, the General Assembly's approval could not create a convention; the drafts approved would remain drafts, which the Assembly could recommend to Governments for adoption.

36. Mr. AMADO pointed out that multilateral negotiations within the United Nations had merely replaced direct negotiations among States. It would, however, be unthinkable that the General Assembly's approval should be construed to mean that States did not have to express their opinions.

37. Mr. PAL said that, after reading articles XI, XII and XIII of the Convention on the prevention and punishment of the crime of genocide he had been confirmed in his view that the words "having being approved by the General Assembly", with or without the initial word "after", were out of place in the draft conventions and should therefore be dropped from the

final clause in question. He therefore proposed that those words be deleted.

38. Mr. LAUTERPACHT did not agree with Mr. Pal. It could not be argued that the General Assembly's approval could give rise to obligations on the part of States, but such an approval had the advantage of establishing a final text and dispensed with the traditional procedure of signature.

39. Mr. LIANG, Secretary to the Commission, said that if the General Assembly adopted the Commission's draft, it would certainly say so in the preamble to the relevant resolution. It was therefore unnecessary to refer to adoption by the Assembly again in the final clauses of the convention itself.

40. With regard to the requirement of signature, he recalled that, in certain cases, the General Assembly had wished to treat a convention as a particularly solemn instrument. That was why, in the case of the convention on the prevention and punishment of the crime of genocide, the Assembly had provided for both signature and ratification. He agreed, however, with Mr. Lauterpacht that signature was only one of several possible procedures.

41. Mr. SCELLE said that the point to be decided was whether the General Assembly was to be asked merely to take note of the Commission's work or else to endorse the draft conventions. The term "approval" was ambiguous.

42. Replying to Mr. Lauterpacht, he pointed out that the question whether the signing of a convention definitively committed the signatory State was governed by the constitutional law of that State. As a rule, signature did not constitute a final commitment.

43. Mr. CORDOVA, Special Rapporteur, agreed that the Commission could not submit proposals direct to Governments; according to its Statute, the Commission was absolutely bound to go through the General Assembly. Even if the Assembly were to reject the draft conventions, it would still be possible for Governments to accept them. It would perhaps be unwise to make the very existence of the conventions dependent upon a decision of the General Assembly.

44. Mr. SPIROPOULOS said that the Commission should only deal with substance and not insert any final clauses. The Commission had followed that course in the past, for example, in the case of the draft convention on arbitral procedure. He drew attention to the provisions of article 23, paragraph 1(c), and article 16(j) of the Commission's Statute.

45. Mr. ZOUREK agreed with Mr. Spiropoulos that it would be premature to insert final clauses.

46. Mr. LAUTERPACHT said that the proposal made by Mr. Spiropoulos and Mr. Zourek was tantamount to the reversal of an earlier decision and would require a two-thirds majority.

47. Mr. SPIROPOULOS explained that he would simply vote against the Sub-Committee's text.

48. The CHAIRMAN then called for a vote on Mr. Pal's amendment to the effect that the words "after having been approved by the General Assembly" should be deleted.

The amendment was rejected by 6 votes to 3, with 4 abstentions.

49. Faris Bey el-KHOURI suggested that the words "open to accession" should be replaced by "open to signature".

The amendment was adopted by 6 votes to 3, with 4 abstentions.

50. The CHAIRMAN said that Mr. Lauterpacht's amendment to the effect that the words "or acceptance" should be inserted accordingly no longer applied.

51. Mr. SPIROPOULOS said that if the Commission wished to make the final clauses applicable in practice, the whole text of those clauses would have to be revised.

52. Mr. ZOUREK proposed that the words "and to ratification" should be inserted after the word "signature".

53. Mr. CORDOVA, Special Rapporteur, supported Mr. Zourek's proposal.

54. Faris Bey el-KHOURI said that Article 110 of the Charter might be a suitable precedent for the clause under discussion.

55. The CHAIRMAN put Mr. Zourek's amendment to the vote.

The amendment was adopted by 7 votes to 1, with 3 abstentions.

56. The CHAIRMAN put to the vote the first of the final clauses, as amended.

The draft clause was rejected by 4 votes to 4, with 5 abstentions.

57. Mr. SPIROPOULOS explained his adverse vote, saying that it did not mean that he opposed the procedure of signature and ratification. The General Assembly would be free to transmit the draft conventions to Member States.

58. The CHAIRMAN asked if the Commission wished to discuss the other final clauses.

59. Mr. LAUTERPACHT said that the Commission had decided to include the final clauses because it had considered them essential. Without final clauses, the draft might have a lesser chance of being adopted by the General Assembly. By rejecting the first of the sub-committee's draft final clauses the Commission had merely indicated its intention to redraft it. Hence a new sub-committee should be appointed to redraft the text.

60. Faris Bey el-KHOURI said that the sub-committee should prepare two distinct articles providing separately for signature and ratification of the conventions.

61. Mr. SPIROPOULOS said that the sub-committee should simply reproduce the relevant clauses of the convention on the prevention and punishment of the crime of genocide.

62. The CHAIRMAN proposed that the sub-committee should consist of Mr. François, Mr. Córdova and himself.

It was so agreed.

The meeting rose at 5.55 p.m.

252nd MEETING

Tuesday, 22 June 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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

Nationality, including statelessness (item 5 of the agenda)
A/CN.4/83, A/CN.4/84) (continued)

MULTIPLE NATIONALITY

1. The CHAIRMAN invited debate on the Special Rapporteur's report on multiple nationality (A/CN.4/83).¹ He asked what action the Commission proposed to take with regard to it.

2. Mr. CORDOVA, Special Rapporteur, said his personal views were set forth in the introduction to his report on multiple nationality. Further information on the subject was contained in the Secretariat's survey of multiple nationality (A/CN.4/84),¹ the former Special

¹ In *Yearbook of the International Law Commission, 1954*, vol. II.

Rapporteur's report (A/CN.4/50)² and in the *Study of Statelessness*.³

3. Mr. FRANÇOIS paid a tribute to the Special Rapporteur for his painstaking research. The report was a valuable document to which, however, he wished to make certain reservations.

4. It should be borne in mind with regard to the system proposed by the Special Rapporteur that the attribution of a nationality to a stateless person was a very different matter from that of depriving of a nationality a person possessing two or more nationalities; in the latter case it would be necessary to determine the nationality of which he should be deprived. The Special Rapporteur suggested that that person should lose the nationality acquired *jure sanguinis*, but countries applying that rule would certainly object. If *jus soli* were sacrificed there would be equal opposition among the countries recognizing the rule of *jus soli*. That problem was inadequately covered in the report.

5. The Special Rapporteur's system would also fail to prevent a conflict between the nationality of a child and the nationality of its parents, which would raise considerable difficulties in private international law. In the case of a child born in a *jus soli* country to parents who were nationals of a *jus sanguinis* country, the child would until the age of eighteen have a different nationality from that of its parents. In the case of persons who changed their residence frequently, from one country to another, each of their children might acquire a different nationality.

6. It would be preferable, instead of withdrawing one nationality, to take measures to prevent a person acquiring more than one nationality. The Commission should, for the time being, merely attempt to find solutions for such subsidiary but in practice much more important problems as that of military service and diplomatic protection of persons having two or more nationalities.

7. Mr. ZOUREK thought the report submitted by the Special Rapporteur a valuable document, particularly in its reference to military service and diplomatic protection. Multiple nationality could easily give rise to serious disputes between States, quite apart from involving the persons concerned in difficult situations. If it was agreed that multiple nationality was an evil, there was, however, profound disagreement as to the means of remedying it. The Special Rapporteur believed that multiple nationality could be eliminated by means of an agreement among *jus sanguinis* countries not to apply their legislation to persons born in *jus soli* countries. That solution might be satisfactory in theory, but in practice no country applying *jus sanguinis* would be prepared to accept it, and vice versa. It should be recognized that both systems existed, and if one were abolished in favour of the other, States would be unlikely to accept the solution proposed. Besides, the two systems

were the product of a long historical evolution and the different States had chosen one of them in keeping with their particular needs and their conceptions of nationality. The law relating to nationality was a matter essentially within the domestic jurisdiction of States. The Commission should merely endeavour to solve conflicts of law in the matter of nationality in so far as they related to such practical questions as military service and diplomatic protection. The 1930 Codification Conference at The Hague had drawn up a Protocol relating to military obligations in certain cases of double nationality. The Commission might attempt to define diplomatic protection; to go beyond that would be useless.

8. Mr. SPIROPOULOS agreed with Mr. François and Mr. Zourek. Countries applying *jus sanguinis* would certainly not accept the system proposed by the Special Rapporteur. It was inconceivable that the Greek Government, for instance, should consider Greeks born abroad as aliens.

9. He did not attach as much importance to the problem of diplomatic protection as some other members of the Commission. It was mainly invoked when a crime had been committed, which in practice did not happen often. Military service, on the other hand, was a very difficult problem which the Commission should study on the basis of the provisions of The Hague Protocol of 1930, or in any other way that commended itself to it.

10. Mr. LAUTERPACHT commended the Special Rapporteur for his reports on statelessness and multiple nationality; the Secretariat's analysis was also valuable, though he felt that it anticipated some of the views contained in the report of the Special Rapporteur who regarded double nationality as an unmitigated evil.

11. Dual or multiple nationality was not necessarily an evil, even if it entailed certain disadvantages. It would, indeed, be necessary to complete the work initiated by The Hague Codification Conference in 1930 and to solve such problems as that of military service, the multiplicity of diplomatic protection, the possibility for a person to renounce one nationality and the right of the person with dual nationality to be treated as a national of one State only. The 1930 Hague Conference had formulated solutions for those problems and certain courts in the United States of America had made some enlightened decisions during the war on problems connected with military service.

12. Undoubtedly, the multiplicity of diplomatic protection created a problem. That was not necessarily an evil — apart from the necessity of regulating cases where the individual concerned invoked the protection of one State against the other. After all, diplomatic protection was invoked and granted, in principle, only in cases of actual or alleged violation of international law in relation to the person concerned. If there was a violation of international law, there was nothing shocking in the notion that more than one State should have the opportunity of challenging it. The effect of recent conventions was to treat diplomatic protection as something independent of

² In *Yearbook of the International Law Commission, 1952*, vol. II.

³ United Nations publication, Sales No. 1949.XIV.2.

nationality. Thus, whenever in various humanitarian conventions or those relating to refugees, or to the protection of minorities, or the population of Trust Territories, the contracting parties had the right to invoke the jurisdiction of the International Court of Justice, such jurisdiction was not dependent upon any compliance with the rule of nationality claims—a rule which in any case was not as rigid as some imagined. Generally, the recent legislation of some States by no means rejected double nationality. Under the British Nationality Act, 1948, naturalization abroad did not automatically cause the loss of British nationality.

13. Whereas it was most important for every person to have at least one nationality, it was quite conceivable that a person could owe allegiance to more than one State. Dual or multiple nationality would give rise to serious problems only in war time and in the matter of military service. But the Commission ought not to formulate the law on the subject by reference to the abnormal condition of war, although, following The Hague Protocol of 1930, some safeguards might be adopted with regard to military service and otherwise. Generally, although under existing international law the possession of nationality was essential, it did not follow that nationality was a quality so absolute, mystical and undivided as to make the possession of one nationality only an obvious rule of law. Actually, many persons who had several nationalities were usually reluctant to renounce any one of them. He therefore proposed that the Commission should not attempt to eliminate or to reduce cases of dual or multiple nationality, but should concentrate on improving and completing the provisions adopted by the 1930 Hague Conference on that subject.

14. Mr. LIANG, Secretary to the Commission, pointed out that the Secretariat's survey had been prepared primarily for the use of the Special Rapporteur. In its present version it embodied the main principles of the latter's report on multiple nationality, and it was at the Special Rapporteur's request that the document had been made available to the Commission.

15. The authors of the survey had not pleaded for a drastic solution of the problem. It had always been his own opinion that any study of the problem of nationality would be incomplete if restricted to statelessness. In order to deal with it in a practical way the Commission should study the legal problems arising from multiple nationality.

16. International law laid down a number of rules with regard to the diplomatic protection of persons with dual nationality. Disputes frequently arose in that connexion, as well as in connexion with persons enjoying multiple nationality residing in a third State. If it were true that there had recently been a tendency to retain multiple nationality, as suggested by Mr. Lauterpacht, such a tendency might to a certain extent be explained by a desire to safeguard the independence of married women. Also if certain States had specified that no automatic renunciation of nationality should be presumed in the case of naturalization, that could be explained by a wish to preserve the person's freedom of will. Those

were considerations which the Commission should take into account.

17. Mr. PAL associated himself with the tribute paid to the Special Rapporteur and to the Secretariat for their invaluable work. He felt it was wrong to put statelessness and multiple nationality on the same footing. Stateless persons were in a tragic situation, whereas multiple nationals were in an entirely different position. The Commission realized that stateless persons suffered unnecessary hardship, and it was also profoundly dissatisfied with the existing international arrangements for such persons. Yet it was only contemplating a minimum concession, which it thought sovereign States might perhaps make in their own interest, to alleviate the unfortunate situation.

18. Multiple nationality only gave rise to really serious difficulty in war time, and it was not the Commission's function to help nations to prepare for war. Multiple nationality was the almost unavoidable result of modern freedom of movement coupled with the rigidity of the several systems of nationality legislation. Perhaps the best solution would be to encourage States to facilitate freedom of movement still further by enabling persons to carry with them their own law relating to nationality. A national of a *jus soli* or of a *jus sanguinis* country would carry the particular law with him wherever he went, and his children would acquire a nationality *jure soli* or *jure sanguinis* as the case might be.

19. Mr. HSU complimented the Special Rapporteur on his report. He had been particularly impressed by the drastic solutions it proposed, although he feared that the Special Rapporteur had perhaps gone a little too far. He was simplifying international relations instead of merely making them more humane. His proposals with regard to dual nationality were, in his opinion, too bold.

20. Mr. SALAMANCA appreciated the objections raised by Mr. François, Mr. Lauterpacht and Mr. Spiropoulos, but was on the whole in agreement with the views expressed by the Special Rapporteur. If there were certain advantages to the possession of multiple nationality, it was nevertheless a fundamental principle that an individual should be entitled to one nationality only. He drew attention to the case of immigrants from *jus soli* countries with a surplus population settling in *jus sanguinis* countries. They became naturalized, frequently prospered in those countries and enjoyed all the privileges the host country could confer, while retaining their original nationality. If no agreement were reached to remedy that situation, it might attain serious proportions; *jus soli* countries would be still more reluctant to admit persons from *jus sanguinis* countries and might even enact discriminatory legislation against them.

21. Faris Bey el-KHOURI said that a person should be entitled to one nationality only; dual nationality should be avoided at all costs. In practice dual nationality frequently led to abuses. He recalled the case of the gypsies who were anxious to acquire as many nationalities as possible so as to enjoy the rights and privileges of as many countries as possible. If a person had a right

to two nationalities *jus sanguinis* should prevail over *jus soli*, as the blood connexion was in practice stronger than that acquired through residence. The Commission should accept the principle that no nationality should be granted to a person already possessing one unless he was prepared to renounce his original nationality. If those three principles were adopted it would be possible to revert to the principle of a single nationality with allegiance to one State.

22. Mr. AMADO did not share the opinion of Faris Bey el-Khoury who had said that *jus sanguinis* should prevail over *jus soli*. The Syrians who had immigrated into Brazil were only too anxious to remain Brazilians. Europeans who emigrated to other countries carried their nationality in their blood, but the countries of the new world were interested primarily in their future, not in their past nationality. Immigrants should not be allowed to bring with them their own nationality laws. He felt that the question should be approached with great care.

23. The CHAIRMAN was unable to agree with certain of the general views expressed by Mr. François and Mr. Lauterpacht. Statelessness on the one hand, and dual and multiple nationality on the other, called for an entirely different approach. He failed to see any good reason for encouraging multiple nationality and pointed out that more recent legislation, as in the Scandinavian countries, tended to avoid dual and multiple nationality. The problem of the nationality of immigrants from countries with a surplus population should in most cases solve itself through the process of assimilation. It might be appropriate to study also certain problems other than multiple nationality, but he did not wish to make any precise recommendation at that point.

24. Mr. CORDOVA, Special Rapporteur, regretted that he had not known the views of the Commission on the problem of multiple nationality at the time of preparing the report. He made no claims for his effort, and had merely called it a basis for discussion.

25. His approach had not been fully understood by the Commission. He was well aware of the practical difficulties arising in connexion with dual nationality and appreciated the work done by the Secretariat in recalling former attempts to solve the problem at The Hague and at Montevideo.

26. There were in practice fewer cases of multiple nationality than there were of statelessness, but the former was nevertheless a serious matter. If statelessness was a tragic human problem it did not give rise to disputes between States, whereas dual or multiple nationality might.

27. He agreed with Mr. Salamanca that emigration countries frequently wished to retain their rights of protection over their emigrants, particularly when the latter possessed assets abroad.

28. Statelessness did not give rise to any problems with regard to extradition or deportation. He had compared the problems arising in cases of statelessness on the one

hand, dual or multiple nationality on the other, and had come to the conclusion that in both cases the main causes were identical: (1) birth; (2) deprivation of nationality; and (3) a change of status by the individual concerned. If, in the case of statelessness, it had been possible to make *jus soli* prevail over *jus sanguinis*, while at the same time giving the child the possibility of reverting to the nationality of its parents at the age of eighteen, he believed that the same principle might well provide a solution to the problem of multiple nationality.

29. The CHAIRMAN said that precedence of *jus soli* over *jus sanguinis* had been adopted with regard to the reduction of statelessness because a period of residence had been taken as a basis; the same basis might possibly be adopted to solve the problem of multiple nationality.

30. He asked the members of the Commission if they considered that the subject of nationality including statelessness would be exhausted with the topics dealt with by the Special Rapporteur or if they wished to include under that heading the study of other questions relating to nationality.

31. Mr. CORDOVA, Special Rapporteur, recalled that the Commission had selected nationality as a main topic for codification. It had taken up the study of dual nationality at the suggestion of the Economic and Social Council. He thought the Commission should continue its work of codification.

32. Mr. SALAMANCA inquired how the Commission proposed to deal with the problem of multiple nationality, and whether, in particular, it should report on the question to the Sixth Committee of the General Assembly.

33. Mr. LAUTERPACHT said that the Commission should follow a systematic plan of study. If it wished to discuss the whole topic of nationality it would have to study, in addition to statelessness and multiple nationality, such other questions as:

(1) The problem of the various types of nationality, with special reference to such customs as the peculiar citizenship status granted to aliens by some Latin American and other countries, and also to the status of protected persons falling short of nationality;

(2) General principles of nationality legislation; that would involve a study of the regulations contained in The 1930 Hague Convention on certain questions relating to conflicts of nationality laws;

(3) The recognition of nationality granted by another State;

(4) The right of States to confer their nationality on persons of their choice, with special reference to cases of persons not resident in the territory of the State granting them nationality.

34. Mr. SPIROPOULOS proposed that the Commission should be satisfied with the work done so far and should not undertake the task of codifying the whole topic of nationality.

35. Mr. SCELLE said that the Commission should be content with the work it had done, or rather with what it had not done. The question of nationality had been discussed since 1930 and the prospect of general agreement on it was remote. The Commission had only eight or ten weeks every year in which to deal with the questions referred to it. It was obvious that if a full discussion of nationality problems were to be undertaken, the Commission would have virtually no time to do anything else. He considered that the Commission should concentrate on questions in which tangible results appeared possible.

36. The CHAIRMAN said that the Commission had been requested to study the nationality of married women.

37. Mr. SCELLE said that the Commission should not attempt to study either multiple nationality or the nationality of married women.

38. Mr. AMADO agreed. When a subject was so controversial that concrete results could not be expected, it was best not to devote any time to it.

39. Mr. CORDOVA, Special Rapporteur, said that at the Economic and Social Council's forthcoming session a draft convention on the nationality of married women would be considered.

40. Mr. LIANG, Secretary to the Commission, said that the draft convention referred to by Mr. Córdova concerned the nationality of married persons. The Commission on the Status of Women had requested that a suitable draft convention should be prepared. Mr. Hudson had drafted a set of rules (A/CN.4/50, Annex II, *in fine*)⁴ but the International Law Commission had not accepted that draft because it had not previously discussed the question of nationality of married persons.⁵ Some delegations on the Commission on the Status of Women wanted the International Law Commission to study the matter, whereas other delegations wanted the Economic and Social Council to examine the draft convention without reference to the International Law Commission. It would be very difficult for the International Law Commission to devote sufficient time and attention to the draft convention which had been considered by the Economic and Social Council for several years. Perhaps the best course for the Commission to adopt was to state in its report that, in view of the advanced stage reached in the study of the nationality of married women by the competent Commission of the Economic and Social Council,⁶ it had decided not to study either that question or the problem of multiple nationality.

41. Mr. CORDOVA, Special Rapporteur, said that in his report on multiple nationality (A/CN.4/83,

⁴ *Vide supra*, para. 2.

⁵ See *Yearbook of the International Law Commission, 1952*, vol. II, pp. 100-103, 106.

⁶ Cf. resolution 502 (XVI) adopted by the Council on 23 July 1953, in *Official Records of the Economic and Social Council, Sixteenth Session, Resolutions, Supplement No. 1*.

paragraph 21)⁷ he had given his reasons for not dealing with the nationality of married persons.

42. The Commission could not deal with the codification of the whole of international law because of the limited time and means at its disposal. It could only deal with such problems of international law as happened from time to time to become urgent or significant.

43. Mr. LAUTERPACHT said that two distinct views could be adopted concerning the Commission's work. One view was that the Commission should, among other things, also study particular subjects which happened to be of topical importance or of immediate urgency. The other view was that the Commission should undertake the codification of international law as a whole and aim at a complete codification of every subject. The latter might not be possible in view of the existing constitution and resources of the Commission. That being so, there was some advantage in leaving aside, for the time being, other aspects of nationality.

44. Mr. SCELLE said that the Commission had a number of items on its agenda and that the time at its disposal was limited. It should concentrate on topics with respect to which it could reasonably expect States to surrender some of their prerogatives. The topics of the territorial sea, the high seas, the law of treaties and international criminal law offered the Commission ample scope for useful work. The Commission should not discuss questions concerning which Governments would not be prepared to make any concessions. The topic of nationality as a whole would probably not be ripe for discussion by the Commission for many years, and he proposed that further consideration of the topic should be deferred indefinitely.

45. Mr. ZOUREK agreed that the study of nationality should be dropped for the Commission's work was hardly likely to lead to any practical results. The only nationality problem in which practical measures were at all advanced was that of the nationality of married persons which was being dealt with by the competent Commission of the Economic and Social Council of the United Nations.

46. He did not agree with Mr. Scelle that the development of international law implied the progressive surrender by States of their sovereign prerogatives. States could never waive their sovereign power, and in some questions international rules were even quite inadmissible.

47. Mr. AMADO said that nationality should remain on the Commission's agenda. If at some later date the Commission found itself in a position to suggest practical solutions for certain nationality problems, a number of which were mentioned in the Secretariat's survey (A/CN.4/84),⁸ then it could revert to the study of those problems.

48. Mr. SPIROPOULOS agreed that the Commission

⁷ *Vide supra*, para. 1.

⁸ *Vide supra*, para. 2.

should discontinue its study of nationality, having dealt with statelessness which it had been asked to study as an urgent matter by the Economic and Social Council. It was true that the Commission's work would be fragmentary so long as it had not dealt with the whole question of nationality; but it was clear that it would be impossible to reconcile the two great systems of nationality legislation based respectively on *jus sanguinis* and *jus soli*. The 1930 Hague Convention on certain questions relating to the conflict of nationality laws had been ratified by a very few States. As Mr. Amado had said, the conflict between the two systems could only be solved by history; the problems created by that conflict were mitigated by the fact that persons belonging to *jus sanguinis* countries who migrated to *jus soli* countries did not in practice retain any links with their mother country beyond the second or third generation.

49. He added that all the work done on nationality problems was outside the scope of codification of international law. It was rather a legislative process concerned with bringing into line the rules of the various internal nationality laws. By contrast, the topics of the territorial sea, State responsibility under international law and diplomatic immunity came within the scope of the codification of international law and their study appeared more likely to yield fruitful results.

50. Mr. AMADO said that the Commission's work should be theoretical; he regretted that it should have been induced to study nationality problems that were not quite in keeping with the theoretical approach which he regarded as characteristic of its work.

51. Mr. HSU said it would perhaps be wise to await the world's reaction to the Commission's work on problems of statelessness before proceeding to study any further questions concerning nationality.

52. Faris Bey el-KHOURI said the question of multiple nationality should remain on the Commission's agenda because it was liable to cause friction between States.

53. The CHAIRMAN gathered that Mr. Scelle was proposing that the Commission should for the time being defer any further consideration of multiple nationality and of all other questions relating to nationality, with the exception of those concerning the elimination and reduction of statelessness. He put the proposal to the vote.

The proposal was adopted by 9 votes to none, with 4 abstentions.

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

54. Mr. FRANÇOIS, Special Rapporteur, said that the Commission had begun its work on the territorial sea in 1952 when he had submitted his first report (A/CN.4/53)⁹ of which the Commission had only

⁹ In *Yearbook of the International Law Commission, 1952, vol. II.*

discussed articles 1 to 6 and 13.¹⁰ He had subsequently submitted a second report (A/CN.4/61 and Add. 1)¹¹ in the light of the comments made by members on those seven articles. Since then a committee of experts had met at The Hague and prepared a report on certain technical questions concerning the territorial sea (annex to A/CN.4/61/Add. 1). Certain observations had also been received from governments concerning the delimitation of the territorial sea of adjacent States and of States situated opposite each other (A/CN.4/71 and Add. 1 and 2).¹¹ He was now submitting his third report (A/CN.4/77).¹² Clauses which were common to the second and third reports had not been reproduced in the third, and hence both documents had to be read together. He suggested that the articles should be discussed one by one forthwith.

CHAPTER I: GENERAL PROVISIONS

*Article 1: Meaning of the term
"territorial sea" (A/CN.4/61)¹³*

55. Mr. FRANÇOIS, Special Rapporteur, recalled that at an earlier session¹⁴ the Commission had decided to adopt the expression "territorial sea" instead of the somewhat ambiguous term "territorial waters".

56. Mr. CORDOVA said it was necessary to mention, for the sake of clarity, that the "belt of sea" referred to in article 1 was adjacent to the land territory of the State concerned.

57. Mr. FRANÇOIS, Special Rapporteur, suggested the adjectives "adjacent" or "contiguous".

58. Mr. SCELLE said that the word "contiguous" should not be employed: it might lead to confusion because of its use in connexion with the term "contiguous zone".

59. Mr. AMADO noted that the articles the Commission was discussing were described (A/CN.4/61) as "revised draft regulation". He inquired whether the term "regulation" had been used at The Hague Codification Conference in 1930.

60. Mr. LAUTERPACHT said that Mr. Córdova's point might be covered by a revised text of article 1 reading:

"The territory of the State includes a belt of sea adjacent to its coast and described as the territorial sea."

¹⁰ See *ibid.*, vol. I, pp. 142-190, 249.

¹¹ In *Yearbook of the International Law Commission, 1953, vol. II.*

¹² In *Yearbook of the International Law Commission, 1954, vol. II.*

¹³ Article 1 read as follows:

"The territory of a State includes a belt of sea described as the territorial sea."

¹⁴ See *Yearbook of the International Law Commission, 1952, vol. I, p. 150.*

61. Mr. AMADO said he was not certain that alteration was really necessary. He would like the Commission to examine the articles drawn up in 1930 by The Hague Codification Conference before deciding the issue.

62. The CHAIRMAN then called for a vote on Mr. Lauterpacht's amendment.

The amendment was adopted by 7 votes to none, with 5 abstentions.

63. Mr. AMADO said that the decision just adopted would complicate the Commission's discussion of the contiguous zone.

64. Mr. ZOUREK said that at an earlier session it had been decided to adopt the term "territorial sea" provisionally (A/2456, para. 85).¹⁵ In several languages, the term used was "territorial waters" or an equivalent expression rather than "territorial sea"; the 1930 Hague Conference on the codification of international law had preferred the latter term, and yet the other appeared in the relevant General Assembly resolution. He personally preferred the term "territorial waters" because it emphasized their appurtenance to the territory of a State, rather than the term "territorial sea" which placed the emphasis on the fact that the waters concerned were part of the sea. He accordingly proposed that the term "territorial sea" should be replaced by "territorial waters".

65. Mr. FRANÇOIS said that in the report of the Second Committee of the 1930 Conference at The Hague¹⁶ it had been stated that there were sound reasons for preferring the term "territorial sea" to "territorial waters", which might lead to confusion. He saw no reason to adopt a different view.

66. Mr. SCALLE said that the term "territorial sea" was in clear contrast with the term "high seas".

67. Faris Bey el-KHOURI preferred the term "territorial waters" which could be translated into Arabic more easily.

68. The CHAIRMAN said that at a previous session the Commission had decided in favour of the term "territorial sea".

69. Mr. ZOUREK said that no final decision had been taken. Since 1930, ideas on the subject had evolved, as shown by the fact that the much more recent resolution of the General Assembly referred to "territorial waters". The arguments used in the 1930 report were not convincing, because "inland waters" had been clearly defined and no confusion was possible for jurists.

70. Mr. SPIROPOULOS said that the choice between the two terms had been discussed three times already by

the Commission and there was no necessity to reopen the question.

71. Mr. LAUTERPACHT said that the term "territorial sea" emphasized the fact that the waters in question were part of the sea, and as such subject to a peculiar régime which had in many respects differed from the law applicable to the land territory of States. From the point of view of respect for the freedom of the seas the term "territorial sea" was the better one.

72. The CHAIRMAN called for a vote on Mr. Zourek's proposal to replace the term "territorial sea" by "territorial waters".

The proposal was rejected by 11 votes to 2.

73. Mr. CORDOVA inquired whether a decision would be taken at that stage on the title "draft regulation".

74. Mr. FRANÇOIS, Special Rapporteur, said that the term "this regulation" was used in article 2. When the Commission came to discuss that article it could usefully discuss the suitability of the term in question.

75. The CHAIRMAN then called for a vote on article 1 as amended.

Article 1 as amended was approved by 9 votes to none, with 4 abstentions.

The meeting rose at 1 p.m.

253rd MEETING

Wednesday, 23 June 1954, at 9.45 a.m.

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Chairman: Mr. R. CORDOVA

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

¹⁵ In *Yearbook of the International Law Commission, 1953*, vol. II.

¹⁶ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal, 1930.V.16), p. 213.

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

CHAPTER I: GENERAL PROVISIONS (continued)

Article 2 : Juridical status of the territorial sea
(A/CN.4/61)²

1. The CHAIRMAN invited debate on article 2 of the revised draft regulation contained in Mr. François' second report on the régime of the territorial sea (A/CN.4/61).¹

2. Mr. FRANÇOIS, Special Rapporteur, recalled that, in his first report (A/CN.4/53),¹ he had suggested that the article should simply state that sovereignty over the belt of territorial sea "is exercised subject to the conditions prescribed by international law".³ He had adopted that wording so as not to anticipate the Commission's decision on the form which its draft articles would take. The Commission had, however, considered the wording in question too vague.⁴ Accordingly, his second report proposed that the clause should provide that sovereignty would be exercised "subject to the conditions prescribed in this regulation and other rules of international law". He wished, however, to draw attention to the closing sentence of his introductory remarks on article 2 in his second report (A/CN.4/61, Introduction), where he suggests that article 2 might not be necessary. Article 1 provided that the territory of a State included a belt of sea described as the territorial sea. The sovereignty of the State, wherever exercised, was always limited by the rules of international law. The Commission might perhaps be content with setting forth its ideas in the comment to article 1.

3. Mr. SCELLE considered that article 2 should be retained.

4. Mr. PAL was of the opinion that the order of article 3 and article 2 should be reversed. Article 2 might be re-drafted to read: "Sovereignty over this belt is exercised subject to the conditions and limitations herein prescribed."

5. Mr. GARCÍA-AMADOR said that perhaps the provisions of article 2 could be included in article 1.

6. Mr. LAUTERPACHT suggested that the words "over this belt" should be replaced by "over the territorial sea".

7. With reference to the term "regulation", he recalled that in the draft relating to the régime of the high seas

the Commission had used the expression "draft articles".

8. Mr. ZOUREK agreed that for the sake of uniformity the expression "draft articles" should be used.

9. He said that the Commission's function was to promote the codification of existing international law. Accordingly, it should formulate all the provisions of the international law in force. Indeed, it was required to do so by article 20 of its Statute. For that reason the reference to other rules of international law was inadmissible. In that connexion he thought the last three lines of the comment on article 2 in the Special Rapporteur's second report (A/CN.4/61) disconcerting. If there were any rules relating to the régime of territorial waters it was the Commission's duty to state them in its draft convention; if there were not, any reference to international law became unnecessary.

10. Mr. LAUTERPACHT said that it was not permissible for the Commission to assume that the draft articles covered the entire topic so that the residuary reference to "other rules of international law" was unnecessary. In the first place, allowance had to be made for the possibility of an involuntary omission; secondly, there were certain general rules of international law which were applicable in the matter, as indeed to other topics of international law, such as the principle prohibiting the abuse of rights and, generally, the law of state responsibility.

11. Accordingly, the Commission should follow the relevant provision adopted by the Hague Codification Conference of 1930 which, in the convention on certain questions relating to the conflict of nationality laws, referred to applicable general principles of international law.

12. The CHAIRMAN agreed with the Special Rapporteur that article 2 was superfluous, because its provisions were already implicitly contained in article 1. Sovereignty was always exercised within the limits set by international law. If one were to add the words "subject to the conditions prescribed in this regulation", it would be tantamount to adding a special limitation to a pre-existing general limitation. The Commission, however, had no regulatory powers. It could either codify existing law or propose to States that they should adopt different solutions. If a proposal made by the Commission was adopted by Governments, it would become a rule of international law.

13. He added that Mr. García-Amador's suggestion would mean that article 1 would have to be amended to read: "The territory over which a State exercises its sovereignty includes a belt of sea..."

14. Mr. FRANÇOIS, Special Rapporteur, pointed out that he had not formally proposed that article 2 be deleted.

15. Mr. SCELLE said he did not agree with the Chairman. The sovereignty exercised over the territorial sea was not of the same nature as that exercised over the mainland. It was in fact completely different from it, as

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² Article 2 read as follows:

"Sovereignty over this belt is exercised subject to the conditions prescribed in this regulation and other rules of international law."

³ *Yearbook of the International Law Commission, 1952*, vol. I, p. 145, footnote 5.

⁴ *Ibid.*, pp. 150-151.

was shown by the right of passage, the right of pursuit, etc. He had no objection to the term "sovereignty" although he personally preferred the term "jurisdiction". It was, however, essential to retain article 2.

16. Mr. LAUTERPACHT agreed with Mr. Scelle: the régime of the territorial sea was not identical with that of other areas over which a State exercised its sovereignty. It would be a dangerous over-simplification to consider the sovereignty of a State over its territorial sea as identical with the sovereignty it exercised over its land domain. In fact, the sole purpose of the Commission in drafting the regulation was to define the special régime applicable to the territorial sea. He felt very strongly that article 2 should be retained, especially as some members of the Commission were proposing that the breadth of the territorial sea should extend to six, nine or even twelve miles.

17. Mr. ZOUREK, in reply to Mr. Lauterpacht, said that the Commission was expected to formulate a complete draft and hence the question of an involuntary omission could not arise. If it was argued that it was impossible to codify all the general rules which were potentially applicable to territorial waters he would answer that the same problem had cropped up in connexion with every draft codification, for example, the draft articles relating to the continental shelf, and yet the Commission had not inserted any clause containing a reference to international law. Article 2 should read: "Sovereignty over this belt is exercised subject to the conditions prescribed in the articles of this regulation."

18. Mr. LIANG, Secretary to the Commission, said that the draft which the Commission was discussing was certainly in the nature of a convention. If that part of the draft did not come under the heading of development of international law, Mr. Córdova's fears would be justified; but it was always difficult to distinguish between articles which corresponded to existing rules of international law and those which embodied mere recommendations. Article 2 referred to certain rules of a legislative character, as indicated by the term "regulation". On the other hand, it also concerned positive or customary law.

19. At the Conference for the Codification of International Law, held at The Hague in 1930, the same difficulty had not arisen because the text then discussed had been in the form of a draft convention, whereas the Commission was now discussing a text of which it was not yet clear whether it involved codification or development of international law.

20. Mr. PAL said that all the present difficulties had been caused by the extension of a term full of implications in law to a region which it did not normally denote. It was proposed to extend the territory of a State to the territorial sea of that State. By that extension, all the legal incidents of the territory of a State were extended to the new region. The situation then became almost inextricably complicated; preferably the two should be kept distinct, with distinct incidents.

The Commission should treat the territorial sea as an area distinct from the territory of a State, though it might provide that the coastal State's sovereignty extended to the territorial sea subject to the limits prescribed in the regulation.

21. Mr. SCELLE could not agree with Mr. Pal, although his arguments were admittedly logical and scientifically sound. The term "territorial sea" was now in current use and in practice was not liable to be misconstrued. It was also not desirable to merge the provisions of articles 1 and 2 into a single article.

22. Mr. ZOUREK said that sovereignty remained unaffected, whether exercised over the territorial sea or over the remainder of the territory. Only the right of passage under international usage represented a certain limitation on the exercise of sovereignty over territorial waters. The Commission should study the conditions under which the right of passage was exercisable.

23. The CHAIRMAN agreed with Mr. Zourek's opinion on that point. He recalled that, according to the report of the Second Committee of the 1930 Hague Codification Conference, the power exercised by the States over that belt was in no way different in its nature from the power which it exercised over its land domain.⁵ The Commission should not mistake legislation for codification.

24. Mr. SCELLE said that there was no codification without legislation. Provisions taken from different sources could not be embodied in a single instrument without mutual adjustment. It was true that States alone had the power to legislate, but the Commission prepared their work in that respect. Codification and development of international law were inseparable and mutually complementary.

25. Referring to the French text, he added that it would be better to say *le présent règlement* instead of *ce règlement*.

26. The CHAIRMAN put to the vote Mr. Lauterpacht's amendment to the effect that the words "this belt" should be replaced by the words "the territorial sea".

The amendment was adopted unanimously.

27. The CHAIRMAN proposed that the words "this regulation and other" be deleted.

The amendment was rejected by 4 votes to 1, with 5 abstentions.

28. Mr. LAUTERPACHT proposed that the words "in this regulation" should be retained provisionally until the Commission had decided on the presentation of the draft as a whole.

The proposal was adopted by 9 votes to 1, with 1 abstention.

⁵ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations Publication, V. Legal, 1930.V.16), p. 212.

29. The CHAIRMAN put to the vote Mr. Zourek's amendment requesting the deletion of the words "and other rules of international law".

The amendment was rejected by 6 votes to 1, with 4 abstentions.

30. The CHAIRMAN put to the vote article 2 as a whole, which in its amended form read:

"Sovereignty over the territorial sea is exercised subject to the conditions prescribed in this regulation and other rules of international law."

Subject to the reservation relating to the words "this regulation" proposed by Mr. Lauterpacht, article 2 as a whole was adopted, as amended, by 10 votes to none, with 1 abstention.

31. The CHAIRMAN, replying to a question by Mr. Lauterpacht, said that the Commission would take up the comments to article 2 when discussing the general report covering the work of the session.

Article 3: Juridical status of the air space, the sea-bed and the subsoil (A/CN.4/61)⁶

32. Mr. FRANÇOIS, Special Rapporteur, said that his draft article 3 was identical with the corresponding article in the text prepared at The Hague Codification Conference in 1930.⁷ In his first report (A/CN.4/53),⁸ he had not referred to air space, but the Commission had felt that the omission should be corrected.

33. Mr. SCELLE criticized the use of the terms which did not correspond sufficiently closely to the physical aspect of the things. To say that territory also included the air space might appear surprising to readers not familiar with the fictions of international law. It would be enough to say that the jurisdiction of the coastal State extended also to the air space, the sea-bed, and the subsoil. He was, however, prepared to accept the words "sovereign rights" and even "sovereignty", but pointed out that sovereignty as such was merely a set of powers of jurisdiction.

34. Mr. SPIROPOULOS pointed out that in article 2 the Commission had used the word "sovereignty". There should be a certain uniformity in the terminology used in the two articles.

35. Mr. ZOUREK thought Mr. Scelle's amendment unnecessary, because it was universally admitted that the air space was part of a State's territory in the technical sense of the term. He would not object to the use of the word "sovereignty".

36. The CHAIRMAN said that it would be difficult not to mention territory in article 3 since it was stated in article 1 that the territory of a State included the terri-

torial sea. Either article 3 would have to remain as it stood, or else article 1 would have to be amended.

37. Mr. FRANÇOIS, Special Rapporteur, thought that the redrafting of the first three articles and their rearrangement in a logical order might be left to the Drafting Committee.

38. Mr. SCELLE agreed with the Special Rapporteur.

39. Mr. LAUTERPACHT remarked that in the English text it would be necessary at the end of article 3 to add the words "under the territorial sea".

40. Mr. FRANÇOIS, Special Rapporteur, said, in reply to a question by Mr. García-Amador, that he interpreted his own draft as meaning that the conditions referred to in article 2 applied also to the parts of the territory mentioned in article 3.

41. Mr. ZOUREK said that the Commission should vote on the text of article 3 leaving aside, for the time being, the question of its numbering.

42. The CHAIRMAN put to the vote Mr. Scelle's amendment to the effect that the words "The territory of a coastal State includes also the air space..." should be replaced by the words "The sovereignty of a coastal State extends also to the air space..."

The amendment was adopted unanimously.

43. The CHAIRMAN put to the vote article 3 as a whole, as amended and with the drafting changes suggested by Mr. Lauterpacht:

"The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to the bed of the territorial sea and its subsoil."

Article 3 was adopted by 10 votes to none, with 1 abstention.

44. The CHAIRMAN recalled that the Special Rapporteur had proposed that the first three articles should be rearranged in a more logical sequence and that the terminology should be standardized by replacing in article 1 the word "territory" by the word "sovereignty", which would merely be a matter of drafting.

45. Mr. ZOUREK disagreed. He pointed out that if the order of articles 2 and 3 were changed, the restrictions on the sovereignty of States in maritime questions might be interpreted as applying also to the air space above the territorial sea, which would be inconsistent with the international law in force. In any case, the Commission had never considered the question.

46. Mr. LAUTERPACHT and Mr. SPIROPOULOS thought that it was understood that, in the Commission's opinion, the same restrictions applied in both cases.

47. Mr. LIANG, Secretary to the Commission, pointed out that in the draft regulations there were no special rules relating to the air space. Moreover, the question of the bed of the territorial sea and the subsoil under it would have to be considered again in connexion with

⁶ Article 3 read as follows:

"The territory of a coastal State includes also the air space over the territorial sea, as well as the bed of the sea, and the subsoil."

⁷ See p. 213 of the publication cited above in footnote 5.

⁸ *Vide supra*, 252nd meeting, para. 54 and footnotes.

the continental shelf. It therefore seemed to him premature to adopt any final decision at that point.

48. Mr. LAUTERPACHT said that the text under consideration was only a draft and that any necessary explanations could be included in the Commission's general report.

49. The CHAIRMAN took it to be the general wish that the Special Rapporteur should state the rules and restrictions relating to the air space more precisely. In any case there would be no further discussion on the substance of the articles adopted; only drafting changes would be made if necessary.

CHAPTER II : LIMITS OF THE TERRITORIAL SEA

Article 4 : Breadth (A/CN.4/77)⁹

50. The CHAIRMAN referred to the difficulties which had always accompanied the study of the breadth of the territorial sea, with which article 4 dealt. Failure by the Commission to reach agreement on that subject could jeopardize its entire work on the territorial sea. It might therefore be more desirable to leave that article to the last. If the Commission was unable to draft an agreed text, it would still be able to submit the rest of its report to the General Assembly.

51. Mr. SPIROPOULOS did not see how postponement of the study of article 4 until after the study of the remaining articles would help to solve the difficult question of the breadth of the territorial sea, which was considered by all to be the most important of those relating to the régime of the territorial sea. It was not impossible that the Commission adopted a decision with only a small majority, which was clearly not desirable. Accordingly he proposed that the Commission defer the study of the breadth of the territorial sea and attempt to reach agreement on the other articles of the report.

52. Mr. FRANÇOIS, Special Rapporteur, pointed out that, before being submitted to the General Assembly, the draft report should be circulated to Governments for study. The Commission might explain the position to them and suggest a compromise solution; on receipt of

their replies, it would be in a better position to adopt a definite attitude with regard to the final text to be submitted to the General Assembly. It was precisely because of its great importance that he did not wish consideration of the question to be postponed.

53. Mr. LAUTERPACHT agreed with the Chairman. It might at first sight seem strange that the Commission, in preparing a report on the régime of the territorial sea, should leave aside a point of capital importance; but it would take a long time and would not be easy to work out a compromise solution; and meanwhile the Commission could consider the other important rules of international law which were relevant.

54. Mr. HSU said that the Commission was only at the preliminary stage of its work on the question. Nevertheless, in international law codification inevitably implied development, and under article 23 of its Statute the Commission could in certain cases recommend the convening of a conference with a view to concluding a convention. The Commission should not be deterred by the complexity of the question but should discuss it forthwith.

55. Mr. PAL thought that it would be difficult to discuss the special rules relating to the régime of the territorial sea without first defining its breadth; he therefore opposed any postponement of the study of the question.

56. Mr. GARCÍA-AMADOR agreed. It was impossible in practice to consider the remaining articles of the report without first reaching a decision on the breadth of the territorial sea. The eventual majority which would support the decision was not as important a question as some members of the Commission believed; there had been cases of decisions adopted unanimously which had subsequently been rejected by the General Assembly, whose actions were influenced by political considerations.

57. Mr. FRANÇOIS, Special Rapporteur, said that the Commission's attitude to certain other questions would of course be affected by its decision on the breadth of the territorial sea. Moreover, if it failed to make any proposal regarding the latter, Governments might consider that a sufficient reason for not studying the report. If the Commission agreed with the Chairman, it would be unable to submit a complete draft to Governments.

58. Faris Bey el-KHOURI thought that it would be difficult and even impossible to agree on a breadth acceptable to all States. However, it was not perhaps necessary for the breadth to be the same for all seas and all countries. If that was so, the question might be reconsidered and the Special Rapporteur asked to prepare a new draft. He agreed that in the absence of any decision on that point the Commission's work on the other articles of the report might serve no useful purpose. It was therefore desirable that it should come to a decision.

59. Mr. ZOUREK said that the Commission should defer the study of article 4. The 1930 Codification

⁹ Article 4 read as follows :

"1. The breadth of the territorial sea shall be three nautical miles measured from the base line of the territorial sea.

"2. The coastal State may, however, extend the territorial sea up to a limit of twelve nautical miles from the base line, subject to the following conditions, that is to say that :

"(a) Free passage in the territorial sea is guaranteed as provided in this regulation.

"(b) The coastal State may only claim exclusive fishing rights for its nationals up to a distance of three nautical miles measured from the base line of the territorial sea. Beyond this limit of three nautical miles, fishing in the territorial sea may be made subject by the coastal State to regulations designed solely to protect the resources of the sea. There shall be no discrimination against the nationals of foreign States. Any dispute concerning the validity of measures adopted for the aforementioned purpose shall be submitted to an international conciliation procedure or, if no agreement is reached, to arbitration."

Conference of The Hague had shown that there were no rules in international law defining the breadth of the territorial sea. Consequently, it was for each State, by virtue of its sovereignty, to fix the breadth of its territorial waters in keeping with its particular needs and with the provisions of international law. In taking up that question the Commission might waste time without achieving a great deal. He saw no objection to preparing a draft on the régime of the territorial sea which did not delimit the breadth of that sea, though after the receipt of the replies of Governments the question might be reconsidered.

60. Mr. SCELLE said that the arguments for and against immediate consideration of article 4 appeared equally good, and that he would therefore abstain from voting. He thought that every State had to have a territorial sea, but the Commission should not, in his opinion, fix a uniform limit; even a maximum limit might meet with objections, as the Special Rapporteur had himself admitted. Every case should be treated individually, and the best solution from the legal point of view would be to resort to arbitration or to apply to the International Court. That solution would be difficult to accept, but there were already a number of precedents. On the other hand the Commission should definitely oppose the tendency observable in certain States to identify the territorial sea with the continental shelf and to claim, for example, that their sovereignty extended over a maritime belt of 200 miles. Such an attitude he thought was the very negation of general international law.

61. The CHAIRMAN recalled that in the first report on the régime of the territorial sea (A/CN.4/53)¹⁰ the Special Rapporteur had recognized even if for the time being it was impossible to adopt a uniform breadth for the territorial sea, it was nevertheless worth while to endeavour to agree on the other disputed points. Many Governments would probably like to know what was the exact position in the matter of the territorial sea; but the General Assembly would understand the Commission's inability to agree on a question with which it had been grappling unsuccessfully for three years. Furthermore, it was doubtful whether the Commission, being composed of experts and not of representatives of governments, was in a position to find an answer to it.

62. Mr. FRANÇOIS, Special Rapporteur, said he had not changed the views he had expressed in his first report. He nevertheless deemed it desirable to establish rules concerning the territorial sea and not to interrupt the work the Commission had undertaken. In the course of three years the problem had only been considered once by the Commission, and he was surprised that members should wish to dismiss his suggested solution without even discussing it. In the course of the present session, all that the Commission was being asked to do was to prepare a draft and to request Governments to comment on it: if the draft were to contain no provisions relating

to the territorial sea, Governments would consider it very incomplete and would not be very disposed to answer.

63. Mr. LAUTERPACHT doubted whether the provisions of many of the draft articles were really affected by the issue concerning the limits of the territorial sea.

64. The CHAIRMAN said that, in his opinion, article 5 (base line) was unaffected by that issue.

65. Mr. HSU said that, as opinion in the Commission seemed to be deeply divided, it should decide whether the question of determining the limits of the territorial sea was within its terms of reference or not.

66. The CHAIRMAN said that, for the moment, the Commission was merely deciding the order in which the articles would be discussed. He then called for a vote on his proposal that article 4 should be discussed after the other articles had been dealt with.

The proposal was adopted by 5 votes to 4, with 2 abstentions.

67. Mr. SCELLE said that he would propose, at a subsequent meeting, a new draft article giving a definition of the territorial sea. That definition was an essential preliminary question; the Commission could not continue to discuss the territorial sea without first defining it, with special reference to the distinction between that sea and the high seas.

68. Mr. GARCÍA-AMADOR asked if it was agreed that the breadth of the territorial sea would be discussed in the course of the current session. He did not want the decision to postpone discussion thereon to be taken as a reason for deferring the question to a future session.

69. After an exchange of views, the CHAIRMAN said that the decision taken by the Commission meant simply that article 4 would be discussed after article 23; it did not impair in any way the right on the part of members of the Commission, when the time came to discuss article 4, to make whatever proposal they wished.

The meeting rose at 1 p.m.

254th MEETING

Thursday, 24 June 1954, at 11.15 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

¹⁰ *Vide supra*, 252nd meeting, para. 54 and footnotes.

Present :

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

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

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

CHAPTER II: LIMITS OF THE TERRITORIAL SEA
(continued)

Article 5: Standard base line (A/CN.4/77)²

1. The CHAIRMAN invited debate on draft article 5.
2. Mr. FRANÇOIS, Special Rapporteur, said that article 5 should give rise to few difficulties. It was based on the regulation adopted at the Codification Conference at The Hague in 1930.³ At the time, however, a somewhat broader text had been adopted covering cases of possible bad faith on the part of States in determining the limits of their territorial waters. The Committee of Experts which met at The Hague in 1953 had come to the conclusion that the provision referring to that possibility was unnecessary and should be deleted.⁴
3. The CHAIRMAN asked how the high-water or the low-water line could be used as a base line by countries, such as Sweden, where there were no tides.
4. Mr. FRANÇOIS, Special Rapporteur, replied that in countries with no appreciable tidal flow the base line should be the permanent line of the water.

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² Article 5 read as follows:

"As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast, as marked on the largest-scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn which show the low-water line, the shore line (high-water line) shall be used."

³ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations Publication V. Legal, 1930.V.16), p. 217. The 1930 text read as follows:

"Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast.

"For the purposes of this convention, the line of low-water mark is that indicated on the charts officially used by the coastal State, provided the latter line does not appreciably depart from the line of mean low-water spring tides.

"Elevations of the sea-bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base-line of the territorial sea."

⁴ See the Report of the Committee of Experts, annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission*, 1953, vol. II.

5. In reply to a question by Mr. Córdova regarding the legal competence of the experts at The Hague, he said that the Committee had met under his chairmanship.

6. Mr. LAUTERPACHT thought that article 5 gave a good definition of the basic rule, although the introductory words "As a general rule" were too vague. If it was intended to mean that the breadth of the territorial sea was to be measured from the line of low-water mark subject to the provisions of article 6 and the provisions regarding bays and islands, the words "As a general rule" should be replaced by the words "Subject to the provisions of article 6". He made a formal proposal to that effect.

The proposal was adopted.

7. The CHAIRMAN agreed with Mr. Lauterpacht. The decision of the International Court in the Anglo-Norwegian fisheries case⁵ had specified that the ruling with regard to archipelagoes did not constitute an exception but was merely the general rule as applied to a particular case.

8. Mr. FRANÇOIS, Special Rapporteur, said that he had drafted article 5 on the understanding that it should embody the general rule and article 6 the exceptions to it. He agreed that the introductory words were perhaps too vague.

9. Mr. ZOUREK inquired why the Special Rapporteur had given preference to the line of low-water mark in article 5 and proposed the straight-line method for the exceptional cases provided for under article 6.

10. Mr. FRANÇOIS, Special Rapporteur, replied that he had acted in what he believed to be the spirit of the decision of the International Court.

11. Mr. ZOUREK said that hitherto under existing international law States had been free to choose between the straight-line method and the methods based on the line of low-water mark. The Special Rapporteur had overlooked the fact that the Court had admitted the principle of the straight line not only in the case of well-defined bays but also in the cases of minor curvatures of the coast-line. In his second report⁶ the Special Rapporteur had indeed interpreted the Court's decision as expressing the law in force. Accordingly, States should remain free to choose between the various methods of drawing the base line. Moreover, according to the second sentence of article 5 the high-water line was mentioned as a possible line from which to measure the territorial sea; such a provision conflicted with the international law as reflected in the practice of States.

12. Mr. FRANÇOIS, Special Rapporteur, was unable to agree with Mr. Zourek. Until the decision of the International Court the line of low-water mark had been accepted as the normal rule. No claim for freedom of choice had ever been made, and in the Anglo-Norwegian

⁵ *I.C.J. Reports 1951*, p. 116.

⁶ A/CN.4/61, comment to article 5, in *Yearbook of the International Law Commission*, 1953, vol. II.

fisheries case the claim had been formally advanced for the first time. The Court confirmed the traditional low-water line as the normal rule, adding that in exceptional cases the straight-line method could be used. He believed that his draft articles 5 and 6 correctly interpreted the Court's decision.

13. Mr. LAUTERPACHT hoped that the Special Rapporteur would not modify articles 5 and 6 as submitted to the Commission. Mr. Zourek, who proposed that States should retain their freedom of choice, should remember that the object of the Commission was precisely to establish binding rules so that those matters would no longer be left to the discretion of States. There was little object in codification which on main controversial points confined itself to giving States freedom of action.

14. The principle of following the coast-line was important in that it provided a safeguard for the freedom of the high seas. Article 5 was, from that point of view, well drafted and if article 6 contained exceptions to it, he was glad to see that the draft proposed by the Special Rapporteur had made the decision of the International Court considerably clearer. While the Court's judgement on the subject had developed international law, it had done so by reference to somewhat general principles which, unless defined, might become a source of uncertainty. That defect the present article 6 intended to eliminate. He hoped that the articles would not be modified in substance.

15. Mr. CORDOVA pointed out that it might be necessary to insert a provision relating to countries which had no tides. He asked if one and the same country could apply both the low-water line method and the straight-line method; and also what body would be competent to settle possible disputes.

16. Mr. FRANÇOIS, Special Rapporteur, said that a country would be able to apply both methods as required by the configuration of the coast. Possible disputes would probably be settled by arbitration.

17. Mr. ZOUREK pointed out that the method proposed in the second sentence of article 5 did not correspond to the view taken by The Hague Codification Conference in 1930 which had favoured the line of mean low-water spring tides. Article 5, as drafted, referred to the low-water line in cases where charts were available and to the high-water line in cases where there were none. The rule recommended in 1930 was more precise and more convenient in cases of doubt or dispute, and he inquired why the Special Rapporteur had found it necessary to depart to such an extent from the solutions adopted at The Hague.

18. Mr. FRANÇOIS, Special Rapporteur, said that the conclusions reached at The Hague in 1930 had been studied by the Committee of Experts which had in its turn proposed the new criteria. The official charts of most countries showed the low-water line, but where no such indication was given, ships at sea could only rely on the high-water line which, being identifiable with the shoreline, was always visible. The possibility of no charts

being available had not been taken into consideration by the International Court at the time of its decision. It had proposed the mean low-water line as a criterion from which official charts should not stray.

19. Mr. SPIROPOULOS pointed out that if the line drawn on an official chart differed to any great extent from the tide-line a protest could be made and the chart corrected. He agreed that in practice the only possible solution from the point of view of ships at sea where no charts were available, was that advocated by the Special Rapporteur.

20. Mr. ZOUREK was unable to accept Mr. Lauterpacht's views. The Commission should prepare the work of codification, but should leave States complete freedom in solving such technical problems as the one under consideration.

21. Mr. FRANÇOIS, Special Rapporteur, pointed out, in reply to a question by Mr. Córdova, that the exact position of the low and high water lines was important for vessels at sea as it enabled them to identify the limits of the territorial and high seas. It was also important to know their exact positions for they affected the limits of the stretches of water lying between the coast and the base line where the right of passage might be subject to restrictions by the coastal State.

22. The CHAIRMAN put to the vote article 5 as amended by Mr. Lauterpacht.

Article 5 as amended was adopted by 12 votes to 1.

23. Mr. ZOUREK explained that he had voted against article 5 because he considered that, under international law, States were free to choose between the two systems: that of measuring the breadth of the territorial sea from the low-water line, and that of measuring it from straight base lines.

Article 6: Straight base line (A/CN.4/77)⁷

24. Mr. FRANÇOIS, Special Rapporteur, said that in drafting article 6 for his second report (A/CN.4/61) he

⁷ Article 6 read as follows:

"1. As an exception, where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the base line may be independent of the low-water mark. In this special case, the methods of base lines joining appropriate points on the coast may be employed. The drawing of base lines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"2. As a general rule the maximum permissible length for a 'straight base line' shall be ten miles. Such base lines may be drawn, where justified, between headlands on the coastline or between any such headland and an island, or between two islands provided that every such line remains within five miles from the coast and provided further that such headlands and/or islands are not more than ten miles apart. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea.

"3. Where 'straight base lines' are justified, it shall be the responsibility of the coastal State to give adequate publicity thereto."

had treated the judgement of the International Court in the Fisheries case,⁸ a decision which had been given by a majority of ten judges to two, as a statement of the international law in force. The Commission had accepted in principle his draft article 6 as appearing in that second report. Since then, the committee of experts which had met at The Hague in 1953⁹ had pointed out, *inter alia*, that the rule embodied in the Fisheries case judgement required to be clarified. It was essential not to depart appreciably from the general outline of the coast, and for that purpose, a maximum permissible length had to be laid down for the "straight base lines". That maximum length had been laid down at ten miles in the new draft article 6 in his third report (A/CN.4/77). Clearly, by laying down that the maximum permissible length for a "straight base line" would be ten miles, more of the sea was included than if the maximum permissible length had been, say, two miles.

25. Article 6, paragraph 2, provided that, where justified, such base lines could be drawn not only between headlands but also between a headland and an island, or between two islands, so long as all points on such lines were within five miles from the coast and so long as such headlands and islands were not more than ten miles apart in each case. The purpose of paragraph 2 was to provide for the special case of certain coasts which were deeply indented or which had islands in their immediate vicinity.

26. He recalled that the Commission had reserved its decision on article 4 which dealt with the breadth of the territorial sea. He thought that the Commission should nevertheless take a decision covering article 6, because he agreed with the committee of experts and with the ruling of the International Court that there was no relation between the length of "straight base lines" and the breadth of the territorial sea. Even if the territorial sea were to be 200 miles wide, it would still have to be measured from the same base line.

27. The CHAIRMAN said that in the Scandinavian countries, some of the provisions of draft article 6 had not met with approval. Firstly, the special régime for a deeply indented coast or one having islands in its immediate vicinity was not regarded in Scandinavia as an exceptional rule; that objection could, however, be met by not using the term "as an exception". Secondly, it was felt that a ten-mile maximum for the "straight base line" would be inconsistent with the International Court's judgement in the Fisheries case. That decision had stated that the ten-mile maximum had been adopted by some States in their municipal law and in conventions signed by them, and had also been recognized in arbitral awards; but the International Court had added that it was not a general rule of international law. The ten-mile maximum was not therefore approved of in the Scandinavian countries. There was no obvious reason for

preferring a ten-mile maximum to, say, a twenty-mile or a thirty-mile maximum, for the straight base line.

28. Mr. FRANÇOIS, Special Rapporteur, was disappointed to hear that the new draft article 6, based on the conclusions of the committee of experts, had not met with approval in the Scandinavian countries; one of the experts had been Professor L. E. G. Asplund of the Geographic Survey Department of Stockholm, who had been in full agreement with the other experts.

29. In the Fisheries case, the International Court had necessarily to give a decision based on *lex lata*; it had therefore stated that there was no accepted rule of international law laying down a ten-mile maximum for straight base lines. Members of the Commission fully agreed that they were not merely codifying the existing international law relating to the territorial sea. They were trying to settle the rules for the future. It was therefore quite natural that they should be discussing a rule concerning straight base lines that was more definite and precise than the Court's decision on that point. The choice of a ten-mile maximum was indeed somewhat arbitrary. He would point out, however, that seafaring men had a preference for a distance of five miles, which was the range of vision in either direction in clear weather. A line ten miles long would join all points from which one at least of two headlands or islands could always be seen.

30. Mr. HSU suggested that the discussion of article 6 should be postponed, in view of the fact that article 4, which laid down the breadth of the territorial sea, had already been postponed. It was obvious that if the territorial sea were to extend 200 miles from the coast, it became a purely academic question whether it was measured from straight base lines of a maximum length of ten miles or not. He wished to stress that only one-third of the States of the world still adhered to the three-mile limit for the territorial sea; it was therefore not improbable that the Commission would finally adopt a different limit. In fact, even if the territorial sea were to extend to twelve miles, the significance of article 6 was materially reduced.

31. Mr. CORDOVA said that the question was a highly technical one. It seemed to him that the purpose of the ten-mile maximum length permissible for straight base lines aimed at keeping the base line as close as possible to the general outline of the coast.

32. Mr. LAUTERPACHT said that article 6 seemed to him generally acceptable. He would, however, suggest some alterations. Two of them concerned the wording of the article. Firstly, he would suggest substituting the words "where exceptional circumstances permit" for the opening words used in the draft of article 6, paragraph 1. Secondly, the second sentence of article 6, paragraph 1, should read (in the plural) "in these special cases" instead of the singular, as it referred to several cases and not one.

33. He would suggest moreover a further amendment of substance. He did not agree with the closing words of

⁸ *I.C.J. Reports 1951*, p. 116.

⁹ *Vide supra*, footnote 4.

article 6, paragraph 1, reading "the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters". The words "subject to the régime of internal waters" lent themselves almost irresistibly to the interpretation that the areas of the sea enclosed by the straight base lines were fully assimilated to the régime of internal waters and that the coastal State could therefore interfere at its discretion with freedom of navigation in those waters. Any such result could not be admitted.

34. It was essential, for reasons of substance, to clarify the term "internal waters". The term did not carry a very precise meaning. There seemed to him to be three types of waters that might be relevant to the discussion: (1) the territorial sea; (2) the waters behind the straight base lines, which could perhaps be described as internal waters; and (3) inland waters properly so-called—namely, rivers, etc.

35. When the Commission came to discuss right of passage, he would propose the extension of that right to internal waters. In the Fisheries case judgement, large stretches of what had hitherto been high seas had been transformed into internal waters. Although the Court had only been really concerned with fisheries, its ruling lent itself to the interpretation that the waters in question were no longer subject to the rule of the freedom of the seas in any respect whatsoever. That was a result going beyond the subject of the dispute as originally submitted to the Court—namely, whether the Norwegian decree delimiting Norwegian waters for the purpose of fisheries was in accordance with international law.

36. For those reasons, he would propose that the last phrase should be deleted and replaced by the words "the sea areas lying within these lines must have a sufficiently close connexion with the land domain." No reference would be made to the régime of internal waters.

37. Mr. HSU formally proposed that the Commission postpone all discussion of article 6 until it had discussed article 4.

38. Mr. SPIROPOULOS said he agreed that, should the Commission decide on a twelve-mile limit for the breadth of the territorial sea, that would make a considerable difference to the relevance of the subject matter of article 6.

39. Mr. GARCÍA-AMADOR supported Mr. Hsu's proposal.

40. Mr. FRANÇOIS, Special Rapporteur, said that a 200-mile limit for the territorial sea was imaginary. Practically, the only real choice lay between the three-mile limit and the system of allowing States to fix their own limits, provided always that they did not exceed twelve miles. The system of straight base lines would lead in some cases to advancing the outer limit of the territorial sea by as much as five miles in places. It therefore followed that the relative importance of article 6 was not materially diminished even if it were

assumed that the Commission would go to the extreme limit of allowing States to define their territorial seas as extending up to twelve miles in breadth.

41. Mr. Lauterpacht had raised an important question. The waters behind the straight base lines would become internal waters and would as such be subject to a special régime. It was therefore extremely important to define the limit of those waters accurately, though that was an entirely different question from the breadth of the territorial sea.

42. The CHAIRMAN put to the vote Mr. Hsu's proposal that the discussion of article 6 should be postponed until the Commission had dealt with article 4.

The proposal was rejected by 5 votes to 3, with 4 abstentions.

The meeting rose at 1 p.m.

255th MEETING

Friday, 25 June 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

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

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

Article 6: Straight base line (A/CN.4/77)²
(*continued*)

1. The CHAIRMAN called upon Mr. Lauterpacht to proceed with his remarks.

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² For the English text of the article, *vide supra*, 254th meeting, footnote 7.

2. Mr. LAUTERPACHT recalled that at the previous meeting he had proposed two purely stylistic changes³ in the wording of paragraph 1. He also suggested that the last nine words of the paragraph ("to be subject to the régime of internal waters") should be deleted.⁴ The Commission would thus avoid prejudging what régime was to be applicable to the stretches of water enclosed between the low-water mark and the straight base line. It might well be considered that the area in question should not be included in the internal waters, and should form a separate zone, distinct both from the territorial sea and from the internal waters properly so-called. It was perhaps with the purpose of suggesting such a discrimination that in the English text the term *eaux intérieures* had been rendered by the term "internal waters" in the last line of paragraph 1, and by "inland waters" in the last sentence of paragraph 2.

3. Paragraph 2 laid down the two conditions to be satisfied by straight base lines. Firstly, the length of the base line should not exceed ten miles; secondly, no point on such lines should be further than five miles from the coast. The first condition would only apply "as a general rule", and exceptions would be admissible but the Special Rapporteur did not give a precise indication of the cases to be treated as exceptions. The second rule apparently admitted of no exception; it was therefore desirable to say so expressly in the article. Paragraph 2 also clearly showed that there was no relation between the maximum permissible length of the straight base lines and the limit of the territorial sea; the Commission should therefore not hesitate to adopt article 6, for fear that it would be prejudicing the question of the breadth of the territorial sea. He added that the last sentence of paragraph 2 appeared unnecessary.

4. Lastly, he asked the Special Rapporteur if, under the provisions of his draft, States would be required to give their reasons for drawing straight base lines in general or only in the case of straight base lines measuring more than ten miles. As a general rule, did the Special Rapporteur propose that the International Court should have compulsory jurisdiction over exceptions to the low-water line rule? If so, an express stipulation to that effect should be inserted either in article 6 or in a separate article to be added at the end of the draft regulation.

5. Mr. FRANÇOIS, Special Rapporteur, replied that there had to be justification for straight base lines in all cases. The onus was on the State employing the method of drawing straight base lines to prove that it was proper to do so because its coast was deeply indented; that was true even if the straight base lines did not exceed ten miles in length.

6. With regard to the five-mile maximum distance between all points on straight base lines and the coast, he did not feel sure that Mr. Lauterpacht's interpretation

agreed with the intentions of the committee of experts which had met at The Hague from 14 to 16 April 1953. The experts seemed rather to have meant the five-mile rule to apply only where a straight base line exceeded ten miles;⁵ a different system was, however, conceivable and Mr. Lauterpacht had suggested alternatives.

7. He agreed that the new idea of base lines might lead to the formation of a new zone distinct from internal waters in the sense in which the term had been construed in the past. The question of the right of passage in that zone would then arise; neither the experts nor he himself had considered that issue but the Commission might do so at a later stage. The essential problem, for the time being, was to decide if the actual principle of straight base lines was acceptable.

8. The CHAIRMAN recalled that, at the previous meeting, Mr. François had explained that the maximum permissible length of ten miles for straight base lines had been chosen by the committee of experts as being twice the range of vision of an observer on the bridge of a ship. Such a criterion was arbitrary and without practical value, not only because in northern regions there was no daylight for six months, but also because in many areas fogs were frequent. The real intention behind the straight base lines was that the outer limit of the belt of territorial sea should not be excessively tortuous and irregular, as the Special Rapporteur himself admitted;⁶ if one wished to arrive at that result, the maximum permissible length of the straight base line should not be so short. In its decision in the Fisheries case dated 18 December 1951,⁷ the International Court had acknowledged that certain States had adopted, for the entrance to bays included in internal waters, distances well in excess of ten miles and that consequently the ten-mile rule had not yet the authority of an established rule of international law. He considered that progress lay along that more liberal line of thought; and therefore suggested the following amendments to article 6:

(1) Paragraph 1 should be replaced by:

"1. Where a coast is deeply indented or cut into or there is an archipelago comprising a considerable number of islands in its immediate vicinity, the base line may be independent of the low-water line if as a consequence the perimeter of the territorial sea is simplified to a reasonable extent."

(2) Paragraph 2 should be deleted.

9. He would further suggest that articles 5 and 6 should be amalgamated into a single article, so as to avoid drawing a distinction between the normal base line

³ *Vide supra*, 254th meeting, para. 32.

⁴ *Ibid.*, paras. 33-36.

⁵ See the report of the committee of experts, paragraph 3 of the answer to question IV. The report is the annex to document A/CN.4/61/Add.1, published in *Yearbook of the International Law Commission, 1953*, vol. II.

⁶ See comment to article 7 in A/CN.4/77.

⁷ *I.C.J. Reports 1951*, p. 116.

constituted by the low-water line, and straight base lines which would be exceptional.

10. Mr. SCALLE mentioned the question of islands. He asked whether, for the purpose of base lines drawn from islands, the latter had to be situated less than five miles from the coast.

11. The CHAIRMAN said in that connexion that in the Fisheries case, the Government of the United Kingdom had contended that drying rocks and shoals could only be used as points from which to draw base lines if they were less than four miles away from permanently dry land, but the Court did not have to consider that question.

12. Mr. FRANÇOIS, Special Rapporteur, said that he personally would prefer that no island should serve as a point from which to draw straight base lines, if the distance from the coast exceeded five miles.

13. The CHAIRMAN read an extract from the judgement in the Fisheries case. The Court had acknowledged the principle that the belt of territorial waters should follow the general direction of the coast. From that principle there necessarily followed certain criteria for the delimitation of the territorial sea. Hence, in the case of deeply indented coasts, it was not possible to observe the maximum ten-mile rule.

14. Mr. FRANÇOIS, Special Rapporteur, pointed out that according to the Committee of Experts in many cases it would be impracticable to establish the general direction of the coast. Accordingly, it was necessary to apply the system of lines of a maximum length.

15. Mr. CORDOVA said that perhaps the general direction of the coast might be determined every five miles.

16. Mr. SCALLE said that the term "general direction of the coast" should be construed as meaning the direction of the whole coast-line of a State. In the case of Norway, for example, the direction would be from north-east to south-west.

17. Mr. LAUTERPACHT said that if the general direction of the coast were to be taken as the only criterion, it would be possible to draw straight base lines from headland to headland of as much as forty miles in length or more; the length of straight base lines might be even greater in the case of islands, a matter which had not yet been examined; a vast area situated on the inside of the base line would thus be taken away from the high seas. He drew attention to the words in paragraph 1: "must be sufficiently closely linked to the land domain". In his opinion, the Commission should establish precise rules on that point, and lay down a maximum length and a maximum distance from the coast, as the Special Rapporteur had done.

18. Mr. SCALLE thought that the maximum distances laid down in the draft were too short; in the case of islands, they would tend to create an undesirable multi-

plicity of zones of territorial waters. The idea of a base line conforming with the general direction of the coast was a convenient starting point. In the Fisheries case, the International Court had adopted a very liberal point of view, and the Commission should emulate it. The Commission should endeavour to extend the limits of the territorial sea; among other things such a course would have the advantage of making the problem of the continental shelf less acute.

19. Mr. CORDOVA said that the principle of the ten-mile maximum permissible length for straight base lines and that of the five-mile maximum distance from the coast were acceptable, subject to exceptions where justified.

20. Mr. SCALLE said he would agree with Mr. Córdova if the principle of compulsory arbitration were accepted for the purpose of determining the base line of the territorial sea; in that case, it would not even be necessary to lay down maximum distances. For the time being, he would favour authorizing the drawing of straight base lines from headland to headland up to a length of twenty miles, provided that all points in such lines were no more than ten miles distant from the coast.

21. Mr. ZOUREK said that all the difficulties originated in the Special Rapporteur's proposal that the base line of territorial waters should be the low-water line, and that straight base lines should be exceptions to that general rule. The low-water line, however, was only practicable in the case of straight coast lines, which were very rare. Even in the case of only slightly indented coasts, the parallel-line method would give the territorial waters an outer limit in a zig-zag shape which was not practical for shipping. He realized that article 7⁸ provided for a new method of determining the outer limit of the territorial sea; but the Commission had to take into consideration the special needs and particular conditions of each coastal State and leave those States completely free to choose whichever method they preferred.

22. The ten-mile rule—which would recur in connexion with bays and archipelagoes—might well prove the stumbling block of the whole draft regulation. It was not without reason that many States had for long been drawing much longer straight base lines, and freedom of navigation had not suffered. He was also surprised that the Commission should be so rigid in its attitude to the territorial sea, while it accepted the creation of much vaster contiguous zones in which coastal States had certain rights in such matters as fishing, customs and health inspection.

23. He could not agree to the five- or ten-mile distances proposed by the Special Rapporteur, for such distances were not provided for in international law and even if regarded as *de lege ferenda* they were quite arbitrary. For all those reasons he proposed the following amendment:

⁸ In A/CN.4/77.

(1) That paragraph 1 should be replaced by the words: "The coastal state shall be free to adopt as the base line straight lines joining appropriate points on the low-water line. In any such case the breadth of the territorial waters shall be measured from the lines so drawn."

(2) That paragraph 2 should be deleted.

(3) That in paragraph 3 the word "justified" should be replaced by the word "adopted".

24. Mr. FRANÇOIS, Special Rapporteur, was surprised that Mr. Scelle, who had always defended the principle of the freedom of the seas, should criticize the proposals contained in his (the Special Rapporteur's) report as not liberal enough. The Committee of Experts had above all wished to avoid an unwarranted extension of the area of inland waters; in any case the Commission's members were not experts in marine navigation, and for the moment, its only task was to propose that Governments should adopt a maximum permissible length so as to avoid abuses, and to ask Governments for comments.

25. He recalled in that connexion that as a rule seafaring men were not in favour of straight base lines. Unless they had charts indicating the base lines in question, they would be unable to calculate their position by reference to the limit of territorial and internal waters. That was indeed the reason why the committee of experts had stressed that the base lines should be entered on charts and maps.

26. In reply to Mr. Zourek, he said that if complete freedom were to be left to the States there would be no point in formulating rules of international law. The matter of the territorial sea concerned not merely the interests of one State; it was a possible source of abuse and the Commission should endeavour to secure acceptance of a rule applicable to all countries. If the Commission wished to codify international law, or establish its rules by means of conventions, it could not leave unlimited discretion to Governments in all matters.

27. Mr. GARCIA-AMADOR inquired from the Special Rapporteur whether articles 6 and 12⁹ were not partly contradictory. Article 12 mentioned, with reference to groups of islands, straight lines not exceeding five miles, whereas article 6 allowed straight base lines up to ten miles in length.

28. Mr. FRANÇOIS, Special Rapporteur, replied that that point could more usefully be considered when the Commission discussed the problem of islands in connexion with article 12.

29. Mr. SCELLE, replying to Mr. François, said that he was indeed a supporter of the freedom of the seas. The open sea was public international domain and in any system of law, at any level, there had inevitably to be public domain. For that very reason that fundamental

principle should not be jeopardized by an excessively uncompromising attitude. He agreed that a limit should be laid down for the breadth of the territorial sea, but that limit should make allowance for recent tendencies and for the needs of modern life, and should not be too narrow. Ideally, of course, an international judicial authority should define the line in each particular case.

30. Mr. PAL thought the Commission was attempting to impose uniformity where none existed and where perhaps none was possible. The International Court had emphasized that no hard-and-fast rule could be applied. Every case had to be treated on its individual merits. The various possible cases would be so different from each other that it would not even be possible to consider the rules governing them as exceptions to any one general rule.

31. The suggestions made by the committee of experts for a maximum length of ten miles and a maximum breadth of five failed to take into account the existing diversity of conditions and did not contribute to the co-ordination of the many different rules in existence. In view of the prevailing diversity of conditions and the different rules applied in each particular case, the States concerned could hardly be expected to accept a system as rigid as the one proposed, merely on the grounds that it would introduce uniformity. Quite possibly there was no single solution to the problem of the great diversity at present obtaining in that sphere.

32. The base line should only be used for the purpose of determining the outer limits of the territorial sea, and the Commission should not inquire into the question of the law applicable to internal waters.

33. He proposed that only the first two sentences of paragraph 1 of article 6 should be retained, subject to redrafting, and that paragraph 2 should be deleted.

34. Mr. ZOUREK said that he had never claimed unlimited freedom for States for the purpose of determining the breadth of territorial waters. He had merely said that States should be free to take as the base line either the line of low-water mark or the straight lines proposed by the Special Rapporteur. The latter had restated the arguments of the committee of experts against that right of choice; but surely the Commission had every right to reconsider the experts' conclusions, particularly as the committee of experts had been a purely private body, constituted unilaterally, and as the question at issue was not one which could be left to experts, for the final decision lay with the Governments.

35. The CHAIRMAN pointed out that in order to accomplish the technical task entrusted to them, the experts had first to define their objective. That objective might have certain legal aspects on which the Commission should give its opinion. Actually, the principle of the freedom of the seas, which had perhaps influenced the experts, was not so much a matter for them as for the Commission.

⁹ *Ibid.*

36. Mr. HSU thought that the detailed regulations laid down in article 6, paragraph 2, would probably only be acceptable to the few countries which fix the breadth of their territorial sea at three miles—namely, a few European States, the countries of the British Commonwealth and countries which had only recently emerged from European rule. The last-mentioned would, on becoming aware of their national interests, probably abandon the three-mile limit. The Commission could not work for only a small group of States; it had to draft texts which would be valid for all. It was, indeed, necessary to clear up the existing chaotic situation, but for that purpose the Commission would have to agree on a rule that was reasonable.

37. Mr. AMADO said that the Commission should first make up its mind on the following two points: First, did the decision of the Court in the Fisheries case constitute, as the Special Rapporteur said in his commentary to article 6, a statement of the law in force? Secondly, should the Commission follow the Special Rapporteur's example and supplement the decision of the Court by the comments of the committee of experts?

38. If paragraph 2 was put to the vote at that stage of the debate, he would be obliged to vote against it.

39. Mr. CORDOVA thought the solution proposed by the Chairman was dangerous for it gave coastal States absolute freedom to decide what was "reasonable" and what was not, and also to draw the base line as they saw fit. The Special Rapporteur's text had the advantage of being an exact statement of the general rule and also of the exception to it, while yet not leaving too broad an expanse of water between the coast and the beginning of the territorial sea.

40. Mr. LAUTERPACHT expressed some surprise at Mr. Pal's statement that the Committee of Experts had not had all the necessary data at its disposal. It implied no disrespect for the Commission to suggest that with regard to expert knowledge of facts it ought to defer to experts.

41. Mr. PAL pointed out that the experts themselves had emphasized that the uniform system proposed did not take into account existing diversity. They had proposed the ten- and five-mile limits as an ideal solution without attempting to co-ordinate existing rules. Certain States might interpret their proposal as a tyrannical attempt to impose uniformity. Where there existed differences in the configuration of the various coastlines and in the justified special interests of the coastal States, any attempt to impose uniformity would make a just solution of the problem impossible.

42. Mr. LAUTERPACHT said there was every reason to believe that the experts' report was based on fact, and the Commission should not, unless it had excellent reasons for doing so, depart from the unanimous opinion of the experts and the Special Rapporteur. The Chairman had said that the experts had allowed themselves to be influenced by the principle of the

freedom of the seas. It would be more exact to say that they had combined their own recognition of that principle with a thorough knowledge of the facts.

43. Several members of the Commission had proposed that only general principles should be stated, and that no detailed regulation should be drafted. Such an approach would be in direct conflict with the terms of reference of the Commission, which had been instructed to draft detailed rules. The International Court of Justice itself had done more than proclaim mere general principles; it had formulated certain general tests such as that of the general direction of the coast, the economic interests of the population, long usage, the realities of the situation, and so on. It was the Commission's function to express those principles in more concrete terms.

44. In reply to Mr. Amado, he said that the Commission should respect the decision of the International Court, which in that respect had not so much applied the law in force as prepared its development. Before the Court had given its judgement, the most generally accepted opinion had been that the limit of the territorial sea ran parallel to the coast. It was not a universally accepted opinion, but if universality were to be made a condition of the validity of rules of international law there would be very few rules left.

45. He pointed out that the adoption of Mr. Scelle's suggestions would produce a much more serious situation than that caused by the creation of the continental shelf, and would be a disservice to the principle of the freedom of the seas.

46. The Commission had both the right and the duty to examine the figures submitted to it and should leave no room for vagueness.

47. The CHAIRMAN pointed out that if the Commission was not to depart without good reason from the opinion expressed by the experts and the Special Rapporteur, it had to be equally careful in rejecting the solutions of the International Court of Justice. It was premature to express the ideas of the Court in definite terms. First the Commission had to decide whether it should draft a clause in flexible terms—which was his own preference—or a more elaborate provision on the lines proposed by Mr. Lauterpacht. While admittedly his own solution would leave the initiative to States, their decisions would always be open to judicial review.

48. Mr. AMADO said he had not claimed that the Court's decision represented a statement of the law in force. He had merely said that the Commission should first decide if in fact it did. Secondly, he asked if Mr. Lauterpacht thought that the Court's decision contained only considerations of a general nature or as much precise information as was available on the subject.

49. Mr. HSU said that if the Commission was unable to agree on a definite rule, it should rather drop article 6 altogether.

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

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

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

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

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

The meeting rose at 1 p.m.

256th MEETING

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

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

Filling of casual vacancy in the Commission

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

Date and place of the seventh session

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

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

CHAPTER II: LIMITS OF THE TERRITORIAL SEA (continued)

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

3. Mr. PAL said that it was impossible to lay down a rigid rule fixing the length of the straight base line at five or ten miles. Article 6 should be as flexible as possible. In certain exceptional cases the length of the straight base line might well exceed ten miles and in those cases the length should be a "reasonable" one. He thought that the proposals of the Chairman⁴ and Mr. Lauterpacht⁵ were intended precisely to make the article more flexible, and proposed that the Commission consider them without delay.

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

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

² *Vide supra*, 252nd meeting, para. 54 and footnotes.

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

⁴ *Vide supra*, 255th meeting, paras. 8 and 9.

⁵ *Ibid.*, paras. 1-4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ *I.C.J. Reports 1951*, p. 116.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Paragraph 3 to be renumbered paragraph 4.

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

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

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

"Straight Base Lines"

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

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

⁷ Cf. *supra*, 255th meeting, para. 6.

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6 p.m.

257th MEETING

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

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present :

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

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

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

CHAPTER II: LIMITS OF THE TERRITORIAL SEA
(continued)

Article 6: Straight base line (A/CN.4/77)² (continued)

1. Mr. LAUTERPACHT said he had decided to withdraw, provisionally, the last sentence of paragraph 1 of the draft article 6 he had submitted to the Commission.³ He agreed that the question of the right of passage in internal waters should be dealt with in another part of the convention.

2. He added that his draft for paragraph 1 did not materially depart from the corresponding clause drafted by the Special Rapporteur. Accordingly, he was not formally proposing an amendment to the Special Rapporteur's draft.

3. Mr. ZOUREK said he could see no reason for the rule proposed in article 6, paragraph 2. As a general rule coasts were irregular, straight coastlines being the exception; consequently, the straight base line method should be the rule and the low-water line rule the exception. By authorizing States to adopt the system of straight base lines only where the coast was exceptionally indented and not in cases of lesser sinuosities, the Commission would even be departing from the International Court's judgement in the Fisheries case⁴ which admitted the straight base line rule even in the case of minor irregularities of the coast. The rule of a maximum permissible length of ten miles for the straight base lines was not part of existing international law. It had been suggested that it might be adopted as *lex ferenda*. In order to assess the chances of such a rule being adopted, however, the law as it stood had to be taken into consideration. The Court's decision showed that States could freely choose whichever system of delimitation suited them best. In practice, certain States drew straight base lines twenty, thirty and even forty miles long; it would not be realistic to suppose that they would discontinue their practice.

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² For the English text of the article, *vide supra*, 254th meeting, footnote 7.

³ *Vide supra*, 256th meeting, para. 27.

⁴ *I.C.J. Reports 1951*, p. 116.

4. The system of drawing straight base lines in no way impaired the freedom of the seas in practice; for while the outer limit of territorial waters was thereby pushed a little further to seaward the areas which would thereby cease to form part of the high seas were as a rule not crossed by the great ocean routes.

5. Some members of the Commission had relied, in support of their views, on the opinion of the committee of experts. That committee was an unofficial body set up unilaterally, not one of the experts being from a socialist country. It had really been a group of private persons whose decisions in no way bound the Commission. He added that if the Chairman was prepared to delete the word "deeply" from his amendment⁵ he (Mr. Zourek) might be prepared to accept paragraphs 1 and 2 of the Chairman's draft.

6. The Chairman said he preferred to maintain the term "deeply" which appeared in the International Court's decision and which enabled the provisions of the relevant paragraph to be extended to bays.

7. Mr. HSU pointed out that most of the members of the committee of experts came from countries which applied the three-mile limit, a circumstance which had surely influenced their advice. The rules which the experts had formulated and which the Special Rapporteur had endorsed were of interest only for those countries, which after all constituted a small minority.

8. The principal object of the straight base lines method, as of the theory of the contiguous zone and of the continental shelf, was to meet objections to the three-mile limit on the part of certain countries, particularly in northern Europe. He thought that either paragraph 2 should be dropped from article 6 or else its provisions should be restricted expressly to those countries which observed the three-mile rule in respect of their territorial sea.

9. Mr. FRANÇOIS, Special Rapporteur, replying to Mr. Zourek, said that his draft was not intended to prevent States from applying the straight base line method if justified, but only to avoid abuses. Countries which at the moment drew straight base lines of more than ten miles in length were in any case not numerous; in practice, only a few Scandinavian countries were involved.

10. In reply to Mr. Hsu, he repeated that there was no relation between the straight base lines method and the question of the breadth of the territorial sea.

11. With regard to the amendment proposed by Mr. Lauterpacht⁶ he would point out that the words in paragraph 2 thereof "and provided further that such headlands and/or islands are not more than ten miles apart" were redundant in view of the first sentence in the same paragraph. In that connexion, he proposed that paragraph 2 of his own article 6, the text of which was obscure, should be replaced by one

⁵ *Vide supra*, 256th meeting, para. 24.

⁶ *Vide supra*, 256th meeting, para. 27.

of the following alternative drafts A and B. He personally preferred alternative A.

Alternative A: "As a general rule the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. In exceptional cases the drawing of a longer line may be permitted; in that case, however, no point on such lines should be farther than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea."

Alternative B: "The maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn, when justified, between headlands of the coastline or between any such headland and an island, or between islands, provided that no point on such lines is farther than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea."

12. Mr. CORDOVA said that under the Special Rapporteur's article 6 States would have greater latitude in the case of small indentations in the coast than in the case of large bays. Article 8,⁷ which related to bays, did not allow for any exception to the ten-mile rule.

13. Mr. FRANÇOIS, Special Rapporteur, said that the answer to that question depended on the definition of the term "bay".

14. The CHAIRMAN said the Commission would consider that question in connexion with article 8. The five-mile rule for the maximum distance from the coast would be difficult to apply in the case of archipelagoes such as the *Skjaergaard* off the coast of Norway, unless straight base lines were drawn around the whole archipelago. In support of his view, he read a passage from the judgement of the International Court of Justice in the Fisheries case;⁸ the Court had further stated that the straight base lines rule was not a precise mathematical rule.⁹ Hence the rule should remain flexible to some extent; for that purpose, the general rule should perhaps be laid down first and the exceptions stated afterwards, as the Special Rapporteur had done in his draft.

15. Mr. LAUTERPACHT thought it important to retain the rule which laid down that the straight base line should at no point be more than five miles distant from the coast. A base line might very well be drawn through a number of islands less than ten miles apart and would thus attain a considerable length. If there

were no limit to its distance from the coast, vast stretches of the high seas might be enclosed. He pointed out that the stipulation of a maximum distance of five miles in no way meant that the remoter islands would not have their own territorial sea.

16. In reply to Mr. Zourek he said that coastal waters were frequently used for purposes of navigation both in time of peace and in time of war. He recalled the controversy which had arisen in that connexion in the case of the *Altmark* in 1940 during the second world war. For that reason the problem created by straight base lines transcended the question of safeguarding the economic interests of the coastal State. Moreover, from the latter's point of view it was as well to bear in mind that, while the method of straight base lines extended the rights of coastal States, it also greatly increased their duties, especially if they were neutrals.

17. Referring to the Chairman's draft¹⁰ he doubted whether the words "for the purpose of simplifying to a reasonable degree the perimeter of the territorial sea" were appropriate. Obviously, straight base lines simplified the situation. But simplification was a somewhat dangerous formula if it resulted in subjecting large areas of the high seas to the sovereignty of the coastal State.

18. The clause relating to "historical grounds" in the same draft was, however, acceptable in the sense that it referred to prescriptive rights. The same applied to other draft provisions. A better formula would be: "historical or prescriptive rights".

19. The CHAIRMAN said he had proposed the words "simplifying to a reasonable degree" because an excessively irregular outer limit for the territorial sea was undesirable. That had been one of the arguments of the Court in favour of straight base lines.

20. Mr. FRANÇOIS, Special Rapporteur, thought Mr. Lauterpacht's draft identical in substance with his own, with the exception of the last phrase of his own draft relating to internal waters. The Commission might defer consideration of that clause.

21. He preferred his own draft as it conformed exactly to the Court's decision; there was every advantage for the Commission to have the backing of the Court's authority.

22. With regard to the Chairman's draft, he wondered if the clause relating to historical grounds was not already contained by implication in the phrase "where circumstances necessitate" of his own text.

23. The CHAIRMAN thought these words were not sufficiently precise.

24. Mr. LAUTERPACHT pointed out that in their context they could not refer to historical grounds.

25. Mr. PAL wondered if the Commission was right, for the purpose of article 6, in treating in the same

⁷ In A/CN.4/77.

⁸ *I.C.J. Reports 1951*, p. 131.

⁹ *Ibid.*, p. 142.

¹⁰ *Vide supra*, 256th meeting, para. 24.

way the outline of the coast itself and islands. The position of such islands in relation to the coast was important for article 6. Islands within the territorial sea and those lying outside it should not be subject to the same régime. Only those islands situated within the territorial sea of a State and recognized as forming an integral part of its territory should be taken as individual points of departure for measuring the breadth of the territorial sea. Other islands would no doubt have their own territorial sea, but it would be difficult to consider them as individual points of departure for the base line provided for in the article under consideration. Such islands could be subject to the sovereignty of the coastal State and could possess their own territorial sea and safety zone. In order to be considered as points of departure for the base line, they must be recognized as an integral part of the territory of the State.

26. The CHAIRMAN pointed out that the outer limit of the territorial sea would vary according to the method adopted for drawing the base line.

27. Mr. CORDOVA said that Mr. Lauterpacht, supported by the Special Rapporteur, apparently envisaged the formation of two distinct zones between the straight base line and the coast, the one differing from the other only in respect of the right of passage. He inquired where the outer limit of the first zone would be.

28. Mr. LAUTERPACHT replied that it would be the line of low-water mark.

29. Mr. CORDOVA thought that there should be only one line to separate internal waters from the territorial sea. He agreed with Mr. Pal so far as the question of islands was concerned.

30. Mr. SPIROPOULUS thought that the Commission should not at that point consider the question of the right of passage; it should merely discuss paragraph 1, for which he preferred the Special Rapporteur's draft.

31. Mr. ZOUREK pointed out in reply to Mr. François that, without consulting all Governments, the Commission could not possibly discover exactly how many States drew lines more than ten miles in length. For example, the People's Republic of Bulgaria had adopted the straight base lines system between the promontories of Stalin (formerly Varna) Bay and between the promontories of Burgas Bay, the area lying between those lines and the coast being treated as internal waters.

32. Mr. PAL thought that, for the purpose of drawing the base lines, the only islands to be taken into consideration were those situated within the existing limits of the territorial sea and those which were internationally recognized as forming an integral part of the territory of the coastal State.

33. Mr. AMADO recalled that under article 11,¹¹ every island had its own territorial sea. That question did not affect article 6.

34. Mr. SPIROPOULOS agreed with Mr. Amado.

35. Mr. CORDOVA thought that in selecting the method of drawing the base lines the committee of experts had only had in mind countries applying the three-mile rule.

36. The CHAIRMAN said the Commission should vote on paragraph 1 of article 6 of the Special Rapporteur's draft.

37. Mr. LAUTERPACHT pointed out that the Chairman's amendment, by referring only to very indented coastlines, was not likely to give rise to any abuses. Nevertheless, he preferred the Special Rapporteur's text.

38. The CHAIRMAN agreed with Mr. Lauterpacht's view and withdrew his amendment.

39. He put to the vote Mr. Zourek's amendment to paragraph 1.¹²

The amendment was rejected by 8 votes to 1, with 4 abstentions.

40. Mr. SCALLE proposed the deletion of the words "As an exception" at the beginning of paragraph 1.

41. Mr. AMADO thought those words important. Article 5 laid down a general rule for the drawing of the base line; article 6 provided for exceptions to that rule, and in law, every exception had to be spelled out in full. The International Court had acknowledged in its decision in the Fisheries case that States had as a general rule adopted the line of low water mark for calculating the breadth of the territorial sea.

42. Mr. LAUTERPACHT suggested that the question of the exact terms to be employed might be referred to the Drafting Committee. In his opinion the rest of the text showed sufficiently clearly the exceptional nature of the straight base line, and the words "As an exception" at the beginning of the paragraph were, therefore, unnecessary.

43. Mr. FRANÇOIS, Special Rapporteur, said he would prefer the words in question to stand.

44. Mr. SCALLE thought that by presenting the rule of the straight base line as an exception, the Commission was departing from the spirit of the International Court's decision and was adopting a stricter attitude than the Court.

45. The CHAIRMAN put to the vote Mr. Scelle's proposal that the words "As an exception" at the beginning of paragraph 1 should be omitted.

The proposal was not adopted, 5 votes being cast in favour, 5 against, with 3 abstentions.

¹¹ In A/CN.4/77.

¹² *Vide supra*, 255th meeting, para. 23.

46. Mr. LAUTERPACHT proposed the deletion of the last phrase of the Special Rapporteur's paragraph 1 ("to be subject to the regime of internal waters"). The Commission should not prejudge the régime of the belt of sea between the limit of internal waters and the territorial sea.
47. Mr. CORDOVA pointed out that if it was not expressly stated at the outset that the new belt of sea would be subject to the same régime as the territorial sea, yet another zone might be formed which would only complicate the problem still further.
48. The CHAIRMAN recalled that in its decision in the Fisheries case, the International Court had made no special provision for the stretches of water lying to landward of the straight base line. The Commission might consider what law should be applicable thereto after it had fixed their limits.
49. Mr. ZOUREK stressed that the base line should be a dividing line between the waters; internal waters had their own régime and the meaning of the term was generally recognized beyond any doubt, the waters contained between the base lines and the coast were internal waters.
50. Mr. AMADO referred to the traditional distinction between inland waters, territorial sea and territory; there was no need to add a further category. In article 8,¹³ all the expanse of water lying to landward of the base line was treated as inland waters.
51. Mr. LAUTERPACHT said the problem was bound to crop up what régime was to be applicable to the expanse of water between the line of low-water mark and the straight base line; that expanse of water could become important in the case of the base line being drawn through islands. In any case, the Commission should decide what régime should be applied, and particularly to what extent the right of passage was to be recognized in those waters.
52. Mr. CORDOVA remarked that Mr. Lauterpacht's proposal might increase the breadth of the territorial sea. As the Special Rapporteur's draft provided for the drawing of straight base lines up to a distance of five miles from the coast, it would be impossible, in certain cases, to observe the three-mile limit for the breadth. Accordingly he could only vote in favour of article 6 if the last sentence was retained.
53. Mr. SCELLE said the Commission should not confuse two distinct problems; that of the base line and that of the right of passage in internal waters. The right of passage was absolutely necessary because no navigation was possible, even on the high seas, without ports of call; that was the meaning of the well-known principle of the unity of the sea. It would, however, be easier if the Commission discussed Mr. Lauterpacht's proposal in connexion with the question of the right of passage as a whole.
54. The CHAIRMAN agreed with Mr. Scelle, and again referred to the extracts from the International Court's judgement which he had quoted earlier.¹⁴
55. Mr. FRANÇOIS, Special Rapporteur, said that perhaps the question of the right of passage was not as important as some members of the Commission seemed to think. Mr. Lauterpacht probably did not intend to treat as inland waters the new zone which might be called *eaux intermédiaires*; he wondered, however, under what conditions the right of passage would be acknowledged therein. The matter could perhaps be held over until the Commission considered the rights of States. He wished to stress, however, that the new zones in question would probably not be as extensive as Mr. Lauterpacht thought; the straight base lines could not be at a greater distance than five miles from the coast and in any case would not be permitted except in the case of a particularly indented coast.
56. Mr. LAUTERPACHT agreed to the suggestion made by the Special Rapporteur and Mr. Scelle that the Commission should discuss the point he had raised when it came to deal with right of passage. Accordingly, he withdrew his draft amendment. He would, however, point out that the Special Rapporteur's remarks on the five-mile maximum distance prejudiced the Commission's future decision concerning paragraph 2.
57. The Chairman said that, before voting on paragraph 1 as a whole, the Commission should further decide if it was going to mention "historical rights".
58. Mr. LAUTERPACHT said that a drafting question of that nature could be left to the Drafting Committee.
59. Mr. HSU on the contrary regarded the question as one of substance. The term "historical rights" was vague; it might enable States to avail themselves of situations which they had themselves created in violation of international law. He would prefer a simple reference to "historical grounds".
60. Mr. AMADO and Mr. CORDOVA pointed out that the term "historical rights" had a very definite meaning; it referred to immemorial rights.
61. The CHAIRMAN said that the term "historical grounds" which had been employed by the International Court of Justice in its decision in the Fisheries case, would be quite appropriate in the particular context.
62. Mr. LAUTERPACHT suggested that the first sentence of paragraph 1 should read: "... where historical reasons or where circumstances..." In the same paragraph the words "In these special cases" would replace the singular "In this special case".
63. The CHAIRMAN put to the vote article 6, paragraph 1, in that amended form.

Article 6, paragraph 1, as amended, was adopted by 8 votes to 1, with 4 abstentions.

¹³ In A/CN.4/77.

¹⁴ *Vide supra*, para. 14.

64. Mr. ZOUREK explained that he had voted against paragraph 1 because it was inconsistent with existing international law in that it treated the straight base lines system as an exceptional case; also, it tended to restrict the right of States to choose whichever system was most suitable to their particular needs.

65. Mr. SCELLE said he had abstained because the draft adopted by the Commission treated straight base lines as the exception.

66. Faris Bey KHOURI said he had abstained from voting because he wanted to wait until the draft had been considered by the Drafting Committee. The final phrase referred to the regime of the sea areas lying within the base lines, which was not the subject matter of the paragraph in question. Besides, the reasons or circumstances which might justify the straight base lines method had not been explained in sufficient detail.

67. The CHAIRMAN said that the Drafting Committee was, of course, free, within the limits of its competence, to alter the wording of the paragraph just adopted.

68. Mr. FRANÇOIS, Special Rapporteur, recalled that, earlier in the meeting, he had proposed two new alternatives for paragraph 2 and had expressed a preference for alternative A.¹⁵

69. Replying to a question by Mr. Córdova, he explained that the alternative drafts differed only in respect of the maximum ten-mile length for the straight base lines. Under alternative A that length could, in exceptional cases, be extended, on condition that no point of the base lines was more than five miles from the coast; lines of less than ten miles in length could even, at certain points, be more than five miles distant from the coast.¹⁶ Alternative B contained a more rigid rule which prohibited the drawing of a line exceeding ten miles in length or which at any one point was more than five miles from the coast.

70. Alternative A would be more convenient in the case of certain deeply indented coastlines. He added that it was based directly on the conclusions reached by the committee of experts at The Hague (A/CN.4/61/Add.1, annex, page 4, paragraph 2, and page 5, paragraph 3).

71. Mr. LAUTERPACHT pointed out that the words "such islands" in alternative A showed clearly that lines exceeding ten miles in length could not be measured as from islands lying at a distance of more than five miles from the coast.

72. He also thought that the words "when justified" in alternative A should be replaced by some such words as "in the cases referred to in paragraph 1".

73. Finally, he pointed out that, by contrast with the

formula in paragraph 1, the "exceptional cases" referred to in alternative A were not specified.

74. Mr. FRANÇOIS, Special Rapporteur, said, in reply to Mr. Lauterpacht's last remark, that the committee of experts had not been more specific in their own conclusions; they had given no indication with regard to cases where the extension of the line was authorized, or with regard to the length to which such a line might be extended.

75. Mr. LAUTERPACHT said that in a legal instrument such vagueness was inadmissible. Exceptional circumstances justifying departures from the rule might be historical, geographical or of any other kind. He wondered how a judicial authority could apply a rule drafted in such terms.

76. Mr. CORDOVA shared Mr. Lauterpacht's misgivings.

77. Mr. SPIROPOULOS proposed that the words "In exceptional cases" should be deleted, and that the Commission should simply recognize the right to draw base lines exceeding ten miles in length. States would always make it known if they considered theirs to be an exceptional case.

78. Mr. ZOUREK pointed out that there was a contradiction between article 6, paragraph 2, and article 13.¹⁷ Article 13 provided that drying rocks and shoals might be taken as points of departure for measuring the territorial sea, without specifying whether those rocks had to be within a certain distance from the coast. They had, of course, to be situated wholly or partly within territorial waters. In his opinion, the two distances of five and ten miles mentioned in article 6, paragraph 2, were arbitrary and could be variously interpreted. He recalled that in his proposed amendment¹⁸ to article 6 he had suggested that the paragraph in question should be deleted.

79. Mr. CORDOVA said that Mr. Spiropoulos' suggestion was not acceptable; the opening sentence of paragraph 2 laid down a general rule; it was therefore necessary to state that departures from that general rule would only be allowed in exceptional cases.

80. Mr. SPIROPOULOS, replying to Mr. Córdova, said that if the first rule were to be considered as a general one and the second as a special one, his own suggestion implied no contradiction.

81. In reply to Mr. Zourek, he said that for the time being the Commission was not discussing article 13. The distances of five and ten miles were provisional, as he had mentioned before; their main purpose was to give Governments the opportunity of stating their point of view.

82. Mr. LAUTERPACHT agreed with Mr. Córdova that if the words "In exceptional cases" were dropped

¹⁵ *Vide supra*, para. 11.

¹⁶ *Vide supra*, 255th meeting, para. 6.

¹⁷ In A/CN.4/77.

¹⁸ *Vide supra*, 255th meeting, para. 23.

from alternative A, then the words "As a general rule" should not be used either. Paragraph 2 would then be more affirmative. In his opinion, provision had to be made for exceptional cases and accordingly he suggested that the words "In exceptional cases" should be retained, subject to the addition, as in the case of paragraph 3 of his own draft article 6,¹⁹ of the words "or where equitable considerations permit..." That was a vague, but nonetheless legal' formula.

83. The CHAIRMAN said he would find it difficult to accept a rule as rigid as that drafted by the Special Rapporteur; he therefore proposed that in the last sentence of alternative A the words "in that case, however, no point on such lines should be farther than five miles from the coast", should be replaced by the words "and the distance of five miles may also be exceeded". As he had explained by reference to archipelagoes, in some cases the base line could not invariably remain within five miles from the coast.

84. Mr. SCELLE suggested that, as a precaution against abuses, the Chairman's proposal should read: "... may also be slightly exceeded."

The meeting rose at 1 p.m.

¹⁹ *Vide supra*, 256th meeting, para. 27.

258th MEETING

Wednesday, 30 June 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

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

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

Article 6: Straight base line² (*continued*)

1. The CHAIRMAN invited the Commission to resume debate on the Special Rapporteur's alternative A for paragraph 2.³

2. Mr. ZOUREK, comparing the Special Rapporteur's first alternative, alternative A, with the relevant paragraph in the committee of experts' report,⁴ said that the alternative contained two arbitrary data, the five-mile and the ten-mile distances. The Special Rapporteur's draft provision was much harder on coastal States than the experts' opinion, for the latter had stipulated a maximum five-mile distance from the coast only with respect to the first island and not with the others, in cases where more than one island was concerned.

3. With reference to Mr. Spiropoulos' contention⁵ that the only object of stipulating the maximum breadth of ten miles was to elicit comments from Governments, he expressed surprise that the article in question should expressly provide for a ten-mile distance. He opposed any mention of a particular figure, but if it was desired to mention one at all for the object Mr. Spiropoulos had indicated, a twenty-five mile distance would be just as suitable and perhaps even more likely to provoke a reaction on the part of governments.

4. He pointed out that a number of the provisions contained in draft article 6 would, if adopted, prejudice the discussion of other articles which the Commission had not yet considered. A decision on a maximum ten-mile length and on a five-mile maximum distance from the coast would prejudice the question of bays in article 8; by adopting those provisions the Commission would be prejudging the definition of "groups of islands" to be given in article 12 and the delimitation of the territorial sea at estuaries as proposed in article 15.⁵ The Commission could not adopt the five- and ten-mile maximum distances which had been proposed. Accordingly, he proposed that paragraph 2 of article 6, which was not indispensable for either the article or the draft regulation as a whole, should be deleted.

6. Mr. FRANÇOIS, Special Rapporteur, pointed out with regard to the first point raised by Mr. Zourek that he had probably only read the French text of the

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 254th meeting, footnote 7.

³ *Vide supra*, 257th meeting, para. 11.

⁴ Annex to document A/C.N.4/61 in *Yearbook of the International Law Commission, 1953*, vol. II.

⁵ *Vide supra*, 256th meeting, paras. 8-9 and 257th meeting, para. 81.

committee of experts' report. Their report had originally been drafted in English, and the French translation was not exact.

7. Mr. Zourek was right in pointing out that all the questions under discussion were inter-connected and article 6, in particular, had a bearing on articles still to be discussed. It was impossible to consider all articles simultaneously and even if in the light of future discussion the Commission had to revise its earlier decisions, the order of discussion proposed by the Chairman was in his opinion the correct one.

8. The CHAIRMAN proposed that in the Special Rapporteur's alternative A the phrase: "in that case, however, no point on such lines should be farther than five miles from the coast" should be replaced by the phrase: "and the said distance of five miles from the coast may equally be extended". He would oppose the suggestion that the word "slightly" should be inserted before the word "extended" as that suggestion did not take into consideration the special nature of the "Skjaergaard".⁶

9. Mr. FRANÇOIS, Special Rapporteur, thought the Chairman's amendment unacceptable because it gave governments absolute freedom to draw the base line as they saw fit, both in regard to its length and to its distance from the coast, and any dispute concerning that line could only be settled by a judicial authority. The latter, however, was given no guidance as to the principles on which its decision should be based. The Chairman's amendment was very close to that proposed by Mr. Zourek.

10. Mr. LAUTERPACHT pointed out that under the Chairman's amendment Governments would have full discretion "in exceptional cases" only. If the Chairman gave a definition of those exceptional cases his amendment might be more acceptable.

11. Mr. SCELLE said that the insertion of the word "slightly" before the word "extended" would be useful in restricting the great latitude allowed for by the Chairman's amendment.

12. The CHAIRMAN said that the latitude given to States by his amendment was not unlimited. The right of States to draw base lines remained subject to the provisions of paragraph 1 which had been accepted.⁷ The extension of the distance from the coastline was only authorized in exceptional cases. Finally, the condition that the line was to be a "reasonable" one restricted Governments still further.

13. Mr. FRANÇOIS, Special Rapporteur, agreed that the introduction of the word "slightly" would improve the Chairman's amendment. It was not enough to require that the line should be a "reasonable" one.

14. Mr. CORDOVA did not think that any useful purpose would be served by allowing for exceptions

in paragraph 1 and subsequently qualifying them in paragraph 2. A better solution would be to delete paragraph 2 and to provide for a judicial authority to settle disputes arising in connexion with paragraph 1.

15. Mr. FRANÇOIS, Special Rapporteur, said that the most important point was the five-mile distance between the base line and the coast; provision could be made for a straight base line slightly longer than ten miles on condition that no point on that line was more than five miles away from the coast.

16. Mr. AMADO said that paragraph 1 of article 6 contained an important limitative condition in the words "because the coast is deeply indented or cut into". He hoped that the Chairman and Mr. Scelle would be able to reach some agreement on the Chairman's amendment. It was premature to discuss what judicial body would be empowered to settle disputes. The Commission should first draw up a set of rules which should be as consistent *inter se* as possible.

17. The CHAIRMAN put to the vote Mr. Zourek's proposal for the deletion of paragraph 2.

The proposal was rejected by 6 votes to 4, with 3 abstentions.

18. Faris Bey el-KHOURI asked who would be empowered to extend the distance of five miles from the coast under the Chairman's amendment.

19. The CHAIRMAN replied that in the first instance it would be the coastal State, and that subsequently the distance might form the subject of a judicial decision.

20. Mr. CORDOVA said it was important that either paragraph 1 or paragraph 2 should specify what authority would be competent to settle disputes.

21. Mr. FRANÇOIS, Special Rapporteur, warned the Commission against making everything dependent on the decision of a court. It was, to all intents and purposes, being suggested that the Commission should be as vague as possible in its proposals and leave everything to be decided by a court in a "reasonable" manner. The task of the Commission was to draw up definite rules. The idea of arbitration was not in itself a bad one, but in that particular case it did not apply.

22. The CHAIRMAN put to the vote his amendment to the effect that the phrase in alternative A: "in that case, however, no point on such lines should be farther than five miles from the coast" should be replaced by the phrase: "and the said distance of five miles from the coast may equally be extended".

The amendment was rejected by 5 votes to 3, with 5 abstentions.

23. Mr. ZOUREK pointed out that, as the Special Rapporteur himself had said, the Commission's decision was purely provisional and could be revised in the light of debate on the other articles. The Chairman had confirmed that view.

⁶ *Vide supra*, 257th meeting, paras. 83 and 84.

⁷ *Vide supra*, 257th meeting, para. 63.

24. The CHAIRMAN put to the vote the Special Rapporteur's alternative A for paragraph 2 in its amended form:

"As a general rule the maximum permissible length for a straight base line shall be ten miles. Such base lines may be drawn in accordance with paragraph 1, between headlands of the coast line or between any such headland and an island less than five miles from the coast, or between such islands. The drawing of a longer line may be permitted; in that case, however, no point on such lines should be farther than five miles from the coast. Base lines shall not be drawn to and from drying rocks and shoals. Such lines shall be deemed to separate inland waters from the territorial sea."

Paragraph 2 as amended was adopted by 7 votes to 4, with 2 abstentions.

25. Mr. HSU said that he had voted against paragraph 2 as its adoption would prejudice too many questions still to be considered by the Commission; it would also be prejudicial to the final determination of the breadth of the territorial sea.

26. Mr. ZOUREK said that he had voted against paragraph 2 because its provisions were inconsistent with the international law in force and could not seriously be put forward as a rule *de lege ferenda*.

27. Mr. LAUTERPACHT wished to maintain his draft of paragraph 3.⁸ In adopting paragraph 2 the Commission had very properly filled a gap left by the decision of the International Court in the Fisheries case. It had laid down maximum distances. However, in his opinion the Commission should go further. It should provide for exceptional cases. In addition to those falling within the category of historical circumstances, the Court should be empowered to consider exceptional cases in which equitable considerations permitted the drawing of base lines of a length and at distances exceeding those laid down in paragraph 2. In such cases, the Court should rule *ex aequo et bono*; indeed, that was the only possible way of determining what the equitable considerations in question were.

28. Mr. SPIROPOULOS thought that there was a misunderstanding between Mr. Lauterpacht and himself. He did not object to the principle of arbitration. He merely criticized Mr. Lauterpacht's draft because it proposed that the International Court should have the power, "in conformity with paragraph 2 of article 38 of its statute, to maintain, modify or annul the lines thus drawn." Actually, the Court's statute in no way empowered it to act as proposed by Mr. Lauterpacht. A decision of the Court could never have the effect of modifying a line drawn by a State. His was perhaps a formal objection, but he emphasized that he was not opposed in principle to the submission of cases to arbitration.

29. Mr. SCELLE supported Mr. Lauterpacht's proposal. The Special Rapporteur's draft embodied very broad

rules of law which left a wide margin for interpretation. If the Commission's draft was to be of any value, the rules it laid down had to be precise and consequently to be based on precedent. Mr. Lauterpacht had argued that unless a judicial authority had the power to review action taken under paragraph 2, that paragraph would allow too much latitude to States, and had accordingly drafted a paragraph 3 to provide for the possibility of such review.

30. He suggested that the objection raised by Mr. Spiropoulos might be met by modifying in Mr. Lauterpacht's draft of paragraph 3, the wording of the sentence: "to maintain, modify or annul" while retaining the idea.

31. Mr. CORDOVA agreed that either the International Court or some other tribunal should be empowered to deal with cases arising out of paragraph 2.

32. He had two objections to Mr. Lauterpacht's draft. Firstly, the Commission had adopted a general rule in article 5 to the effect that the breadth of the territorial sea should be measured from the low-water mark. Paragraph 1 of article 6 contained an exception to that rule, which was widened by paragraph 2, and would be still further widened by the introduction of the notion of equitable consideration. Surely that was unnecessarily complicated. Secondly, Mr. Lauterpacht's proposal referred only to the coastal State drawing the base line on the basis of equitable considerations. In his opinion, the Court should also be given jurisdiction in cases where the base line was drawn in accordance with paragraphs 1 and 2 of the article.

33. Mr. LAUTERPACHT said that the International Court's jurisdiction under article 38, paragraph 1, of its statute, would generally apply to all articles of the regulation on the territorial sea. His proposal was that the Court should be given the right to decide *ex aequo et bono* in the special case under reference.

34. Mr. AMADO said that under article 38, paragraph 2, of its statute, the International Court could decide a case *ex aequo et bono* "if the parties agree thereto". Clearly the Court could only have power to decide in that manner—instead of in accordance with international law pursuant to article 38, paragraph 1, of its statute—in cases where the interested parties were in agreement. But Mr. Lauterpacht's proposed paragraph 3 laid down that "at the request of any interested State, the International Court of Justice shall have the power, in conformity with paragraph 2 of article 38 of its statute, to maintain, modify, etc." That would be tantamount to allowing one of the interested parties to authorize unilaterally the International Court to decide a case otherwise than by reference to international law.

35. Mr. PAL agreed with Mr. Scelle that Mr. Spiropoulos' objection was one of mere form in so far as it criticized the powers given to the Court "to maintain, modify or annul" the straight base lines. Whenever a court was called upon to decide a boundary dispute, it had not merely the choice between the lines proposed

⁸ *Vide supra*, 256th meeting, para. 27.

by the contending parties; it could also adopt an intermediate line between the two, which was tantamount to modifying the lines drawn by the parties.

36. He suggested that Mr. Lauterpacht's draft paragraph 3 should not refer to equitable considerations and that the paragraph should be redrafted on the following lines:

"In the cases where it is permissible to draw base lines of a length and at distances exceeding those laid down in paragraph 2, in the circumstances given therein, the coastal State, etc."

37. Mr. FRANÇOIS, Special Rapporteur, was inclined to agree with Mr. Spiropoulos' criticism of the term "to maintain, modify or annul". Furthermore, he did not favour *ex aequo et bono* jurisdiction. He could not recall a single case in which the parties had accepted to refer to the International Court a case giving it power to decide *ex aequo et bono*.

38. If the Commission were to accept the principle of *ex aequo et bono* rulings it would be necessary to have a special agency to give such rulings. In the draft articles on fisheries adopted at the fifth session of the Commission,⁹ article 3 made provision for a special international authority empowered to prescribe a system of regulation of fisheries on the high seas.

39. He would suggest that the International Court of Justice should be authorized to decide disputes over base lines in accordance with international law. If the law was too vague, the only course open to the Commission was to create a special agency with powers to decide disputes on equitable grounds.

40. Mr. GARCÍA-AMADOR said that it would save time and avoid lengthy discussion if the question of compulsory jurisdiction of the International Court, and that of the creation of a special agency, were dealt with in a single article at the end of the draft regulation. Mr. Lauterpacht's draft, paragraph 3 would then become unnecessary. The best course was to follow the usual United Nations practice and to provide in a general way for the compulsory jurisdiction of the International Court over the interpretation of the regulation.

41. Mr. ZOUREK said that Mr. Lauterpacht's proposal to empower the International Court to modify straight base lines drawn by States would be tantamount to transferring to the Court one of the essential attributes of the sovereignty of States and to convert the Court into a body superior to States. The proposal was also inconsistent with the Court's Statute, for the Court was only competent to adjudicate disputes between States. Under Mr. Lauterpacht's proposal a State would be able to apply unilaterally to the Court to amend a rule enacted by another State even if no dispute existed. Furthermore it was an essential preliminary condition

of the power to decide a dispute *ex aequo et bono* that the parties should consent to such an adjudication. Obviously, the power could operate only within the limits stipulated in the Court's statute. Under the proposal in question the International Court would acquire legislative powers which even the General Assembly of the United Nations did not possess.

42. Besides, the paragraph under discussion was not necessary. Any State could at any time accept the compulsory jurisdiction of the International Court under article 36 of its statute. A State which was disinclined to accept that compulsory jurisdiction was also unlikely to accept the Commission's draft.

43. Mr. SPIROPOULOS said that even where two States parties to a dispute agreed that the Court should decide it *ex aequo et bono*, the decision would only be valid for the States in question. It would be quite inoperative with respect to other States.

44. The International Court, when giving its judgement in the Fisheries case, had ruled in accordance with international law—and not *ex aequo et bono*—although no very precise rule existed for the drawing of base lines. Since the Commission was adopting more precise rules than those obtaining at the time of the Fisheries case dispute, there was no reason why the International Court's jurisdiction should not apply in the normal manner—namely, under article 38, paragraph 1, of its statute, which required disputes to be decided in accordance with international law.

45. With regard to the possibility of creating a special agency, he would suggest that such agency could be the same as that referred to in the draft articles on fisheries prepared at the fifth session.¹⁰ The idea of a special agency was by no means a new one: at the 1930 Codification Conference at The Hague, establishment of an international body had been suggested with powers to fix the limits of the territorial sea for all States parties to the convention then drafted.

46. Mr. SCELLE agreed that the International Court's *ex aequo et bono* jurisdiction only applied in cases of agreement between the parties.

47. The Permanent Court of International Justice, in the case concerning certain German interests in Polish Upper Silesia,¹¹ had made it clear that any decision or regulation issued under municipal law was from the standpoint of the Court merely a fact; the Court could ignore it, and thus leave it without effect in international law. It was clear that while the International Court of Justice could not in a literal sense annul or modify base lines drawn by States, it could nonetheless arrive at the same result by treating a State's decision as ineffective in international law.

48. Two important conclusions could be drawn from the useful exchange of views that had just taken place.

⁹ See p. 17 of the report of the commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹⁰ *Ibid.*

¹¹ *Publications of the Permanent Court of International Justice, Series A, No. 7, p. 19.*

Firstly, he was glad to see that there was no disagreement concerning the inclusion of an article providing for the compulsory jurisdiction of the International Court. Secondly, the whole question of jurisdiction could best be treated in a single article applicable to the whole regulation, as suggested by Mr. García-Amador. The possibility of the parties accepting *ex aequo et bono* jurisdiction could usefully be mentioned in such an article. It should be remembered that the border-line between law and equity was a difficult one to draw. In the Fisheries case, the International Court had really given an equitable rather than a purely legal decision.

49. Mr. LAUTERPACHT said that since he had first proposed that provision should be made for the possibility of an equitable departure from the principles laid down in article 6, paragraph 1, the situation had materially altered. The Commission had meanwhile introduced in article 6, paragraph 1, a provision permitting the departure from the low-water line on historical grounds, which was one of the chief cases he had had in mind when mentioning equitable considerations. Moreover, in the version finally adopted for article 6, paragraph 2, the drawing of straight base lines longer than ten miles had been authorized, provided that no point on such lines was farther than five miles from the coast. For all those reasons, he withdrew his draft new paragraph 3.

50. Replying to questions by Mr. Córdova, Mr. García-Amador and Faris Bey el-Khouri, the CHAIRMAN said that the Special Rapporteur would prepare in consultation with other members, a draft article concerning the settlement of eventual disputes which would apply to all questions dealt with in the regulation.

51. Mr. FRANÇOIS, Special Rapporteur, turning to the final paragraph of his article 6,¹² said that the provision embodied in the paragraph was absolutely essential to seafaring men who needed to know precisely where the base lines, and hence the outer limit of the territorial sea, were to be entered on the maps. He would even add that all base lines, even if not justified, should be given proper publicity.

52. Mr. LAUTERPACHT suggested that the paragraph should read: "Due publicity shall be given by the coastal State to straight base lines drawn in conformity with paragraphs 1 and 2." He attached particular importance to the words "due publicity".

53. Mr. FRANÇOIS, Special Rapporteur, proposed the following redraft for paragraph 3 to take into account Mr. Lauterpacht's text: "Where straight base lines are drawn in conformity with paragraphs 1 and 2, it shall be the responsibility of the coastal State to give due publicity to the lines so drawn."

54. The CHAIRMAN put to the vote article 6 as a whole, subject to possible drafting changes.

Article 6 was adopted by 7 votes to 1, with 5 abstentions.

55. Mr. ZOUREK said that he had voted against the article as a whole because of the objections he had raised in the course of the discussion to paragraphs 1 and 2 of that article and when those paragraphs were voted.

*Article 7: Outer limit of the territorial sea
(A/CN.4/77)¹³*

56. Mr. FRANÇOIS, Special Rapporteur, said that his draft article 7 was based on the recommendations of the committee of experts¹⁴ which had arrived at the conclusion that the International Court of Justice, in its decision in the Fisheries case, had somewhat misconceived the exact scope of "arcs of circles" method. In the first place, it should be stressed that—contrary to the Court's impression—that method was not a new one; seafaring men had been using it for a very long time. Furthermore, the "arcs of circles" method did not produce an outer limit which followed the coastline in all its sinuosities.

57. The method in question consisted of drawing a series of circles, all of the same radius—namely, the distance T (T = width of the territorial sea). Those circles would be drawn from all points on the base line. The circles would naturally intersect. The limit of the territorial sea would be constituted by the arcs lying furthest to seaward. Thus all circles on the landward side of the points of intersection of other circles would be disregarded for the purpose of determining the outer limit. That outer limit, consisting of a series of short arcs of circles curving out towards the sea, would be infinitely less sinuous than the actual coastline.

58. Mr. CORDOVA said that such a method would give an outer limit that would not be actually parallel to the base line.

59. Mr. FRANÇOIS, Special Rapporteur, said that that was indeed so. He pointed out that if the system of straight base lines were to be generalized, there would be no need for the "arcs of circles" method; the outer limit would be actually parallel to the straight base lines and at a distance of T miles from it.

60. The practical result of the "arcs of circles" method was that any point on the outer limit of the territorial sea would necessarily be T miles away from some given point on the coast—namely, the particular point on the coast which was the centre of the arc of circle

¹³ Article 7 read as follows:

"The outer limit of the territorial sea is the line, every point of which is at a distance of T miles from the nearest point of the base line (T being the breadth of the territorial sea). It constitutes a continuous series of intersecting arcs of circles drawn with a radius of T miles from all points on the base line. The limit of the territorial sea is formed by the most seaward arcs."

¹⁴ See the committee's report, annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953*, vol. II.

¹² *Vide supra*, 254th meeting, footnote 7.

on which that point on the outer limit was situated. Naturally, a point on the outer limit would be at greater distances from points along the coast, other than the centre of its arc of circle.

61. Mr. ZOUREK inquired if the outer limit would take the form of a tangent or if it would be formed by a series of arcs of circles, as article 7 seemed to suggest.

62. Mr. SCELLE inquired whether the method recommended differed much from that suggested by Professor Gidel in his *Droit international public de la mer* and termed *ligne tangente à tous les arcs de cercle*.

63. Mr. FRANÇOIS, Special Rapporteur, said that the system of *lignes tangentes* was not favoured by seafaring men. A tangent was a straight line perpendicular to the radius of a circle. The "arcs of circles" system, on the other hand, produced an outer limit composed of a series of small arcs bulging outwards towards the sea. The committee of experts had given expressed in their report¹⁵ which he had reproduced in his draft article 7: "The limit of the territorial sea is formed by the most seaward arcs."

64. Mr. ZOUREK said that in the Fisheries case, the United Kingdom had admitted that the "arcs of circles" method was not an established rule of international law. In any case, that method only produced a partial simplification of the outer limit of the territorial sea and was awkward to apply in cases where there were islands off the coast. The net result of adopting such a method would be the creation of a number of pockets of high seas surrounded by the territorial sea—a situation likely to produce serious disadvantages for navigation.

65. The Commission should not attempt to impose a unified system on all States. There were several methods of determining the outer limits of the territorial sea, and States were free to choose whichever they considered best. The Special Rapporteur himself had only adopted the "arcs of circles" method on the recommendation of the committee of experts. In his earlier second report¹⁶ he had not advocated that method.

66. Mr. FRANÇOIS, Special Rapporteur, said that it was not only the opinion of the committee of experts that had swayed him. He had also been very much impressed by the pleadings in the Fisheries case. As international law now stood, it would appear that States were allowed to simplify the outline of the perimeter of the territorial sea instead of following the outline of the coast in all its sinuosities. It was desirable that some definite method should be laid down for that simplification.

67. Mr. SPIROPOULOS inquired whether Mr. Zourek had any alternative suggestion to offer.

68. Mr. ZOUREK said that a line parallel to the low-water line was conceivable in the case of a fairly straight coastline but that a line parallel to straight base lines would be appropriate in other cases.

69. Mr. FRANÇOIS, Special Rapporteur, said that the main purpose of article 7 was to make it clear that should a State employ the "arcs of circles" method when determining the outer limit of its territorial sea, it could not be accused of violating international law. The article made it clear that such a State was under no obligation to follow the outline of the coast in all its sinuosities. All seafaring men were in agreement that it was absolutely impracticable to draw the outer limit of the territorial sea so that it followed the coastline in all its sinuosities. And it was on the basis of the recommendation of experts who agreed with the view universally held by seafaring men that the article had been drafted by him in the form submitted.

The meeting rose at 1 p.m.

259th MEETING

Thursday, 1 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

¹⁵ *Ibid.*

¹⁶ *Op. cit.*, A/CN.4/61.

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

CHAPTER II : LIMITS OF THE TERRITORIAL SEA
(continued)

Article 7 : Outer limit of the territorial sea
(A/CN.4/77)² (continued)

1. Mr. HSU said that the method recommended by the Special Rapporteur seemed to him more scientific than the method employed in the past, for the drawing of arcs was based on a point and not on a short base line.

2. Mr. CORDOVA said that the rule as such was really given in full in the first sentence of the article; he proposed that the other two sentences should form part of the comment to the article.

3. Mr. PAL said, in support of that proposal, that the arcs of circles method was of interest only in cases where the territorial sea was not delimited by the straight base line method. In the latter case it was easier to adopt a line parallel to the base line as the outer limit of the territorial sea.

Mr. Córdova's proposal was adopted unanimously.

Article 7, as so amended, was adopted unanimously.

Order of business

4. The CHAIRMAN said that discussion of article 8 (bays) and related articles might require a great deal of time. The Commission had only three more weeks before the preparation of the report on the session. So that the Commission could accomplish a practical, albeit a partial, result and before long consider the remaining items on its agenda, he proposed that consideration of those articles should be deferred.

5. Mr. FRANÇOIS, Special Rapporteur, supported the Chairman's proposal. It was by no means generally admitted that the questions of bays (article 8), groups of islands (article 12), straits (article 14) and the delimitation of the territorial sea at the mouth of a river (article 15), were not connected with the breadth of the territorial sea. Accordingly, for the time being only less controversial articles should be studied.

6. In that way, at its seventh session the Commission would only have the breadth of the territorial sea to consider, after which it would be able to submit a complete draft regulation to the General Assembly.

7. Faris Bey el-KHOURI said there would be little point in postponing until the seventh session the study of articles connected with the breadth of the territorial sea unless in the meantime the Commission could expect to receive fresh information—for example, comments by Governments on the breadth of the territorial sea.

8. Mr. SPIROPOULOS thought that Governments would only express an opinion if a complete draft were submitted to them. On the other hand, if the Commission wished to finish its study of the report on the territorial sea, it would probably not have the time to consider the other items on its agenda, or only time to do so very superficially.

9. Mr. CORDOVA did not agree with the proposal of the Chairman and Mr. François. If the Commission was unable at the current session to complete the study of the régime of the territorial sea, which had been on its agenda for several years, one might well ask when it would do so. He therefore proposed that the study should be completed before anything else and a full report submitted to the General Assembly, even if the Commission failed to reach agreement on all the articles.

10. Mr. AMADO supported that proposal.

11. Mr. SCELLE did not think fragmentary reports should be submitted to the General Assembly. The Commission should complete the study it had begun and should first consider the articles on which agreement seemed most likely.

12. Mr. LIANG, Secretary to the Commission, referred to General Assembly resolution 374 (IV) which, because the questions of the régime of the high sea and the régime of the territorial sea were closely connected, had recommended the Commission to give priority to the latter question as well. In order to avoid at the next session the difficulties which had been encountered during the current session, the Commission might send out a questionnaire to Governments concerning the breadth of the territorial sea. Governments had not had an opportunity of commenting on the question since the codification conference of 1930.

13. Mr. GARCÍA-AMADOR added that, pursuant to the resolution mentioned by the Secretary to the Commission, the General Assembly was waiting to receive the draft relating to the territorial sea before considering the draft articles concerning the continental shelf, the fisheries and the contiguous zone submitted to it by the Commission in 1953.

14. Mr. ZOUREK recalled that already in 1952 he had proposed that a preliminary questionnaire relating to the most important matters affecting the territorial sea should be sent out to Governments; he thought such a questionnaire might still be sent.

15. Mr. HSU saw no need for such a questionnaire, but thought that the Commission could complete its study of the report on the territorial sea at the current session if it set its mind to it.

16. The CHAIRMAN noted that the members of the Commission were generally agreed that the study of article 8 and of the articles directly or indirectly connected with the question of the breadth of the territorial sea should be deferred for the time being.

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 258th meeting, footnote 13.

17. He put to the vote Mr. Córdova's proposal that those articles should be considered immediately after the articles having no bearing on the breadth of the territorial sea had been discussed.

The proposal was adopted by 8 votes to 1, with 4 abstentions.

*Article 9: Ports
(article 7 of A/CN.4/61)³*

18. Mr. FRANÇOIS, Special Rapporteur, explained that the article (which corresponded to article 7 in his second report, document A/CN.4/61) was identical with the corresponding article prepared at the 1930 Codification Conference.

19. Mr. CORDOVA proposed that the words "the breadth of" in the first line of the article should be deleted.

It was so agreed.

20. Mr. LAUTERPACHT asked if jetties stretching out to sea for seven or eight miles were to be considered as permanent installations. The same question arose in connexion with the dykes which according to some reports the French Government was planning to build in the Bay of Mont Saint Michel to harness the energy of the tides and which would be some twenty miles in length.

21. Mr. SCELLE pointed out that the case of jetties was different from that of dykes. Jetties were used for the loading and unloading of cargo and for sheltering vessels; they were part of the harbour works. The dyke referred to by Mr. Lauterpacht was still only a project mentioned by the French Government in connexion with the Minquiers and Ecrehos case which had been before the International Court of Justice in 1953;⁴ in cases, however, where dykes were already being used to protect the coast and where they could be formed into polders, as at some points of the Dutch coast, they should, he thought, be taken into consideration in determining the limits of the territorial sea.

22. Mr. CORDOVA said that that should not apply to jetties built by private companies for their own particular needs.

23. Mr. FRANÇOIS, Special Rapporteur, said that dykes used for the protection of the coast constituted a separate problem and did not come under either article 9 (ports) or article 10 (roadsteads); roadsteads were in fact merely stretches of water where ships anchored.

24. Mr. LAUTERPACHT was glad to hear that according to the Special Rapporteur dykes should be

studied apart and dealt with in a separate article. As a precautionary measure in connexion with jetties, in article 9 the word "outermost" should perhaps be deleted and the words "stretching out to sea to a distance of three or four miles" inserted after the words "permanent harbour works".

25. Mr. SCELLE proposed that after the words "permanent harbour works" the words "which are an integral part of a port system" should be inserted. The expression was preferable to the shorter term "harbour works" which referred primarily to buildings, cranes, and more generally to movable property and small structures used in ports. In order to avoid repetition the words "in front of ports" at the beginning of the article should be deleted.

26. Mr. AMADO said it should indeed be stressed that a port constituted a legal entity. In order to make that clear he proposed that the words "in front of ports" should be retained.

27. Mr. ZOUREK said that the words "integral part of a port system" were not at all clear. Were they intended to include lighthouses, some of which served to indicate the entrance channel into ports, while others were far out at sea?

28. Mr. SPIROPOULOS said that if a lighthouse were connected with the coast, it was an integral part of the port system. It was impossible to find a formula which covered all cases; the one suggested by Mr. Scelle was substantially in keeping with the conventional meaning of the term "port".

29. Mr. FRANÇOIS, Special Rapporteur, said that the case of lighthouses situated off the coast would be considered in connexion with artificial islands.

30. The CHAIRMAN put to the vote Mr. Amado's proposal that the words "in front of ports" should be retained.

The proposal was rejected by 8 votes to one, with 4 abstentions.

31. The CHAIRMAN put to the vote Mr. Scelle's proposal that the words "which form an integral part of the port system" (*qui font partie intégrante d'un système portuaire*) should be inserted after the words "harbour works".

The proposal was adopted by 6 votes to 2, with 5 abstentions.

32. The CHAIRMAN put to the vote article 9 as amended, without prejudice to any drafting alterations by the Drafting Committee, within the limits of its competence, especially in respect of the English wording.

Article 9 as amended was adopted by 6 votes to none, with 5 abstentions.

³ Article 9 read as follows:

"In determining the breadth of the territorial sea, in front of ports the outermost permanent harbour works shall be regarded as forming part of the coast."

⁴ Cf. *I.C.J. Reports 1953*, p. 71.

*Article 10: Roadsteads (article 8 of A/CN.4/61)*⁵

33. The CHAIRMAN invited debate on article 10, the text of which was identical with that of article 8 of the second report. A roadstead was an expanse of water bordering on a coast and used as an anchorage by vessels which could not come in closer to that coast.

34. Mr. FRANÇOIS, Special Rapporteur, drew attention to the comment attached to the article in his second report.⁶ He added that the solution adopted at The Hague in 1930, whereby roadsteads were deemed to be part of the territorial sea, had not fully satisfied coastal States, because the latter would be unable to enforce their administrative regulations in the waters in question. If, on the other hand, roadsteads were to be treated as internal waters, the normal consequence would be that they would be surrounded by a new belt of territorial sea. Yet a third solution would be to assimilate roadsteads to internal waters, while explicitly stipulating that those waters were not surrounded by a new belt of territorial sea.

35. Mr. LAUTERPACHT pointed out that article 10 did not provide for the case in which a roadstead was wholly within internal waters.

36. Mr. SPIROPOULOS said that, in such a case, it was so obvious that the roadstead was part of internal waters that it was not even necessary to say so expressly. The only question which arose was whether, apart from such cases, roadsteads were to be part of the territorial sea or of the high seas. Since, however, the coastal State had to have certain rights of inspection over ships anchoring in such a roadstead, the waters in question should be part of the territorial sea.

37. Mr. FRANÇOIS, Special Rapporteur, said it was extremely for a roadstead to be situated entirely outside the territorial sea. However, in order to provide for such an exceptional case, the words "or wholly" might be inserted after the words "situated partly". Mr. Lauterpacht's question might be referred to the Drafting Committee.

38. Mr. ZOUREK pointed out that the debate had been concerned, until then, with exceptional cases. Normally a roadstead was situated in front of a port, constituting a sort of entrance to it. Several authors actually held that the term "port" included also roadsteads of that type. It would therefore be illogical if roadsteads were governed by a régime different from that applicable to ports.

⁵ Article 10 read as follows :

"Roadsteads used for the loading, unloading and anchoring of vessels, the limits of which have been fixed for that purpose by the coastal State, are included in the territorial sea of that State, although they may be situated partly outside the general belt of territorial sea. The coastal State must indicate the roadsteads actually so employed and the limits thereof."

⁶ A/CN.4/61 in *Yearbook of the International Law Commission, 1953*, vol. II.

39. Mr. SPIROPOULOS said that the rights vested in the coastal State with respect to territorial waters were amply sufficient to cover the case of roadsteads. An enclave of internal waters would be quite artificial, even where the roadstead was the extension of a port. A provision which treated roadsteads as part of the territorial sea in any case constituted an exception; if a further exception were to be made of the case of a roadstead which constituted the entrance to a port, the Commission's draft regulation would become too complicated.

40. Mr. CORDOVA pointed out that the Special Rapporteur's draft regulation did not contain any article dealing with the régime of the waters of a port. Only the comment to article 9 dealt with that matter.⁷

41. Mr. AMADO said that never before had it been suggested that roadsteads should be treated as internal waters.

42. Mr. ZOUREK said that the whole question had become complicated precisely because it had been proposed that roadsteads and territorial waters should be treated alike. In answer to the Chairman he announced that he would not submit a formal amendment on the question of roadsteads.

43. Mr. LAUTERPACHT inquired whether the last sentence of the article meant that the coastal State should indicate on its charts the limits of roadsteads or whether some special notification was required.

44. Mr. FRANÇOIS, Special Rapporteur, said that was a question of form.

45. The CHAIRMAN suggested that the last sentence of the article should be redrafted by the Drafting Committee. He put to the vote article 10 as amended by the addition of the words "or wholly". The Drafting Committee would consider whether roadsteads situated wholly within internal waters should be governed by the régime applicable to such waters, and would also redraft the last sentence of the article.

Article 10, as so amended, was adopted by 12 votes to none, with 1 abstention.

Article 9: Ports (resumed from para. 32)

46. The CHAIRMAN invited debate on article 9; perhaps the article should specify the character of the waters of the port.

47. Mr. FRANÇOIS, Special Rapporteur, proposed that the following sentence should be added at the end of the article: "The waters of a port, as far as a line drawn between the outermost fixed works, constitute the inland waters of the coastal State." The sentence was taken from the comment to the article.⁸

The proposal was adopted unanimously.

Article 9, as amended, was adopted unanimously.

⁷ See comment to article 7 in A/CN.4/61, *op. cit.*

⁸ *Ibid.*

*Article 11 : Islands (A/CN.4/77)*⁹

48. Mr. FRANÇOIS, Special Rapporteur, said that article 11 raised the delicate issue of artificial islands. The relevant report of the 1930 Codification Conference said on that point that the definition of the term "island" did not exclude artificial islands.¹⁰ On the other hand, article 6 of the draft articles which the Commission had adopted in 1953 on the subject of the continental shelf¹¹ provided that installations necessary for the exploration and exploitation of the continental shelf did not possess the status of islands; the coastal State was merely entitled to establish safety zones around them.

49. Mr. SCALLE said that perhaps the article might specify simply that artificial islands had no territorial sea of their own.

50. Mr. CORDOVA inquired what was the difference between artificial islands and "groups of dwellings built on piles erected in the sea" which were deemed to be islands according to the last sentence of article 11.

51. Mr. FRANÇOIS, Special Rapporteur, said that the question had arisen recently in Indonesia. Real villages had been erected on piles in the high seas and the Indonesian Government wished to enforce its police regulations in those villages.

52. Mr. CORDOVA pointed out that artificial islands necessary for the exploitation of a continental shelf might also include dwellings. Under the last sentence of article 11 many States could only too easily widen their territorial sea unreasonably by building a few houses on piles.

53. Mr. SCALLE said that the last sentence of article 11 was unacceptable.

54. Mr. LAUTERPACHT said that the sentence in question was absolutely incompatible with article 6 of the draft articles relating to the continental shelf. Moreover, the Special Rapporteur's article 11 did not expressly regulate either the question of artificial islands or that of lighthouses. Both those questions were only dealt with in the comment to the corresponding article in the second report.¹²

The meeting rose at 1 p.m.

⁹ Article 11 read as follows :

"Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high-water mark. Groups of dwellings built on piles erected in the sea are deemed to be islands."

¹⁰ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations Publication, V. Legal. 1930.V.16), p. 219. Also in A/CN.4/61, comment to article 9.

¹¹ See Report of the Commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)* pp. 12-13. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹² See A/CN.4/61, comment to article 9.

260th MEETING

Friday, 2 July 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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

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

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

Article 9 : Ports (article 7 of A/CN.4/61)
(*resumed from the 259th meeting*)²

1. Mr. LAUTERPACHT said that before taking up the discussion of article 11 relating to islands, he wished to refer to the Commission's decision on article 9 relating to ports. He had been under the impression that the article had been left open, but had since been given to understand that the Commission had adopted a substantive provision for it. If that was the case, the decision reached was in his opinion one-sided and regrettable. It was agreed that ports were incorporated in inland waters, but nothing had been said of the obligations of States from the point of view of the régime of the ports. The Geneva Convention of 1923 on the International Régime of Maritime Ports³ laid down that States should give access to their ports to foreign vessels on the same conditions as to their own vessels, or those of the most favoured State. The

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 259th meeting, paras. 18-32 and 46-47.

³ *League of Nations Treaty Series*, vol. 58, p. 287.

Commission was codifying and consolidating international law and should lay down in its draft the obligations of States on the basis of the principles of the 1923 Geneva Convention. He was under the impression that the Commission intended to discuss the matter, but if a decision had already been taken, he would be obliged to raise the matter when the Commission discussed freedom of passage.

2. Mr. FRANÇOIS, Special Rapporteur, said he was opposed to the discussion of the régime of ports. The subject was outside the scope of the Commission's work which dealt exclusively with the régime of the territorial sea. He had already agreed to include in article 9 a stipulation originally contained in the comment to that article. However, Mr. Lauterpacht wished the Commission to go still further and actually to determine the régime of the ports. That question had been entirely omitted from his report, and, if it was decided to introduce it, the Commission would have to take up the whole problem of inland waters, which would greatly complicate matters. He appealed to Mr. Lauterpacht not to press for a discussion on the régime of the ports.

3. Mr. LAUTERPACHT replied that the question of ports as considered by the Commission under article 9 in any case fell outside the problem of the territorial sea, as it did not to any great extent affect its delimitation. If the Commission agreed not to discuss the régime of ports he proposed that it should state in article 9 or in the comments to it, that the provisions of the article did not prejudice the question of adopting a general rule in the matter of ports on the lines of the Convention of 1923.

4. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Lauterpacht's proposal.

5. Mr. AMADO said Mr. Lauterpacht had raised a very theoretical point which should not be discussed in connexion with the territorial sea. If the Commission decided to discuss the régime of ports it would have to go into the whole question of inland waters, and then he would raise the question of the régime of river estuaries which was of considerable importance to the countries of South America.

6. Mr. ZOUREK said that the Commission had dealt with ports only in so far as they affected the delimitation of the territorial sea. It was important to distinguish the different régimes to be applied, whether the general rules of international law or the terms of the 1923 Geneva Convention, the latter being binding only on those States which had ratified the Convention or acceded to it. A discussion of the régime of ports was, in his opinion, both outside the subject being dealt with by the Commission and beyond its practical working possibilities during the current session.

7. Mr. SCALLE agreed with the Special Rapporteur and Mr. Zourek that the Commission should not discuss the régime of ports. He had no objection to Mr. Lauterpacht's proposal that the régime of ports

should be more explicitly referred to in a comment to article 9.

Article 11: Islands (A/CN.4/77)

(resumed from the 259th meeting)⁴

8. Mr. FRANÇOIS, Special Rapporteur, said that article 11 as drafted in his third report took into account six possible cases. The first case was that of a naturel island which under article 11, had its own territorial sea.

9. An island formed artificially, by accumulation, for example, of sand or rubble, would also under article 11 have its own belt of territorial sea. It was another question to know if States had the right to erect artificial islands beyond their own territorial waters, as that would allow them to appropriate large stretches of the high seas. Other States had the right to object to such action, and if the island was already erected, could refuse to recognize it and the territorial sea surrounding it. If, however, such an artificial island were erected and no State objected to its erection, it would be entitled to have its own belt of territorial sea.

10. The third case was that of a lighthouse on an area of land permanently above high-water mark. There would be no difficulty as it would *ipso facto* enjoy the status of an island and have its own territorial sea.

11. If the lighthouse was built on an area of land which was only above water at low tide, the area of land would not qualify as an island under article 11, and would not have its own territorial sea.

12. The fifth case referred to technical installations other than lighthouses. The Commission had discussed such installations at its fifth session in connexion with the exploitation of the sea bed and had agreed, and he thought rightly, that such installations should not have their own territorial sea, but only a safety zone, justified by their great vulnerability. In that connexion he mentioned a project for the building of a permanent meteorological station on the Dogger Bank to replace weather ships and assist air navigation. Such an installation would need to be protected, and the Commission might wish to keep the project in mind when discussing definite rules. On the other hand, he did not think that a safety zone was necessary for lighthouses.

13. The sixth case was that of dwellings which were built on piles erected in the sea and groups which constituted actual villages. The Commission should decide whether such villages should be treated in the same way as technical installations and denied a territorial sea of their own. The question was important for South East Asia, where such villages often were bases for drug traffickers, smugglers and pirates. If they had no territorial sea surrounding them nothing could be done to suppress such activities, and his draft article 11 accordingly provided that they should be deemed to be islands.

⁴ *Vide supra*, 259th meeting, paras. 48-54.

14. Mr. LAUTERPACHT said that article 11 was of considerable importance because, however small the island or the area of land purporting to be an island might be, it inevitably involved the subsidiary questions of the territorial sea of that island, the zones contiguous to it and even the continental shelf. The importance of finding a satisfactory solution to the problem was emphasized by a case quoted in *Hackworth's Digest*: in answer to a request by a group of United States citizens for permission to erect an island forty miles off the coast, the Government of the United States had replied that there was nothing in international law to prevent the erection of the island provided that it did not violate the interests of any State. It had added, that if it was erected, it (the Government of the United States) might consider subjecting it to some measure of control.⁵

15. It was important to know to what extent the erecting of artificial structures with their own territorial sea would extend the area not subject to the principle of the freedom of the seas. He agreed to a very great extent with the views of the Special Rapporteur, which would be strengthened if the Commission agreed to make the following minor amendments to article 11.

16. Firstly, that the word "natural" should be inserted before the words "area of land". That would exclude artificial islands if such was the Commission's intention; it would also rule out technical installations, lighthouses and even, possibly, the villages built on piles. In his view no lighthouse or artificial structure should have a territorial sea of its own.

17. Secondly, the words "in normal circumstances" should be inserted before the words "permanently above high-water mark"; that would cover exceptional cases.

18. Thirdly, the words "and capable of effective occupation and control" should be added after the words "above high-water mark".

19. He thought that States should be able to grant at least some measure of protection to lighthouses even if safety zones were not admitted. With regard to the groups of dwellings built on piles, no special provision should be included in article 11.

20. Mr. SCELLE thought that the Commission had embarked on a task which it had no hope of completing. If all the cases enumerated by the Special Rapporteur were taken into account, the draft regulation would have to contain many more articles than was contemplated. He had said before that the régime of ports should not be dealt with by the Commission, and he held the same view with regard to islands, with the exception only of those situated within the territorial sea of a State. The territorial sea of an island situated in the high seas should be dealt with when the Commission studied the régime of the high seas.

21. He had been surprised to hear that lighthouses should have no safety zone, whereas petroleum companies extracting oil from the sea bed should be entitled to protection.

22. Mr. SPIROPOULOS agreed with the draft submitted by the Special Rapporteur with the exception of the last sentence relating to the groups of dwellings built on piles. That case was exceptional and should not be taken into account in the Commission's draft.

23. Referring to Mr. Lauterpacht's proposal for the insertion of the word "natural" before the words "area of land", he thought that certain man-made areas of land could be considered as natural, and that it would be clearer to say areas of land "formed by nature".

24. He agreed that the erection of an artificial island on the high seas was contrary to international law. However, if other States recognized such an island, he saw no reason why it should not have its own territorial sea, particularly if in due course it became, as was probable, indistinguishable from a natural island.

25. He did not object to Mr. Lauterpacht's proposal for the addition of the words "in normal circumstances" although he saw no need for them.

26. Mr. ZOUREK did not think States had the right to build artificial islands in the high seas. Recognition of such a right would be tantamount to recognizing the occupation of portions of the high seas which would be an evident violation of the principle of the freedom of the seas and would invite the most varied claims. Unlike the Special Rapporteur, he considered that the mere absence of any protest by States at the time of the construction of artificial islands was not a reason for recognizing such structures as islands.

27. Groups of dwellings on piles should be treated in the same way as artificial islands; a State could erect them within its own territorial waters as long as they did not obstruct the regular shipping lanes necessary to international traffic. They could, if situated inside territorial waters, constitute points of departure for measuring the breadth of the territorial; if situated in the high seas they should not be given the status of islands, and should not have their own territorial sea.

28. Mr. PAL said that article 11 contained two provisions: firstly, the provision that every island had its own territorial sea; secondly, it defined the term "island" so as to include certain artificial structures. Ordinarily, the term "island" was applied only to natural formations; with regard to islands in that limited sense, he believed, it was generally accepted that they had their own territorial sea, whether they were in the high seas or in the territorial sea of a State. The matter of artificial structures, however, was not without its difficulties. He would therefore propose that the two sets of provisions should be kept distinct. The first sentence of the article was probably acceptable. The question whether the term "island"

⁵ G. H. Hackworth, *Digest of International Law*, vol. II, p. 680.

were to be extended to artificial structures was a completely different one and could best be dealt with in a separate article. If the Commission decided that an artificial island should be treated in the same manner as a real island, then it would have to define the characteristics of such an island for the present purposes so as to make clear what its decision in that respect implied.

29. He did not agree with Mr. Scelle that the Commission was only dealing with islands situated in the territorial sea. All islands, including those in the high seas, had a territorial sea of their own.

30. Mr. HSU said that the most debatable provision in article 11 was that of the final sentence concerning dwellings built on piles erected in the sea. That was really a very special case, and it was not desirable that the Commission should sacrifice the general principle it had adopted and treat such groups of dwellings as islands. The problem of criminals living in such dwellings built on piles could probably be adequately dealt with under existing rules of criminal jurisdiction.

31. Finally, he agreed with the amendments proposed by Mr. Lauterpacht, which made the wording clearer.

32. Mr. SPIROPOULOS said the Commission was in general agreement that every island had its own territorial sea. It also agreed on the definition of an island. The addition of the words "in normal circumstances" before "permanently above high-water mark", as proposed by Mr. Lauterpacht, did not seem essential, as the concept of normal circumstances was implied in the original draft. There was, however, nothing objectionable in it.

33. A vote would have to be taken, however, on the question of artificial islands. He agreed with Mr. Pal that a separate paragraph might be drafted to deal with them. As international law now stood, a State had no right to erect artificial islands in the high seas. Should a State, however, obtain the consent of other States to do so and thus erect an artificial island in conformity with international law, it would still be necessary to determine whether such an island had a territorial sea of its own.

34. Finally, the Commission would probably agree that the reference to groups of dwellings built on piles should be deleted.

35. Mr. AMADO said that the members of the Commission were nearing an agreement on article 11. He disapproved, however, of the provision concerning dwellings built on piles. That matter had already been discussed at The Hague Codification Conference of 1930, and the conclusion to be drawn from these discussions was that such dwellings should not be treated as islands.⁶

36. He drew special attention to Mr. Lauterpacht's amendment under which an island had to be "capable

of effective occupation and control". The Commission should go into that matter carefully before taking a vote upon it. It raised the extremely important issue of whether the possibility of occupation was indeed the test of what was an island in international law.

37. He was prepared to vote for the Special Rapporteur's draft article 11 except for the final sentence concerning dwellings on piles.

38. The CHAIRMAN said that the basic provision of article 11 was that which gave an island its own territorial sea. It followed that an island off the coast enabled a State to extend its territorial sea further to seaward. The question of artificial islands should be left open. Incidentally, nature was still creating islands much faster than man could hope to do: in the north of Sweden the land was rising by one metre every century. The Baltic Sea, being shallow, big stretches of land were emerging and islands were formed.

39. An artificial island erected within the territorial sea might have a territorial sea of its own, but an artificial island erected in the high seas should not be recognized as having a territorial sea.

40. Mr. LAUTERPACHT said the Commission could not construe its task as confined to codifying only those points concerning which there was general agreement, while leaving open all controversial issues. Such a procedure would not produce profitable results. Artificial structures of all kinds—and in particular lighthouses—gave rise to serious practical problems and it was the Commission's duty to give rulings thereon. There was also the problem of solid ice, which, in the region around Spitzbergen and in the areas claimed by States in the Antarctic continent, was of particular importance.

41. If an island were to arise naturally in the territorial sea, it would be under the sovereignty of the coastal State. If, however, it emerged in the high seas, it would be a *res nullius* and would belong to whoever first occupied it.

42. There appeared to be general agreement within the Commission that dwellings built on piles should not be considered as islands.

43. Finally, he hoped that the Special Rapporteur would agree to Mr. Pal's suggestion that separate provisions should deal with artificial islands and natural formations.

44. Mr. FRANÇOIS, Special Rapporteur, withdrew the last sentence of draft article 11: "Groups of dwellings built on piles erected in the sea are deemed to be islands." That sentence had been introduced in order to deal with a problem which was of interest to the Government of Indonesia. That Government would no doubt find the records of the Commission's discussions helpful. Besides, when the draft articles were submitted to Governments, the Indonesian Government would probably comment on the question.

45. Referring to Mr. Scelle's suggestion that article 11 should only deal with islands in the territorial sea and

⁶ *Vide supra*, 259th meeting, para. 48 and footnote 10.

not with those in the high seas, he said the latter also had a territorial sea. The rule that islands had a territorial sea of their own therefore applied to all islands, and not only to those in the territorial sea. He accepted Mr. Lauterpacht's proposal that the words "in normal circumstances" should be added, although those words might be considered as implied in the original draft. He did not, however, agree with Mr. Lauterpacht's proposal for adding the words "capable of effective occupation and control". Any rock could be used as a radio station or a weather observation post. In that sense, all rocks were capable of occupation and control. The provision seemed either unnecessary or confusing.

46. He did not agree either with Mr. Lauterpacht's suggestion that an island should necessarily be a natural formation. Shallow sandbanks or drying rocks could be used as the foundation for artificial islands, as had been done in a number of States. Clearly, the territorial sea should be measured from the new man-made land built on a pre-existing natural formation. The provisions of article 11 would become much too restrictive if the qualification "natural" were to be adopted. His remarks referred to artificial islands in territorial waters. If an artificial island were erected by a State in the high seas, the situation was quite different, because it might well not be recognized by other States.

47. Mr. LAUTERPACHT withdrew his proposal for the inclusion of the words "capable of effective occupation and control". His reason for doing so was not that he had any doubts concerning the reasonableness of the proposal, but that he wished to avoid a lengthy discussion of the meaning of "effective" and "control".

48. He maintained, however, the other two alterations he had proposed. With particular reference to the requirement that an island should be a natural area of land, he would point out that if artificial islands erected within the territorial sea were to have a territorial sea of their own, then a State could erect a series of small artificial islands just within its territorial sea and a few miles apart. It might in that way double the extent of its territorial sea. If its seas were shallow enough, there was no reason why the process should not be repeated and the extent of the territorial sea trebled. A State was free to erect artificial islands in its territorial sea but those islands should not be taken into consideration for the purpose of defining the outer limit of the territorial sea. Finally, if the articles were to deal with artificial structures, there was no reason why it should be silent on the important problem of lighthouses.

49. Faris Bey el-KHOURI said that artificial islands would no doubt be useful for various purposes and Governments should not be discouraged from undertaking their construction. He agreed with Mr. Pal that artificial islands should be dealt with in a separate article.

50. The CHAIRMAN put to the vote the first sentence of article 11: "Every island has its own territorial sea."

The first sentence of article 11 was adopted unanimously.

51. The CHAIRMAN then put to the vote Mr. Lauterpacht's amendment for the insertion of the word "natural" in the second sentence of article 11.

The amendment was rejected by 5 votes to 4, with 2 abstentions.

52. The Chairman then put to the vote Mr. Lauterpacht's second amendment, that the words "in normal circumstances" should be added before "permanently".

The amendment was adopted by 9 votes to none, with 2 abstentions.

53. The CHAIRMAN put to the vote article 11 as a whole, which as amended and after the withdrawal of the last sentence by the Special Rapporteur, read:

"Every island has its own territorial sea. An island is an area of land surrounded by water which is under normal circumstances permanently above high-water mark."

He added that the vote would be without prejudice to possible drafting changes by the Drafting Committee.

Article 11 as a whole was adopted by 8 votes to 2, with 1 abstention.

54. Mr. SCELLE said he had voted against the word "natural" because in his opinion the term "island" should apply to all formations surrounded by water. To restrict the benefit of a territorial sea to natural formations would only be appropriate if the Commission were dealing solely with islands in the high seas. But the Commission was dealing with islands in the territorial sea; and all islands in the territorial sea would enable a State to extend its territorial waters.

55. Mr. ZOUREK said he had abstained from voting on the article as a whole because its provisions did not really solve the problem of islands in the territorial sea.

Article 13: Drying rocks (A/CN.4/77)⁷

56. The CHAIRMAN said that article 12 (groups of islands) had been held over and would be dealt with when the Commission discussed the breadth of the territorial sea.

57. Mr. FRANÇOIS, Special Rapporteur, said that his draft article 13 laid down that drying rocks and shoals which were situated wholly or partly within the territorial sea could be taken as individual points of departure for measuring the territorial sea. For that purpose, drying rocks thus situated were treated exactly

⁷ Article 13 read as follows:

"Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."

like islands. But drying rocks situated in the high seas were not treated like islands and had no territorial sea of their own. Unless that distinction were made, a country like Holland might extend its territorial sea very considerably by advancing from one shoal to another, claiming that a shoal situated within the territorial sea of another shoal had itself a territorial sea. The gist of draft article 13 was that a drying rock within T miles of coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. A drying rock situated more than T miles from the shore, however, should be ignored for the purposes of defining the outer limit of the territorial sea.

58. It might prove necessary later to compare article 13 when adopted with the final sentence in article 6, paragraph 2: "base lines shall not be drawn to and from drying rocks and shoals." Some amendments might be required to ensure concordance of the two articles.

59. The CHAIRMAN pointed out that while the English term "drying rocks and shoals" was used both in article 6 and in article 13, in the French text article 6 used the term *fonds affleurants à basse-mer*, whereas article 13 referred to *rochers ou fonds couvrants et découvrants*.

60. Mr. FRANÇOIS, Special Rapporteur, said that there appeared to be a regrettable divergence in terms between articles 6 and 13. "Drying rocks and shoals" (in French, *sèches* or *rochers ou fonds couvrants et découvrants*) referred to rocks, sandbanks, etc. which were exposed at low-water but covered by the sea at high-water. As to *fonds affleurants à basse-mer* or *affleurants au niveau qu'on a choisi pour la carte*, the English original of the committee of experts' report⁸ described them as "rocks (and similar elevations) awash at the datum of the chart". The expression "drying rocks and shoals" used in the English text of article 6 was correct; the French version should read: *fonds couvrants et découvrants*.

61. Mr. ZOUREK said it was essential that the exact scientific meaning of the term "drying rocks and shoals" should be made clear because, if the articles were adopted, they would be translated into all languages. A precise definition of the term was required; indeed the definition would vitally influence the application of the articles.

62. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks and shoals (*sèches* being the French term used by the International Court of Justice) were rocks, sandbanks, etc., which only emerged from the sea at certain times. The term "rocks awash" implied a rock formation which was just awash at low tide and, at all other times completely under water.

63. The CHAIRMAN said that there appeared to be some discrepancy between article 6, which did not permit straight base lines to be drawn to and from drying rocks and shoals, and article 13, which laid down that such drying rocks and shoals could be taken as individual points of departure for measuring the territorial sea.

64. Mr. FRANÇOIS, Special Rapporteur, said that there was in fact no contradiction between the two articles. Article 13 embodied a general principle, whereas article 6 referred to a special case.

65. Article 13 laid down the general rule for measuring the territorial sea from the normal base line—namely, the low-water line. For that purpose, rocks emerging at low-water were to be taken into account provided, of course, that they were less than 5 miles from the shore.

66. Article 6 was concerned with the exceptional cases in which a State, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight base lines as an artificial substitute for the normal base line (the low-water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. It forbade the drawing of straight base lines to and from banks and rocks emerging only at low tide. The system of straight base lines had been evolved for the benefit of countries like Norway which had a rugged and rocky coast. If the drawing of straight base lines from all shoals were to be permitted, other countries, such as the Netherlands, might benefit unduly from the facility offered. Those countries, unlike Norway, had never claimed the right to draw straight base lines over the shoals.

67. He agreed with the committee of experts that drying rocks and shoals could be taken as individual points of departure for measuring the breadth of the territorial sea.

68. Mr. LAUTERPACHT said that the adjective "drying" which was used to qualify "rocks and shoals" did not seem very clear.

69. Mr. FRANÇOIS, Special Rapporteur, said that the term "drying" implied that the rocks and shoals in question sometimes were under water and at other times emerged and dried. The meaning was perhaps better reflected by the French term *rochers ou fonds couvrants et découvrants*.

70. Faris Bey el-KHOURI said that article 13, when referring to "measuring the territorial sea" presumably meant the measuring of the width of the territorial sea and hence the determination of the outer limit thereof.

71. The CHAIRMAN said that article 11 defined an island as being "permanently above high-water mark", whereas article 13 treated in the same way as islands certain rock formations which only emerged at low water. It was difficult to reconcile the two provisions.

⁸ Annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953, vol. II*.

72. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks and shoals in the high seas which only emerged at low water were not to be used as points of departure for measuring the territorial sea. It was only drying rocks and shoals within T miles from a coast that were virtually treated like islands under the provisions of article 13.

73. Mr. PAL inquired if the purpose of article 13 was to make provision for drying rocks with a territorial sea of their own, or else simply to enable such drying rocks to be used as individual points of departure for measuring the territorial sea. In the latter case, the logical place for the provision was either in, or immediately after, article 6. Article 6, however, specifically laid down that drying rocks could not be used as such points of departure. It was therefore necessary to remove any possible inconsistency between the two articles.

74. If drying rocks were to be acknowledged as having a territorial sea of their own, the Commission had to proceed with caution, as it would thus perhaps be extending existing prerogatives.

75. The CHAIRMAN said that was a question for the Drafting Committee.

76. Mr. FRANÇOIS, Special Rapporteur, said that much more than a question of mere drafting was involved. Article 6 and article 13 dealt respectively with two questions which were different in substance. The adoption of article 6, which forbade the drawing of straight base lines from rocks awash (*fonds affleurant à basse-mer*), had nothing to do with the question whether drying rocks could be used as part of the normal base line. The normal base line being the line of low-water mark, and drying rocks being rocks which emerged at low-water, it followed, as stated in article 13, that such rocks could be used in measuring the territorial sea. That provision of article 13 would apply whether there were any straight base lines under article 6 or not.

77. Mr. PAL quoted from the International Court's decision in the Fisheries case. The Court had referred to the contentions of the United Kingdom Government which had claimed that, in order to be taken into account, a drying rock should be situated within four miles of permanently dry land. The Court had not had to consider that in fact none of the drying rocks used by Norway as base points was more than four miles from the coast.⁹ For the Commission, however, the question of a maximum permissible distance of the drying rocks from the coast would be a relevant and pertinent one. If drying rocks, irrespective of their distance from the coast, were going to be given a territorial sea of their own, that would be tantamount to raising them to the status of islands; he could see no justification for such a course.

The meeting rose at 1 p.m.

⁹ *I.C.J. Reports 1951*, p. 128.

261st MEETING

Monday, 5 July 1954, at 3 p.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

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

1. The CHAIRMAN welcomed Judge Douglas L. Edmonds, who had been elected a member of the Commission and who had just arrived from the United States to take part in its work.

2. Mr. EDMONDS thanked the Chairman for his words of welcome.

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

Article 13: Drying rocks (A/CN.4/77) (*continued*)²

3. Mr. LAUTERPACHT proposed that the words "situated wholly or partly within the territorial sea" should be replaced by "if within the territorial sea as measured from the mainland or from an island".

4. The purpose of his amendment was to prevent a State from using a succession of drying rocks off its coast for the purpose of extending its territorial sea. Under his proposed amendment, only drying rocks near the coast, namely, within the territorial waters as

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 260th meeting, paras. 56-77.

measured from the coast, could be used for an extension of the territorial sea. The device of using drying rocks for the purpose of extending territorial waters could, under the proposed amendment, be used only once. A limit had to be set to the somewhat artificial encroachments upon the area of the high seas.

5. Mr. FRANÇOIS, Special Rapporteur, did not oppose the amendment.

6. Mr. PAL said that, with reference to islands, article 6 laid down that only islands which were five miles or less from the coast could be used for the purpose of determining the territorial sea. Perhaps the Commission might wish to make a similar reservation in the case of drying rocks.

7. Mr. LAUTERPACHT pointed out that the rule of the five-mile maximum distance only applied if a State proposed to draw straight base lines more than ten miles in length.

8. The CHAIRMAN said it was not clear to him in what way Mr. Lauterpacht's amendment differed in substance from the Special Rapporteur's draft.

9. Mr. FRANÇOIS, Special Rapporteur, said that he had interpreted his own draft as meaning much the same as Mr. Lauterpacht's amendment, but the latter had the merit of removing any possible doubts.

10. Mr. CORDOVA said that any rock the occupation of which by an enemy State might endanger the security of the coastal State should be used for the purpose of determining the extent of the latter's territorial sea.

11. Mr. FRANÇOIS, Special Rapporteur, said that drying rocks were not sufficiently important to warrant a substantial extension of the territorial sea.

12. Mr. SPIROPOULOS said that drying rocks and shoals, in view of their very nature, were unlikely to be a source of serious danger to the security of the coastal State.

13. Mr. SCELLE agreed with Mr. Córdova. A landing was possible on certain rocks and shoals of the type referred to. If the danger to which Mr. Spiropoulos had referred were to be taken into consideration in respect of the rocks situated nearest to the coast, there seemed to be no valid reason for treating other rocks differently.

14. Mr. LAUTERPACHT quoted a passage from Lindley's *The Acquisition and Government of Backward Territory in International Law* (1926). Lindley took the view that mere occupation of a rock did not warrant an extension of sovereignty. Accordingly, article 13 in fact represented a concession in favour of the coastal State. He had no objection to such a concession, but he would insist on its being kept within reasonable bounds.

15. Mr. PAL said that article 13 was not a concession granted to the coastal State. That article was based on

considerations of security; if those considerations were valid for one rock, they were valid for all rocks.

16. Mr. ZOUREK said the Commission had admitted, in accordance with general practice, that the territorial sea was measured from the line of land uncovered at low tide. Hence it was logically bound to consider as a point of departure for the measuring of the territorial sea any formation which emerged at low tide and particularly the drying rocks and shoals mentioned in article 13. In any case, he did not believe there was any case of a series of rocks so situated that they might lead to an excessive extension of territorial waters.

17. Mr. SPIROPOULOS said that it was right to refer to the security of the coastal State when dealing with the breadth of the territorial sea although the protection afforded by the latter was more illusory than real. He was, however, surprised that the security of the coastal State should be taken as a possible criterion for determining the point of departure for measuring the territorial sea.

18. Mr. SCELLE, replying to Mr. Spiropoulos, said that the very existence of the territorial sea was, of course, an exception to the general principle of the unity of the sea. Mr. Spiropoulos' argument, however, if taken to its logical conclusion, would result in the elimination of the territorial sea, which would be absurd. If States insisted on retaining and enlarging their territorial sea, they did so in order to safeguard their legitimate interests, particularly in the matter of fisheries.

19. Mr. AMADO supported Mr. Lauterpacht's amendment which would prevent abuses.

20. The CHAIRMAN said that in Sweden the territorial sea was measured from islands submerged during part of the year. Article 13 as drafted did not appear to cover that possibility; he would, however, be prepared to agree to article 13 as it stood.

Mr. Lauterpacht's amendment was not adopted, 4 votes being cast in favour, 4 against, with 4 abstentions.

21. Mr. CORDOVA thought that by rejecting Mr. Lauterpacht's amendment the Commission had shown that it interpreted the Special Rapporteur's draft in a sense contrary to that of Mr. Lauterpacht's text. The Drafting Committee should be asked to redraft article 13 in such a way as to avoid any misunderstanding.

22. Mr. FRANÇOIS, Special Rapporteur, thought that it would be sufficient to add some explanatory remarks in the comment to the article.

23. Mr. LAUTERPACHT pointed out in reply to Mr. Córdova that, as his own draft had only been rejected because it had been put to the vote first, he was satisfied with the Special Rapporteur's assurance that he interpreted the article in the sense of the amendment.

Subject to redrafting by the Drafting Committee, article 13 was adopted by 9 votes to none, with 4 abstentions.

*Article 14: Straits (Article 11 of A/CN.4/61)*³

24. The CHAIRMAN invited debate on article 14, the text of which was contained in article 11 of the second report on the régime of the territorial sea.

25. Mr. FRANÇOIS, Special Rapporteur, pointed out that the article did not deal with the right of passage for that was the subject of chapter III.⁴ Article 14 was concerned only with the legal position of the waters situated between two parts of the high seas. There was no difficulty in cases where, throughout their entire length, straits were more than twice as wide as the territorial sea; the waters of the straits would be divided between two territorial seas separated by an expanse of the high seas. There would also be no difficulty in cases where for their entire length the width of the straits was equal to or less than double the breadth of the territorial sea of the two coastal States, for in that case the waters of the straits would be divided between two territorial seas separated by a median line.

26. The real problem was that of straits of unequal width, for example straits which at both ends were narrower, but in the middle were wider, than twice the territorial sea. If the limit of the territorial sea was drawn in accordance with the general rule there would be an enclave of the high seas in the middle of the territorial sea. The preparatory committee of the 1930 Codification Conference had agreed that such an enclave of the high seas was unimportant and that it was preferable to divide it between the territorial seas of the two coastal States.⁵ However, the conference itself had not entirely adopted the views of its preparatory committee and had restricted the scope of that rule to cases where the enclave was not more than two miles across.⁶ He had himself adopted the same solution, but pointed out that the case was not governed by positive law; he was merely making a proposal.

³ Article 14 read as follows:

"1. In straits which form a passage between two parts of the high sea, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast, even if the same State is the coastal State of both shores.

"2. When the width of the straits exceeds the breadth of the two belts of territorial sea, the waters between those two belts form part of the high sea. If the result of this delimitation is to leave an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area may be assimilated to territorial sea."

⁴ *Vide infra*, 262nd meeting.

⁵ *Conference for the Codification of International Law, Bases of Discussion drawn up for the Conference by the Preparatory Committee*, vol. II: Territorial Waters (League of Nations Publication, V. Legal, 1929.V.2), p. 59.

⁶ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal, 1930.V.16), p. 220.

27. Mr. PAL inquired what the situation would be if two coastal States applied different rules with regard to the breadth of their respective territorial sea.

28. Mr. FRANÇOIS, Special Rapporteur, was of the opinion that the Commission should adopt the attitude that its efforts to standardize the national legislation of States in that respect would be successful.

29. The CHAIRMAN pointed out that the situation described by the Special Rapporteur was similar to that provided for in his article 16⁷ relating to the delimitation of the territorial sea of two States the coasts of which were opposite each other.

30. Mr. Zourek noted that in the comment to the article in the Rapporteur's second report⁸ it was stated that the article did not touch the regulation of straits giving access to inland waters and that such straits remained subject to the rules governing bays and, where necessary, islands. He considered that comment unjustified. The rules concerning bays and islands could not apply to straits connecting inland waters with territorial waters, nor even to straits connecting inland waters with a sea not legally forming part of the high seas (closed sea). In any case, the régime of bays was not laid down by international law and the Commission had not yet discussed it.

31. Secondly, the waters of straits should not necessarily form part of the territorial waters if both shores of the straits belonged to a single State and were not used for international shipping. In the latter case the waters of the straits might be regarded as part of the inland waters of the sovereign State. Such cases did in fact exist. He therefore proposed the deletion of the words "even if the same State is the coastal State of both shores" at the end of paragraph 1 and the insertion after the words "two parts of the high sea" of the words "and separating two or more States".

32. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Zourek that the question of the régime of straits giving access only to inland waters should be held over until the Commission had settled the régime governing bays. In that connexion he added that the authorship of the comment referred to by Mr. Zourek should not be attributed to himself but to the 1930 Codification Conference whose observations he had merely reproduced.

33. He was, however, unable to accept Mr. Zourek's second suggestion. The article related to straits "which form a passage between two parts of the high sea"; in that connexion he referred to the International Court's judgement of April 1949 in the Corfu Channel case.⁹ It was clear from that judgement that the right of passage should be recognized in cases where the straits provided a useful route for international maritime

⁷ *Vide infra*, para. 55.

⁸ See comment to article 11 in A/CN.4/61, *Yearbook of the International Law Commission*, 1953, vol. II.

⁹ *I.C.J. Reports 1949*, p. 4.

traffic. Such a route did not have to be necessary for international maritime traffic as Mr. Zourek proposed.

34. Mr. CORDOVA thought the term "straits" should first be defined in legal language.

35. Mr. LAUTERPACHT could see no substantial difference between the right of passage through straits and the right of passage through the territorial sea in general. The rule laid down by the International Court in the Corfu Channel case would apply equally, in the case of warships, in any territorial sea. He asked which clause of the draft regulation governed the right of passage through straits.

36. Mr. FRANÇOIS, Special Rapporteur, agreed that in most cases the rules normally applied to the territorial sea applied equally well to straits. Nevertheless, he drew Mr. Lauterpacht's attention to article 26, paragraph 4, of the draft.¹⁰

37. Mr. LAUTERPACHT agreed that under that paragraph passage through the straits could not be interfered with under any pretext whatsoever. The International Court had, however, recognized that the coastal State was also entitled, to some extent, to regulate the passage of foreign ships through the straits, although it was not entitled to make the right of passage dependent on previous authorization. There was thus no difference in practice between the legal régime of straits and that of the territorial sea.

38. Mr. SPIROPOULOS said that the Commission should not prejudge its decision on the right of passage; it should only settle the problem of a portion of the high seas enclosed in the territorial sea.

39. Mr. ZOUREK pointed out that the expression "straits which form a passage between two parts of the high sea" was ambiguous. The International Court's judgement in the Corfu Channel case could not be invoked in respect of straits both shores of which belonged to a single State. States should be free to treat such straits, including enclaves, as part of their inland waters. Accordingly, he proposed that the last sentence of paragraph 1 should be amended.

40. Faris Bey el-KHOURI agreed that straits of uneven width which were at some points more than double the breadth of the territorial sea presented a very delicate problem. He could see no better solution than that proposed by the Special Rapporteur.

41. Mr. FRANÇOIS, Special Rapporteur, proposed that the words "In straits which form a passage between two parts of the high sea" should be replaced by "In straits which constitute a useful route for international maritime traffic". Those were the very terms used by the International Court in the Corfu Channel case. The use of those terms would meet Mr. Zourek's objection.

42. Mr. LAUTERPACHT feared that the introduction of such a provision into the article might be tantamount

to granting the coastal State the right to decide whether passage through the straits was useful or not. Actually, except for coast-wise shipping, the coastal State was not qualified to give that decision.

43. Mr. SPIROPOULOS said the Commission was not at that stage concerned with the usefulness or even the possibility of passage through a strait; he therefore proposed that the first phrase of paragraph 1 should be altered to read "In straits joining two parts of the high sea, etc."

44. Mr. FRANÇOIS, Special Rapporteur, agreed to Mr. Spiropoulos' proposal.

45. The CHAIRMAN put Mr. Spiropoulos' proposal to the vote.

The proposal was adopted by 11 votes to 1, with 1 abstention.

46. The CHAIRMAN put to the vote Mr. Zourek's proposal that the final phrase of paragraph 1 "even if the same State is the coastal State of both shores" should be deleted, and that the words "and separating two or more States" should be inserted after the words "two parts of the high sea".

The proposal was adopted by 6 votes to 4, with 4 abstentions.

47. Mr. FRANÇOIS, Special Rapporteur, in reply to a question by Mr. Córdova, said that the amendment just adopted was not a mere drafting change. A special paragraph would have to be added to draft article 14 to provide for the case in which two shores of a strait belonged to the same State.

48. Mr. ZOUREK agreed that article 14 would have to be supplemented. In any case, paragraph 1 as drafted by the Special Rapporteur would not cover all possible cases, since the use of the term "territorial sea" prejudged the régime applicable to straits.

49. Mr. LAUTERPACHT said that paragraph 1 as it stood might produce consequences that could hardly be admitted; it would be surprising, for instance, if the Straits of Messina were to be considered as part of the inland waters of Italy.

50. Mr. ZOUREK agreed that there were exceptional cases such as those of the Straits of Messina and the Straits of Gibraltar which constituted an important recognized international maritime highway.

51. Mr. FRANÇOIS, Special Rapporteur, said the amendment just adopted entailed another consequence, which he considered unacceptable. It would authorize a State to incorporate in its inland waters any straits both shores of which belonged to it, even if the width of the straits exceeded twice the breadth of the territorial sea.

52. Mr. PAL saw nothing in the amendment in question which authorized States to proceed in that manner. All that was necessary was that the Commis-

¹⁰ *Vide infra*, 272nd meeting, footnote 14.

sion should specify what régime would be applicable to the case mentioned by the Special Rapporteur.

53. Mr. SPIROPOULOS said that the amendment in question in effect made it possible to transform the waters of straits into internal seas, as was contemplated in the case of bays. There was nothing illogical in such a situation because in both cases the two areas of inland waters situated on either side of the enclave of open sea were joined together. Whereas other States might claim the right of passage through straits, no question of passage arose in the case of bays. He stressed that no such principle had ever been accepted in international law.

54. Mr. ZOUREK formally moved that the discussion of article 14 should be deferred so that he could submit amendments thereto.¹¹

Mr. Zourek's motion was agreed to without opposition.

*Article 16: Delimitation of the territorial sea of two States the coasts of which are opposite each other (A/CN.4/77)*¹²

55. Mr. FRANÇOIS, Special Rapporteur, said he had reverted in article 16 to the median line method which had been adopted by the Commission in 1953 for determining the boundary of the continental shelf appertaining to two States whose coasts were opposite to each other.¹³ The same method had been adopted by the Committee of Experts.¹⁴ They had, however, added certain particulars which were much more important in the case of a territorial sea than in that of the continental shelf. It was indeed normal, when drawing the median line of demarcation of the territorial sea, to

take into account islands situated between the two States, unless there was an agreement between those States, when, for example, the island in question was farther away from the State to which it belonged than from the other State. That exception extended to the case of dry rocks situated in the territorial sea of a State, which the Commission had deemed to be islands for the purpose of measuring the territorial sea. Drying rocks situated between two States the coasts of which were less than T miles apart would not, however, be taken into account, as both States would have equally valid claims thereto.

56. Mr. SPIROPOULOS agreed that it was impossible to use, in the case covered by article 16, a different method for the delimitation of the territorial sea from that which had been adopted for determining the boundary of the continental shelf. It would be inconceivable that the continental shelf of a State should be under the territorial sea of another State. That being so, he doubted whether there was any justification for the exceptions to the median line rule which had been laid down in the case of islands and drying rocks; as pointed out by the Special Rapporteur, there were no such exceptions provided for in article 7 relating to the continental shelf.

57. Mr. CORDOVA shared Mr. Spiropoulos' misgivings concerning the exceptions referred to. He took the example of two States the coasts of which were eight miles apart. If the breadth of the territorial sea had been fixed at four miles, the median line would constitute a perfectly good boundary both for the territorial sea and for the continental shelf of each State. But if there was an island between the two States, the territorial sea of the State to which it belonged would be greater than the territorial sea of the other and the boundary of the territorial sea would no longer coincide with that of the continental shelf.

58. The CHAIRMAN stressed that article 7 of the draft articles on the continental shelf did not contemplate any exceptions to the median rule in the case of islands or drying rocks, but did contain the proviso "unless another boundary line is justified by special circumstances".

59. Mr. PAL said he feared that the analogy used by the Special Rapporteur had led to a certain amount of confusion. The case contemplated by Mr. Córdova could not arise in practice, for the continental shelf, by definition, commenced where the territorial sea ended, whereas the case under discussion was that in which the distance between two coasts was less than two T miles.

60. Mr. ZOUREK pointed out that the outer limit of the territorial sea formed the frontier of a State; that was not the case with the boundary of the continental shelf. Experience had shown how very difficult the determination of boundaries could be, whether it was on land, in rivers, or at sea. Such boundaries could not be determined merely by the automatic application

¹¹ *Vide infra*, 262nd meeting, para. 72.

¹² Article 16 read as follows:

"1. An international boundary between countries the coasts of which are opposite each other at a distance of less than two T miles (T being the breadth of the territorial sea) is as a general rule the median line, every point of which is equidistant from the base lines of the States concerned. Unless otherwise agreed between the adjacent States, all islands shall be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State shall be taken into account, but similar elevations that are within T miles of both States, shall be disregarded in laying down the median line.

"2. Exceptional considerations of navigation and fishing rights may justify a different delimitation of the boundary, in such manner as the parties concerned may agree.

"3. The line shall be marked on the largest-scale charts available which are officially recognized."

¹³ See article 7 of the draft articles on the continental shelf in the report of the Commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, p. 13. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹⁴ See the Report of the Committee of Experts, annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953*, vol. II.

of a single rule. Several different systems were used by States for that purpose in keeping with special needs. He had mentioned the case of river boundaries; in drawing such boundaries, States employed different methods, sometimes even in respect of the same river. At the Commission's fifth session he had opposed the adoption of a rigid rule and had urged that States should be left free to decide frontier questions in territorial waters by mutual agreement.

61. Mr. CORDOVA pointed out that in many cases, the outer limit of the continental shelf was more important than that of the territorial sea. The concept of the continental shelf had been evolved in order to enable States to exploit the resources of the sub-soil of the sea, such as petroleum. As it seemed impossible to lay down two different boundaries, it would be more practical to make the limits of the territorial sea coincide with those of the continental shelf.

62. Mr. FRANÇOIS, Special Rapporteur, pointed out that article 16 was not concerned with laying down the boundary of the continental shelf; as Mr. PAL had said, the continental shelf was by definition situated outside the belt of territorial sea. The limits of the territorial sea and that of the continental shelf were quite distinct. He was merely proposing to deal with both problems through the application of the same principle—namely, that of the median line which the Commission had adopted at its fifth session; but it would be wrong to infer that because the principle applied was similar, therefore the boundaries in both cases necessarily coincided. The question before the Commission was whether the general principle adopted at the previous session should be supplemented by the provisions contained in his draft.

63. Mr. SPIROPOULOS agreed that the Special Rapporteur's remark applied to the majority of cases. The problem, however, of the territorial sea of a State extending over the continental shelf of another State would inevitably arise in the case of very narrow straits.

64. Mr. SCELLE said that the present difficulties showed how right he had been in the opinion he had expressed on the continental shelf at the Commission's fifth session. He could think of cases where submarine areas which stretched from the coast of one State to the territorial sea of another State, without reaching the 200-metre isobath.

The meeting rose at 6 p.m.

262nd MEETING

Tuesday, 6 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

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

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

*Article 16: Delimitation of the territorial sea of two States the coasts of which are opposite each other (A/CN.4/77) (*continued*)²*

1. The CHAIRMAN said the Commission would resume consideration of article 16 pending the submission of Mr. Zourek's redraft of article 14 on straits.

2. Mr. FRANÇOIS, Special Rapporteur, said that the Commission appeared to favour for article 16 the approach adopted at its fifth session with regard to the continental shelf. He therefore proposed that for article 16 the Commission should adopt the same

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 261st meeting, paras. 55-64.

terminology as for article 7 on the continental shelf.³ It should add in the comments to the article that the committee of experts had drafted a more detailed regulation⁴ which though not adopted by the Commission in detail, was appended for the consideration of Governments. If his proposal were adopted the last sentence of paragraph 1 and the whole of paragraph 2 could be deleted.

3. Mr. HSU thought that, while the median line had been adopted for the purpose of determining the boundary of the continental shelf, it was difficult to accept the same method for the delimitation of the territorial sea between two States. Serious difficulties might arise in the case of two States applying different rules with regard to the breadth of the territorial sea, and the method of the median line would not be applicable. It was, therefore, premature to adopt the median line before agreeing on the rule for the delimitation of the territorial sea. It was perhaps more practical to adopt a less rigid rule.

4. The CHAIRMAN suggested that the Commission might adopt the draft of paragraph 1 as submitted by the Special Rapporteur, and add in the comments to the article that the paragraph in question had been drafted by analogy with article 7, paragraph 1, relating to the continental shelf.

5. In reply to Mr. HSU, he said that the rule as proposed by the Special Rapporteur would favour neither of the parties in question, and the position of the median line would be calculated as from the coasts.

6. Mr. LAUTERPACHT thought that the objections raised by Mr. Pal at the previous meeting and by Mr. Hsu were valid, but only to a certain extent. When the draft regulation was adopted in its entirety, the Commission would have dealt with the question of the delimitation of the territorial sea. It was important to remember that the whole draft was to be based on

³ See chapter III of the Commission's report on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*. Also in *Yearbook of the International Law Commission, 1953*, vol. II. Article 7 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 such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, 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.

"2. 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."

⁴ See the report of the Committee of Experts, annex to A/CN.4/61/Add.1 in *Yearbook of the International Law Commission, 1953*, vol. II.

the assumption that there was a single uniform distance for the breadth of the territorial sea. If, for historical or other reasons, a State made a claim to wider territorial waters, that would be an exception to the general rule which would have to be dealt with on an *ad hoc* basis.

7. He agreed in principle with the provisions of paragraph 1 but suggested that such technical phrases as "a distance of less than two T miles" be replaced by "less than double the breadth of the territorial sea".

8. He regretted the Special Rapporteur's apparent intention to drop the last sentence of paragraph 1 and all of paragraph 2. Their drafting had been the result of a considerable amount of work, and he believed that the Commission should make the provisions of the draft regulation as detailed as it reasonably could.

9. Mr. FRANÇOIS, Special Rapporteur, agreed with Mr. Lauterpacht that the draft as submitted presupposed final agreement on a uniform breadth for the territorial sea. If two States with coastlines facing each other adopted different distances for the breadth of their territorial waters, the article as drafted by him would not apply. It applied only when the breadth of the territorial sea was identical for both States.

10. Mr. Lauterpacht's proposal for simplifying such expressions as "a distance of less than two T miles" could be referred to the Drafting Committee.

11. He had proposed the deletion of the last sentence of paragraph 1 and of the entire paragraph 2, so as to avoid making the provisions too detailed, but would not object to their being included in the comments to the article; that would give governments an opportunity of discussing them. If the majority wished the paragraphs in question to stand, he would not press the point.

12. Mr. PAL said the Special Rapporteur had to a great extent allayed his fears. Mr. Lauterpacht, however, had not been right in saying that the entire draft was meant to be based on the assumption that there was a single uniform distance for the breadth of the territorial sea. No doubt article 16 itself was based on such an assumption; but draft article 4, which was to define that breadth, was likely to give the States a great deal of freedom in that respect.

13. Mr. HSU accepted the Special Rapporteur's explanation that article 16 as drafted would only apply in cases where the territorial sea of two States was of equal breadth.

14. Mr. CORDOVA feared that if the Commission failed to agree on a uniform breadth for the territorial sea, States would claim the right to adopt different breadths. It was therefore necessary to state clearly that the article only applied if the territorial seas of two States were equal in breadth.

15. The CHAIRMAN gathered that the majority of the Commission wished article 16, paragraphs 1 and 2, to be replaced by a simple draft on the lines of

article 7, paragraph 1, of the draft articles on the continental shelf adopted at its fifth session.

16. Mr. ZOUREK could not agree with that approach. There was no doubt that the question was one of *lex ferenda*, as there was no law in force to cover the matters dealt with in those paragraphs. He saw no reason for imposing on States a single method for delimiting their maritime frontiers, particularly as the possible situations were so diverse that no single method sufficed to cover them all. The article before the Commission should be applicable also to cases where States did not have the same breadth of territorial sea, as it would not be realistic to expect agreement on a uniform breadth for the territorial sea. The most that could be done was to retain the Special Rapporteur's draft article as a subsidiary rule and to say that the principle of equidistance applied to cases where the requirements of shipping, the configuration of the coastline or the interests of the States involved did not call for the application of another method. He also thought that if article 16 were replaced by paragraph 1 of article 7 on the continental shelf, it would be too rigid and would have little hope of being adopted by States.

17. The CHAIRMAN pointed out that the adoption of article 7, paragraph 1, on the continental shelf as a basis for article 16 still left States a certain margin for agreement as it stated expressly: "... the absence of agreement between those States or unless another boundary is justified by special circumstances ..."

18. He put to the vote the proposal that paragraphs 1 and 2 of article 16 as drafted by the Special Rapporteur should be replaced by an article drafted on the lines of article 7, paragraph 1, relating to the continental shelf as contained in the Commission's report on the régime of the high seas.⁵

The proposal was adopted by 4 votes to 1, with 8 abstentions.

Paragraph 3 was adopted by 10 votes to none, with 3 abstentions.

Article 16 as a whole, as amended, was adopted by 6 votes to 1, with 6 abstentions.

19. Mr. ZOUREK said he had voted against article 16 for the reasons he had given during the discussion.

Article 17: Delimitation of the territorial sea of two adjacent States (A/CN.4/77)⁶

20. Mr. FRANÇOIS, Special Rapporteur, said that for article 17 he now proposed the same method as that

adopted at the Commission's fifth session for the delimitation of the continental shelf. The article should accordingly be redrafted on the lines of article 7, paragraph 2, relating to the continental shelf⁷ and the phrase "in the absence of agreement between those States or unless another boundary line is justified by special circumstances" added.

21. The question of arbitration could provisionally be left open.

22. Mr. SCELLE did not agree with the Special Rapporteur's proposal that the question of arbitration should for the time being be left open. Differences could very well arise concerning the delimitation of the territorial sea of two adjacent States, particularly if a third party's interests were affected.

23. Mr. FRANÇOIS, Special Rapporteur, replied that there was no question of a third party as the Commission was dealing with the delimitation of the territorial sea between two States only.

24. Mr. SCELLE pointed out that as long as no fixed uniform breadth had been agreed for the territorial sea, two States, the coasts of which were separated by twenty miles, could adopt territorial waters twelve and eight miles in breadth, respectively. In that case, they would eliminate the high seas completely and a third State would be entitled to protest.

25. Mr. FRANÇOIS, Special Rapporteur, said that the case referred to by Mr. Scelle would not arise if agreement was reached on a uniform breadth.

26. Mr. PAL said that in certain cases the territorial sea might be measured from the base lines and not from the coastline, and suggested that the word "coastlines" at the end of the first sentence of the article should be replaced by the words "base lines".

27. He also suggested that the last sentence of the article beginning with the words "The methods whereby..." should be entirely deleted.

28. Mr. FRANÇOIS, Special Rapporteur, recalled that he had already withdrawn his draft of article 17 in favour of article 7, paragraph 2, on the continental shelf, which referred to base lines.

29. Mr. SCELLE hoped that a general arbitration clause would be inserted in the draft regulation to cover all possible disputes.

30. The CHAIRMAN put to the vote article 17 formulated, in principle, by analogy with article 7, paragraph 2, of the draft articles on the continental shelf adopted by the Commission at its fifth session.⁷

The article, to be redrafted on these lines, was adopted in principle by 9 votes to 1, with 3 abstentions.

31. Mr. ZOUREK said he had voted against the adoption of article 17, for the same reasons as he had given with regard to article 16.

⁵ *Vide supra*, para. 2 and footnote 3.

⁶ Article 17 read as follows:

"Except where already otherwise determined the boundary line through the territorial sea of two adjacent States shall be drawn according to the principle of equidistance from the respective coastlines. The methods whereby this principle is to be applied shall be agreed upon between the parties concerned in each specific case."

⁷ *Vide supra*, footnote 3.

CHAPTER III: RIGHT OF PASSAGE

*Article 18: Meaning of the right of passage
(article 14 of A/CN.4/61)*⁸

32. Mr. FRANÇOIS, Special Rapporteur, said there was fairly general agreement among States with regard to the provisions of this particular chapter. The right of passage had been discussed in the Second Committee of The Hague Codification Conference in 1930, and a regulation had been adopted which had subsequently been discussed by the plenary conference.⁹ A greater measure of agreement on that chapter existed among States than on any of the articles previously discussed by the Commission. Accordingly, the right of passage was suitable for codification and he hoped that the articles as submitted by him would not give rise to lengthy discussion.

33. Mr. GARCÍA-AMADOR pointed out that the right of passage was defined in article 19,¹⁰ whereas article 18 contained only a definition of "passage"; he therefore proposed that the body of article 19 should precede article 18 and that the corresponding alterations be made to the headings.

34. Mr. LAUTERPACHT agreed that paragraph 1 of article 19 might come first as it was more logical to begin with a general statement. He did not think, however, that the position of paragraph 2 of article 19 should be altered.

35. On the whole he agreed with the provisions of article 18 as submitted, with the exception of the reference to "public policy" in paragraph 2. "Public policy" was a very elastic term which could be variously interpreted. It would give a very wide measure of discretion, productive of uncertainty and possible arbitrariness, to the administrative authorities of the State. It had probably been translated from the French *ordre public*, and he proposed that it should be replaced by the word "law". Clearly, if the term "law" was adopted, it would refer to such national law as was consistent with international law. If the word "law" were adopted, it would be possible to delete the reference to the fiscal interests of the State; it was not logical to mention fiscal interests if no reference

⁸ Article 18 read as follows:

"1. 'Passage' means navigation through the territorial sea for the purpose either of traversing that sea without entering inland waters, or of proceeding to inland waters, or of making for the high sea from inland waters.

"2. Passage is not *innocent* when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

"3. Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress."

⁹ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee, pp. 164 *et seq.*, 202 *et seq.* and 213 *et seq.*; vol. I: Plenary Meetings, pp. 50 *et seq.* The text of the 1930 regulation is identical with the text of article 18.

¹⁰ *Vide infra*, para. 77, footnote 17.

were made to such other interests as, for instance, sanitary interests.

36. Finally, he was interested in the views of the Special Rapporteur on the comments of the Second Committee of the 1930 Hague Codification Conference¹¹ concerning the extent to which the provisions of the article on the freedom of passage affected the obligations of States in other matters such as navigation, and so on.

37. The CHAIRMAN agreed that the drafting committee should rearrange the articles in a more logical sequence.

38. Mr. FRANÇOIS, Special Rapporteur, did not think it necessary to replace the words "public policy" by the word "law". The expression *ordre public* had been used by the Codification Conference in 1930, and although it might sound slightly ambiguous, it had acquired a sufficiently clear meaning in international law.

39. Mr. SCALLE said that there were countries whose national law was in flagrant contradiction with recognized international law. He was opposed to ships being forced to comply with the national laws of a country if those laws violated international law.

40. Mr. CORDOVA said that in some cases the national law of a country should be taken into account. If, for example, a country was in the throes of revolution and a port had been occupied by a rebel force, the legitimate Government should be entitled to prohibit even innocent passage through its territorial sea. He proposed that the words "public policy" be replaced by the words "public order".

41. Mr. LAUTERPACHT agreed that "public order" was a better formula, but he nevertheless found it still too wide. It would give great latitude to the authorities of the coastal State, who would be able to give the term a very broad interpretation of which ships would not necessarily be aware.

42. Mr. LIANG, Secretary to the Commission, said that at the 1954 session of the Institute of International Law, after a thorough discussion, it had been agreed that the English equivalent of *ordre public* was "public policy". The term "public order" could not be used instead, because it had a completely different connotation. "Public policy" was indeed a vague term but it was well established in legal usage and had been used by the 1930 Codification Conference. It covered what French jurists called *ordre public national*.

43. Mr. SPIROPOULOS agreed with Mr. Liang's remarks concerning the term "public policy". The provisions of article 18, paragraph 2, were a corollary of those embodied in article 19, which laid down that foreign vessels had the right of innocent passage through the territorial sea. Article 18, paragraph 2,

¹¹ *Vide supra*, footnote 9.

defined the cases where passage was not innocent. Thus, a ship which carried out dangerous experiments, or even mere research on the water depth, in the territorial sea of a foreign State would be acting in a manner contrary to the public policy of the State concerned. The text prepared at the 1930 Codification Conference had been drafted after careful consideration of the terms to be used; and unless they could be improved upon he would favour their retention. Innocent passage through the territorial waters of a foreign State meant simply crossing those waters without any other accompanying action.

44. Mr. LAUTERPACHT said that "public policy" concerned to a large extent the economic, social and political régime of a State. That was a criterion which varied from one State to another and could not therefore constitute a suitable basis for the restriction of the right of passage. He agreed that the term "public order" might not be suitable either; it might lead to confusion with the term "good order" used in article 23.¹² He would be prepared to agree to a provision referring to the law of the coastal State. If such law were incompatible with international law then the municipal law in question would constitute a violation of article 18 itself. He proposed that the phrase "to the security, to the public policy or to the fiscal interests, etc." be replaced by the words "to the security of the coastal State or to any law or regulation of that State which is not inconsistent with article 19, paragraph 1". He would delete the reference to fiscal interests which should not be singled out for special reference: a State had many other more important interests, such as public health.

45. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Lauterpacht's suggestion did not seem conducive to much greater clarity; it begged the question as to what laws were inconsistent with article 18, paragraph 1.

46. Mr. SCELLE said that "public policy", or *ordre public national*, would be a dangerous term to use because there were some countries where slavery or forced labour was part of public policy. It would be wrong to suggest that foreign ships could be interfered with in order to safeguard such a policy. The territorial sea was above everything else a part of the sea, and the sea had to be treated as a unity. The coastal State had certain rights in the territorial sea, and they had to be exercised in a manner compatible with international law. But the territorial sea was still part of the sea. There was another theory according to which the territorial sea was regarded purely and simply as part of the territory of a State. That theory was as wrong in law as it was in geography. He would favour a redraft which, while retaining the reservation relating to "public policy", stipulated that the public policy of the coastal State must be consistent with international law.

47. Mr. PAL agreed with Mr. Lauterpacht and Mr. Scelle that the expression "public policy" was dangerously wide and vague and should certainly be avoided in that particular context. If even for internal purposes the term "public policy" was well-nigh undefinable, then *a fortiori* it was far too broad for the purposes of international regulation, particularly if each State was to be free to interpret it at its own discretion.

48. Mr. SCELLE, in reply to a question by the Chairman, said that the French term *ordre public* included laws which were deemed to be part of constitutional practice. With regard to the reference to fiscal interests, he agreed with Mr. Lauterpacht that there was no reason to single them out for special reference and that a better expression would be "and especially, sanitary or fiscal interests".

49. Mr. LIANG, Secretary to the Commission, drew attention to the observations contained in the report of the Second Committee of the 1930 Codification Conference,¹³ in which it was suggested that "fiscal interests" included such matters as public health regulations.

50. The term "law", if used instead of "public policy", would give even more freedom to States to restrict the right of innocent passage.

51. Mr. LAUTERPACHT said he had not suggested that any law of the coastal State should be allowed to interfere with the right of passage. On the contrary, his amendment referred to "any law not inconsistent with the right of passage". It had been suggested that such a provision would be begging the question. That would not be so if some impartial authority were to be the judge of whether a municipal law interfered with the right of passage. Mr. Scelle, in his reference to public policy consistent with international law, was very near to his own view. Reverting to the expression "fiscal interests", he said the term was much vaguer than "fiscal regulations". The provision in question would probably prove unacceptable to maritime nations.

52. Mr. CORDOVA said that it should be provided that a coastal State was empowered to suspend the exercise of the right of innocent passage in certain cases.

53. Mr. FRANÇOIS, Special Rapporteur, said that article 20 (article 16 of A/CN.4/61) covered that point.¹⁴

54. The CHAIRMAN said that the carefully drafted 1930 provision should be retained except where some decisive argument justified an alteration to its provisions.

¹³ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee, p. 213. Also in comments to article 14 of A/CN.4/61 in *Yearbook of the International Law Commission, 1953*, vol. II.

¹⁴ *Vide infra*, 264th meeting, para. 1.

¹² *Vide infra*, 272nd meeting, para. 8.

55. Mr. ZOUREK said that, in practice, vessels only passed through the territorial sea in order to enter or leave a port if the port concerned was open. Passage to enter or to leave a port did not give rise to any difficulties. The only debatable issue was that of lateral passage. In his opinion, the term "passage" did not cover such actions as hovering; the only admissible purpose of passage was to proceed to the port of destination. Moreover, it should be clearly specified in the comment in what cases passage was "innocent". It could not be said that a ship sent to the territorial waters to take photographs of coastal defences was innocently passing through those territorial waters.

56. He did not agree with Mr. Scelle's proposal for introducing the notion of international public order which was not part of public international law. That would be tantamount to making a foreign ship the judge of whether the municipal law of the coastal State was to be disregarded in the name of a new principle, a course which would be absolutely contrary to the sovereignty of States over territorial waters recognized by international law.

57. Mr. HSU inquired what the term "public policy" suggested to the Special Rapporteur.

58. Mr. FRANÇOIS, Special Rapporteur, said that he had taken the term *ordre public* from the 1930 draft. The latter had been drawn up in French and the French term *ordre public* was an accepted term having a clear meaning in legal parlance. He saw no valid reason to depart from the 1930 wording.

59. Mr. SCELLE said that it was not possible to give an exact definition of the term "public policy". In any case, it was never possible for the legislator to lay down rules valid for all cases. It was always the courts which applied the law to special cases. The law laid down that one might kill in self-defence, but it was the judge who decided whether self-defence actually existed in a particular case. That was why he insisted that arbitration should be provided for in the draft regulation.

60. Mr. SPIROPOULOS suggested that paragraph 2 should be redrafted to provide that passage was not innocent if a foreign vessel committed acts which were not necessary for its passage through the territorial sea.

61. Mr. ZOUREK asked the Special Rapporteur whether the passage of a ship with a view to menacing the integrity or independence of the coastal State or for any other purpose incompatible with international law and the United Nations Charter would constitute a breach of paragraph 2.

62. Mr. FRANÇOIS, Special Rapporteur, said that should such a breach of the Charter occur, any State would be entitled to invoke the Charter and claim that the passage was not innocent.

63. The CHAIRMAN put to the vote article 18, paragraph 1.

Article 18, paragraph 1, was adopted by 11 votes to none, with 2 abstentions.

64. Mr. SCELLE proposed that the last phrase of paragraph 2 as from the words "to the security" should be deleted and replaced by the words "to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect (*intérêts que l'existence d'une mer territoriale a pour but de sauvegarder*)".

65. Mr. CORDOVA said that Mr. Scelle's proposal was too wide. He would prefer to maintain the existing draft but add "health and immigration" to "fiscal" interests.

66. Mr. SCELLE said that an enumeration could not cover all cases. Besides fiscal, health and immigration interests, there was the question of fisheries, and many other legitimate interests of the coastal State.

67. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal for replacing the words "to the security, to the public policy or to the fiscal interests of that State" at the end of article 18, paragraph 2, by the words "to the security of the coastal State or to any law or regulation of that State which is not inconsistent with the principles of article 19, paragraph 1".

The proposal was adopted by 5 votes to 2, with 5 abstentions.

68. The CHAIRMAN put to the vote Mr. Scelle's proposal for replacing the phrase "to the security, to the public policy or to the fiscal interests of that State" by the words: "to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect".

The proposal was adopted by 5 votes to 2, with 4 abstentions.

69. Mr. CORDOVA withdrew his amendment which differed less from the original draft than that by Mr. Scelle which had just been adopted.

70. The CHAIRMAN put to the vote article 18, paragraph 2, as amended:

"Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect."

Article 18, paragraph 2, as amended, was adopted by 10 votes to none, with 3 abstentions.

71. The CHAIRMAN put to the vote article 18, paragraph 3.

Article 18, paragraph 3, was adopted by 12 votes to none, with 1 abstention.

CHAPTER II : LIMITS OF THE TERRITORIAL SEA
(*resumed*)

Article 14: Straits (article 11 of A/CN.4/61)
(*resumed from the 261st meeting*)¹⁵

72. Mr. ZOUREK proposed certain amendments. For article 14, paragraph 1, the Commission had adopted the following text:

“In straits which join two parts of the high seas, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast if the straits separate two or more States.”

He proposed a drafting change so that the paragraph would read:

“In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast.”

73. For paragraph 2 he proposed the following text:

“If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 16.”

74. He proposed that paragraph 3 should read:

“If the breadth of the straits exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.”

75. Finally, he proposed that paragraph 4 should read:

“In the case of straits with only one coastal State which are used as a recognized shipping lane between two parts of the high seas, such straits shall be treated in the same way as the straits referred to in paragraph 1, and the provisions of paragraphs 1 and 3 hereof shall be applicable thereto.”

76. The CHAIRMAN said that Mr. Zourek's proposals would be discussed at a following meeting.¹⁶

CHAPTER III : RIGHT OF PASSAGE (*resumed*)

Article 19: Right of innocent passage through the territorial sea (article 15 of A/CN.4/61)¹⁷

77. Mr. CORDOVA proposed that paragraph 1 should read: “As a general rule, a coastal State may put no

obstacles . . .” The coastal State had the right to stop innocent passage in certain cases. He would, therefore, propose, in addition to the insertion of the words “as a general rule”, that the following provision should be added:

“The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that it is necessary for the maintenance of public order. In this case, the coastal State is bound to give due publicity to the suspension.”

78. Such a provision would cover the case in which a State needed to stop even the innocent passage of foreign ships in order to protect them against damage during a rebellion. In answer to a query by Mr. Lauterpacht, he pointed out that in such cases it was not enough to warn the foreign ships concerned. The Mexican International Claims Commission had received claims concerning damage sustained by foreign ships during a rebellion, although the ships in question entered the troubled areas despite warnings.

79. Mr. FRANÇOIS, Special Rapporteur, said that article 19, paragraph 1, laid down the general principle of the right of innocent passage. Other articles, particularly articles 20 and 23,¹⁸ provided for cases in which the freedom of shipping might be interfered with by the coastal State.

80. Mr. Córdova's proposal might be covered by the insertion, after the words: “A coastal State may not put obstacles in the way of innocent passage . . .”, of the words: “except in the circumstances expressly referred to in the following articles”.

81. Mr. SALAMANCA said that article 19, paragraph 1, should have been placed at the beginning of chapter III as suggested by Mr. García-Amador. A provision to the effect that a coastal State had the right to regulate the conditions of passage, as laid down for warships in article 26, paragraph 2,¹⁹ should then follow.

The meeting rose at 1 p.m.

¹⁷ Article 19 read as follows:

“1. A coastal State may put no obstacles in the way of the innocent passage of foreign vessels in the territorial sea.

“2. It is bound to use the means at its disposal to safeguard in the territorial sea the principle of the freedom of maritime communication and not to allow such waters to be used for acts contrary to the rights of other States.”

¹⁸ *Vide infra*, 264th meeting, para. 1 and 272nd meeting, para. 8.

¹⁹ *Vide infra*, 272nd meeting, footnote 14.

¹⁵ *Vide supra*, 261st meeting, paras. 24-54.

¹⁶ *Vide infra*, 263rd meeting, paras. 1-22.

263rd MEETING

Wednesday, 7 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. 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 territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (continued)

CHAPTER II: LIMITS OF THE TERRITORIAL SEA
(resumed from the 262nd meeting)

Article 14: (Article 11 of A/CN.4/61) Straits (resumed from the 262nd meeting)

1. The CHAIRMAN invited the Special Rapporteur to comment upon the new draft proposed by Mr. Zourek at the previous meeting.²

2. Mr. FRANÇOIS, Special Rapporteur, recalled the circumstances in which Mr. Zourek had prepared that new draft; at its 261st meeting, the Commission, on the proposal of Mr. Zourek, had deleted the last phrase ("even if the same State is the coastal State") from paragraph 1 of the original draft article on straits.³ It had then become necessary to supplement the draft article by new provisions concerning the case in which both shores of a strait joining two parts of the high seas belonged to the same State. That was the purpose of the draft which was being submitted by Mr. Zourek, particularly paragraph 4.

3. Nevertheless, the provisions contained in Mr. Zourek's draft seemed incomplete. There was first the case of a strait, both shores of which belonged to a

single State and which was not a recognized shipping route, having a width more than twice the breadth of the territorial sea. According to Mr. Zourek's proposal, such a strait would be governed by the terms of paragraph 1. That was tantamount to allowing States to incorporate into their territorial sea zones of high seas, which was unacceptable. Even if the interests of shipping were not apparently threatened, those of fishing, for example, might be affected.

4. There was another implication of Mr. Zourek's proposal which he could not accept. If the width of a strait of which both shores belonged to the same State did not exceed twice the breadth of the territorial sea, it would be inadmissible for that State to close it, even if it was not a recognized maritime route; passage should always be possible for ships which needed to go from one part of the high seas to another.

5. Mr. Zourek's proposal would only be acceptable in so far as it related to a belt of water situated between the coast and an island near the coast, if shipping normally circumnavigated the island. Such was the case of the Isle of Wight off the English coast.

6. For all those reasons, Mr. Zourek's new draft would have to be amended. The following words might be inserted in paragraph 1: "as well as in straits which have only one coastal State and the width of which is greater than twice the breadth of the territorial sea". In paragraph 4, the words: "which are used as a recognized shipping lane between two parts of the high seas" should be replaced by: "and the passage through which is useful to navigation between two parts of the high seas".

7. Mr. CÓRDOVA felt that the provisions in paragraph 3 of Mr. Zourek's proposal relating to enclaves of high sea were much too wide. The implication was that the coastal State could extend its sovereignty over certain areas of the high seas.

8. The Special Rapporteur's initial draft had provided that such enclaves could only be shared by the coastal States if they were not more than two miles across. That figure was, of course, an arbitrary one, but the Commission had to lay down some limit to the powers of States in that respect.

9. Mr. PAL pointed out that, in paragraph 2 of Mr. Zourek's draft, it would be preferable to keep to the term "limits of the territorial sea" rather than introduce the new concept of "maritime frontier".

10. With regard to paragraph 3, he agreed with Mr. Córdova that States should not have the right to share enclaves of high sea enclosed within straits, irrespective of the breadth of those enclaves. He would prefer the Commission to adhere to the provision contained in paragraph 2 of the Special Rapporteur's initial draft.

11. Finally, the provisions of paragraph 3 relating to the partitioning of the waters of a strait by agreement between the coastal States could not be applied to paragraph 4 of Mr. Zourek's draft, which dealt exclusively with straits having only one coastal State. Under

¹ Vide supra, 252nd meeting, para. 54 and footnotes.

² Vide supra, 262nd meeting, paras. 72-75.

³ Vide supra, 261st meeting, para. 46.

paragraph 3 the two coastal States were to be authorized to apportion and appropriate the intervening areas of the high seas by agreement. The fact that opinions varied might conceivably operate as a check. Where, however, there was only one coastal State, the rule meant simply that the areas of the high seas in question would be surrendered entirely to that State.

12. Mr. ZOUREK, replying first to Mr. François, said that his proposal did not claim to cover all cases, and that was deliberate; he did not wish to depart from the international law in force which, no more than the draft regulations prepared by the 1930 Codification Conference, could not deal with all conceivable cases. The Special Rapporteur's own initial draft related merely to the case of straits "which form a passage between two parts of the high sea". A strait having two or three coastal States was in fact in the same position as an inland sea surrounded by several States. He could see no useful purpose in considering enclaves between two belts of territorial sea in those straits, which in practice were not very large, as portions of the high seas.

13. The Special Rapporteur had also referred to fishing interests; in practice, many States had reserved exclusive fishing rights for their nationals in zones well outside the territorial sea. *A fortiori*, the coastal State of a strait should have the right to enact similar provisions with respect to the waters of straits.

14. Mr. LAUTERPACHT doubted if there existed many—or indeed any—enclaves of the high seas less than two miles across. He did not think so. If any such rare case existed, the States concerned could be left to decide the status of such enclaves by mutual agreement. It was an excess of refinement to attempt to cover such situations.

15. Mr. FRANÇOIS, Special Rapporteur, said that delegations to the 1930 Codification Conference, which had included shipping experts, had considered it necessary to discuss the problem and had suggested a solution; he had simply incorporated that solution in his draft. Presumably, the 1930 Conference had had a good reason for discussing the question and the Commission should not fail to deal with it.

16. Mr. ZOUREK thought that the Vancouver Straits contained enclaves of less than two miles in breadth. The example hardly supported the Special Rapporteur's draft provisions, for the United States and Canada had divided the enclaves in question.

17. Mr. AMADO said that if the case of enclaves was really a theoretical one, the Commission should not discuss it.

18. Mr. CORDOVA agreed with the Special Rapporteur that the Commission could not ignore a problem which had been discussed by the experts at the 1930 Conference. He could see no objection to the rule suggested by the Special Rapporteur. The only question was that of the maximum breadth of two miles. The choice of that figure was certainly arbitrary. On

the whole, however, paragraph 2 of the Special Rapporteur's initial draft seemed acceptable.

19. Mr. HSU said the Commission should first decide whether enclaves should be treated in the same way as the territorial sea; if the Commission decided that they should, there was no reason for limiting the rule to areas which did not exceed two miles in breadth.

20. Mr. FRANÇOIS, Special Rapporteur, pointed out that Mr. Zourek had not answered his most important objection, which concerned the case of a strait wider than twice the breadth of the territorial sea. To exclude such a case from the general rule, and to leave coastal States free to partition them at will, would indeed be a departure from the international law in force.

21. Mr. ZOUREK stressed that his draft paragraph 4 only dealt with cases already provided for by customary law. He pointed out that there existed no rules in international law governing the régime of straits which were not sea routes indispensable to international navigation. The Special Rapporteur's proposed amendment to paragraph 1 would in effect restore the phrase which the Commission had earlier decided to delete.

22. The CHAIRMAN pointed out that the two phrases were not identical, as the Special Rapporteur had added the condition "and the width of which is greater than twice the breadth of the territorial sea". In any case, the Commission could more usefully continue the discussion after the Special Rapporteur had submitted his amendment in writing.⁴

CHAPTER III: RIGHT OF PASSAGE (resumed from the 262nd meeting)

Article 19: Right of innocent passage through the territorial sea (article 15 of A/CN.4/61) (resumed from the 262nd meeting)⁵¹

23. Mr. FRANÇOIS, Special Rapporteur, explained that paragraph 1 of the draft article embodied the principle of free passage through the territorial sea which had been adopted by the 1930 Codification Conference. That principle was a very general one and its application was in a certain measure qualified by the articles which followed. The Commission might wish to add, at the end of paragraph 1, a provision along the following lines: "except as hereinafter otherwise provided".

24. Paragraph 2 was based on the judgement given on 9 April 1949 by the International Court of Justice in the Corfu Channel case.⁶ In that judgement, the Court had stressed that it was the duty of every State not to allow its territory to be used for acts contrary to the interests of other States.

25. Mr. CORDOVA said the general rule was that a State was sovereign over its territorial sea. Hence he

⁴ *Vide infra*, 271st meeting, para. 1.

⁵ *Vide supra*, 262nd meeting, paras. 77-81.

⁶ *I.C.J. Reports 1949*, p. 4.

could not agree that the right of passage should be raised to the status of a principle which prevailed over that rule. In fact, a State had the right, on security grounds, to forbid even the innocent passage of foreign ships through its territorial sea. The Commission had already accepted that principle by adopting the preceding article, and the same principle should be restated in article 19. In some cases even innocent passage might constitute a danger, and the coastal State to which the territorial sea belonged was the only proper judge on that point.

26. In the circumstances, he proposed the following amendments to the Special Rapporteur's draft:

(1) In paragraph 1, before the words: "a coastal State" the words "As a general rule" should be inserted.

(2) A new paragraph 2 should be inserted to read:

"2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that it is necessary for the maintenance of public order. In this case the coastal State is bound to give due publicity to the suspension."

(3) The old paragraph 2 to become paragraph 3.

27. Mr. SCALLE thought Mr. Córdova's amendments in no way altered the substance of the Special Rapporteur's draft. It had never been contended that States should not have the right to forbid access to their territorial sea in certain cases of danger to shipping. Nevertheless, Mr. Córdova's amendments were based on a mistaken principle which, if applied, would eventually mean that the territorial sea would be treated in the same way as the territory proper. Accordingly it conflicted with the traditional view that the sea was a unit and international public domain.

28. Mr. LAUTERPACHT thought Mr. Córdova's amendments should be considered in connexion with article 20 (Steps to be taken by the coastal State).⁷ Those amendments contained nothing objectionable, unless it was held that any exceptions to the principle of the freedom of passage contemplated therein were already authorized under the provisions relating to the security of States, in article 18.⁸

29. Moreover, he thought the right of innocent passage was the general rule and, as suggested at the previous meeting by Mr. García-Amador,⁹ it would be logical to formulate it at the beginning of chapter III. Accordingly he submitted the following draft provision:

"Subject to the provisions of this regulation, vessels of all States shall enjoy the right of innocent passage through the territorial sea."

30. He added that at a suitable moment he would raise two new points: firstly, the régime of the territorial

sea as applied to the waters lying between the coast and the straight base lines; and secondly, the question of artificial straits, such as the Kiel and Panama canals.

31. Mr. ZOUREK submitted the following amendments:

(1) In paragraph 1, the words "Subject to the provisions of articles 20 and 21" should be inserted before the words "a coastal State", the words "in the territorial sea" should be omitted, a comma added and the words "as this passage is defined in article 18" inserted. Accordingly the sentence in question would read:

"Subject to the provisions of articles 20 and 21, a coastal State may put no obstacles in the way of the innocent passage of foreign vessels, as this passage is defined in article 18."

(2) The following sentence should be added to paragraph 1:

"It may, however, close certain areas of its territorial waters to shipping, provided that recognized maritime routes are left open."

(3) Paragraph 2 should be deleted.

32. He pointed out that the order in which the articles in chapter III were arranged did not correspond to the principle adopted by the Commission in connexion with the earlier draft articles, according to which the sovereignty of the State over the territorial sea constituted the rule, and the right of innocent passage only an exception. It would be more logical to specify first the manifestations of that sovereignty and then to refer to the right of innocent passage through the territorial sea.

33. If the Commission refused to adopt that approach the new draft article 19 should, at least, contain a reference to the subsequent articles. It would also be necessary to add that the coastal State had the right to close certain areas of its territorial waters to shipping; such a clause was moreover in absolute agreement with existing international law. The coastal State should be free to close those areas to navigation even for long periods provided that routes used by international maritime traffic were left open.

34. He did not agree with Mr. Lauterpacht's proposal that the clause contained in paragraph 1 of article 19 should be the introductory clause of chapter III. The introductory clause of chapter III should be capable of applying to all vessels, regardless of whether they were warships, merchant vessels, or ships of any other kind. Actually, however, identical rules could not be applied to all types of ships so far as the right of passage was concerned. Moreover, international law as reflected in State practice, jurisprudence and internal legislation clearly did not recognize the right of passage in the case of warships.

35. The CHAIRMAN recalled that the Commission had taken the Special Rapporteur's draft as a basis for discussion. The order in which the provisions of the

⁷ *Vide infra*, 264th meeting, para. 1.

⁸ *Vide supra*, 262nd meeting, paras. 32, 63, 68, 70, 71.

⁹ *Ibid.*, para. 33.

chapter should be arranged was clearly not a question of form and hence not a question that could be referred to the Drafting Committee. The Commission would have to settle it itself after studying the articles submitted by the Special Rapporteur.

36. He put to the vote paragraph 1 of article 19 incorporating Mr. Lauterpacht's amendment as accepted by the Special Rapporteur:

“Subject to the provisions of this regulation vessels of all States shall enjoy the right of innocent passage through the territorial sea.”

Article 19, paragraph 1, as thus amended, was adopted by 12 votes to none, with 1 abstention.

37. The CHAIRMAN said that the vote did not prejudice the decision as to the final place of that clause in the draft regulation, and that the amendments submitted by Mr. Córdova and Mr. Zourek would be put to the vote when the Commission considered article 20.¹⁰

38. Mr. ZOUREK remarked that the right of the coastal State to close certain areas of the territorial waters to shipping, provided that the recognized sea lanes were left open, involved a principle which had a bearing on the problem as a whole.

39. Mr. SCELLE said that apparently Mr. Zourek wished the territorial sea to be governed by the rules applied to the air space. He strongly opposed any such tendency.

40. The CHAIRMAN invited debate on paragraph 2 of article 19.

41. Mr. LAUTERPACHT said he unhesitatingly approved the Special Rapporteur's draft. He recalled that, as the Special Rapporteur had pointed out in his comment, the paragraph was based on the International Court's decision in the Corfu Channel case. The Court had held Albania liable because that country had failed to notify States of the presence of mines which it had admittedly laid itself. It should therefore be stipulated that the coastal State was under a duty to give notice of any serious danger to shipping.

42. It was not desirable to go so far as to say that the coastal State was under a duty to remove obstacles to shipping, for example, to raise submerged wrecks, but it should notify the existence of such obstacles. The Commission should not impose excessively onerous obligations on the coastal State, but it would be useful to specify minimum obligations.

43. Mr. CORDOVA conceded that in its decision in the Corfu Channel case the Court had said that the coastal State should not allow its territorial waters to be used for acts contrary to the rights of other States. The Special Rapporteur's draft paragraph 2 was based on that decision. The Special Rapporteur had, however, gone very much further than the Court when he

said that the State was “bound to use the means at its disposal”; that formula would impose on the coastal State a positive obligation which was both excessive and inconsistent with the Court's decision.

44. Mr. FRANÇOIS, Special Rapporteur, did not think there was any difference of substance between Mr. Lauterpacht's draft and his own. He read the extracts from the Court's decision in the Corfu Channel case reproduced in the comments of his second report¹¹ and stressed the words: “the principle of the freedom of maritime communications”. He pointed out in reply to Mr. Córdova that the Court had said “the obligations incumbent upon...” In his report he had modified that expression and adopted the formula “is bound to use the means at its disposal”, terms which were perfectly usual in international law.

45. Mr. CORDOVA said the Commission could hardly impose on the coastal State the obligation to ensure freedom of navigation in the territorial sea; it did not in fact contest the State's right to lay mines in those waters. The right of innocent passage could not be an absolute right.

46. Mr. LAUTERPACHT recalled that in time of peace a coastal State was not normally entitled to lay mines in its territorial sea.

47. Mr. FRANÇOIS, Special Rapporteur, said that the draft regulation as a whole was concerned with the régime of the territorial sea in peacetime only.

48. Mr. ZOUREK said that even in peacetime there were periods of international tension which could not be termed war but during which a State might require to take security measures.

49. Mr. CORDOVA agreed with Mr. Zourek. Even in peacetime, a State erecting fortifications in its territorial sea could legitimately object to foreign ships navigating too close to those fortifications. He proposed that paragraph 2 should be deleted.

50. Mr. ZOUREK said that paragraph 2 was drafted in such general terms that it would impose excessive duties upon States. Its terms were very much wider than the International Court's judgement in the Corfu Channel case. In wartime, a neutral coastal State could not be held liable in respect of acts committed in its territorial waters by the belligerents. In any case, the Court's decision in the Corfu Channel case was not a precedent; with one exception the Court's conclusions had not been adopted unanimously by the judges and a number of them were controversial; moreover, the judgement dealt with the particular case of a certain strait, whereas article 19 related to the territorial sea in general. He was certain that States would find the Special Rapporteur's draft unacceptable and he accordingly proposed that paragraph 2 should be deleted.

¹⁰ *Vide infra*, 264th meeting, para. 1.

¹¹ A/CN.4/61 in *Yearbook of the International Law Commission, 1953*, vol. II. See also *I.C.J. Reports 1949*, p. 22.

51. Mr. LAUTERPACHT was in favour of retaining paragraph 2 but proposed that the words "to safeguard in the territorial sea the principle of freedom of maritime communication" should be replaced by "to ensure in the territorial sea the respect of the principle of the freedom of maritime communication". The word "safeguard" lent itself to the interpretation that the coastal State was bound to take protective action, such as removal of wrecks. He pointed out that the coastal State would only assume the duties in question in time of peace and within the limits of the means at its disposal. He felt strongly that the coastal State should notify other States of anything that interfered with freedom of communication. Perhaps it was sufficient to make that last point clear in the comment to the article.

52. Mr. PAL said that Mr. Lauterpacht's amendment did not appreciably alleviate the obligation that was being imposed upon the coastal States. Under the amendment, the coastal State would still assume a positive duty. It would be better to say that the coastal State "is bound not to interfere in the territorial sea with the freedom of maritime communication", subject possibly to a proviso to the effect that it had the right to safeguard its own interests in the territorial sea. The "innocent" character of passage might depend on the nationality of the ships involved. If the coastal State was at war with another State and a ship belonging to a third State attempted to pass through its territorial sea, such passage was certainly "innocent" from the legal standpoint; but the coastal State could hardly be forbidden in that case to lay mines in its territorial sea. In order to avoid such complications, perhaps paragraph 2 should be deleted altogether, or else a provision should be inserted to the effect that the coastal State was bound not to allow its territorial waters to be used for acts contrary to the rights of other States.

53. The CHAIRMAN pointed out that part of Mr. Pal's last proposal was already implicitly contained in paragraph 1 as adopted by the Commission.

54. Mr. AMADO said that the provisions of paragraph 2 were calculated to protect the interests of the coastal State as well as those of other States; the coastal State had to ensure freedom of maritime communication in its territorial sea if it wanted its own ships to navigate freely in the territorial sea of other States.

55. Mr. SCELLE said that paragraph 2 was indispensable to compensate for the far-reaching rights granted to the coastal State in the territorial sea.

56. Mr. HSU felt that the Special Rapporteur's draft, even as amended by Mr. Lauterpacht, would place a very onerous obligation upon smaller Powers, particularly during periods of prolonged international tension. A small State which did not have a powerful navy could not be expected to answer for acts committed in its territorial sea by other States.

57. Mr. LAUTERPACHT said that the words "means at its disposal" should reassure Mr. Hsu. No one denied that the coastal State exercised sovereign rights over the territorial sea, but that State nonetheless had, in respect of the maritime portion of its territory, international obligations differing from those which applied to the rest of the territory; that was specifically true of the right of passage. Paragraph 2 was only the application to the special case of maritime navigation of a general rule of international law: the rule that a State must not allow its territory to be used for acts contrary to the rights of other States.

58. Mr. HSU, replying to Mr. Lauterpacht, said that even if the convention did not specifically stipulate it, it was axiomatic that no one could be bound to perform the impossible. He insisted that the duties imposed by paragraph 2 were excessive.

59. Mr. FRANÇOIS, Special Rapporteur, accepted Mr. Lauterpacht's amendment.

60. Mr. ZOUREK said the possible implications of paragraph 2 in extending the coastal State's responsibility were far-reaching. For example, in its judgement in the Corfu Channel case, the International Court had relied on a report by experts who had assumed, among other things, that atmospheric conditions had been normal.

61. Mr. HSU asked if Mr. Lauterpacht really thought an express stipulation to cover the particular point was essential. Every coastal State naturally wished to retain sovereignty over its territorial sea and to punish any violation of its rights.

62. Mr. LAUTERPACHT recalled that the text submitted to the Commission took into account a very important decision adopted almost unanimously by the International Court of Justice. Unless it had very good reasons for doing so, the Commission should not disregard the authority of the Court's decision.

63. The CHAIRMAN put to the vote Mr. Zourek's proposal that paragraph 2 should be deleted.

The proposal was rejected by 7 votes to 5, with 1 abstention.

64. The CHAIRMAN put to the vote Mr. Pal's proposal that the words: "It is bound to use the means at its disposal to safeguard in the territorial sea the principle of the freedom of maritime communication..." should be replaced by the words: "It is bound not to interfere in the territorial sea with the freedom of maritime communication".

The proposal was rejected by 4 votes to 2, with 5 abstentions.

65. The CHAIRMAN put to the vote paragraph 2 incorporating Mr. Lauterpacht's amendment as accepted by the Special Rapporteur. The draft paragraph would read: "It is bound to use the means at its disposal to ensure in the territorial sea the respect of the

principle of the freedom of maritime communication and not to allow such waters to be used for acts contrary to the rights of other States.”

Article 19, paragraph 2, as thus amended, was adopted by 5 votes to 4, with 3 abstentions.

66. Mr. ZOUREK explained that he had voted against paragraph 2 because under it States would have to accept obligations not contemplated by existing international law.

67. Mr. HSU said that he had voted against paragraph 2 because he had not been convinced by the arguments of the members of the Commission who thought the clause indispensable. Nor did he think that the paragraph in question could be based on the International Court's decision in the Corfu Channel case, as the text adopted differed greatly from the Court's conclusions.

68. The CHAIRMAN said that, as the Commission had not yet settled the order in which the provisions of chapter III should be arranged, article 19 as a whole should not be put to the vote at that stage in the discussion.¹²

The meeting rose at 1.5 p.m.

¹² See also below, 264th meeting, para. 57, and 277th meeting, paras. 22-32.

264th MEETING

Thursday, 8 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F.

GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCALLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK.

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

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

CHAPTER III: RIGHT OF PASSAGE *(continued)*

Article 20: Steps to be taken by the coastal State (article 16 of A/CN.4/61)²

1. Mr. CÓRDOVA said that at the previous meeting he had submitted a draft paragraph to be inserted in article 19;³ he now thought it more apposite for the Commission to consider it in connexion with article 20. In his opinion, article 20 as drafted by the Special Rapporteur was incomplete. It was more logical, in dealing with the subject of the right of passage, to begin with a general statement to the effect that the sovereignty of the coastal State should be exercised in accordance with the following articles. Such an introductory statement would dispense with the article proposed at the previous meeting by Mr. Lauterpacht. The initial statement could be followed by his (Mr. Córdova's) draft paragraph 2, reading:

“2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that it is necessary for the maintenance of public order. In this case the coastal State is bound to give due publicity to the suspension.”

2. Article 20 could then serve as a basis for a third paragraph which would lay down the way in which the sovereignty of the coastal State should be exercised in the matter of passage through its territorial sea. In article 20 the negative approach as expressed in the words “does not prevent” was unsatisfactory. It would be more logical to assert the rights of sovereignty and to specify how they were to be exercised; the right of passage was an exception to absolute sovereignty and should be mentioned in second place.

3. Mr. FRANÇOIS, Special Rapporteur, said that although Mr. Córdova's proposed rearrangement appeared logical, he (the Special Rapporteur) had followed the

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² Article 20 read as follows:

“The right of passage does not prevent the coastal State from taking all necessary steps to protect itself in the territorial sea against any act prejudicial to the security, public policy or fiscal interests of the State, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.”

³ *Vide supra*, 263rd meeting, para. 26.

principle adopted by the 1930 Codification Conference and preferred to retain his own method of presentation.

4. The substance of Mr. Córdova's amendment was already covered by the provisions of article 20; he did not think the amendment necessary, but would defer to the majority of the Commission. The reference to "all necessary steps" in the article implied that the State could temporarily suspend the right of passage for special reasons. There was no need to say so specifically.

5. Mr. LAUTERPACHT agreed with the Special Rapporteur and said that article 20 should be retained as submitted. He pointed out to Mr. Córdova that articles 2 and 3 stipulated that a State had sovereignty over the territorial sea, and that that sovereignty should be exercised in accordance with international law. Mr. Córdova wished his draft paragraph to be considered as a general rule, whereas it was in reality a special case and consequently an exception to the rule. It was illogical to place the exception before the rule. In article 20 Mr. Córdova's amendment was covered by the word "security"; however, if the Special Rapporteur did not object, the right of temporary suspension of the right of passage might perhaps be mentioned in the comment to the article in order to satisfy Mr. Córdova.

6. Mr. SCELLE said that according to one school of thought the territorial sea was an integral part of the sea, while another was inclined to consider it as a projection of the territory of the coastal State. He supported the former view and was therefore in favour of not changing article 20.

7. Mr. HSU thought that Mr. Córdova might agree to the insertion in the text of article 20 of a sentence to cover his amendment concerning the temporary suspension of the right of passage. In his opinion such an addition was not necessary, but at the previous meeting⁴ the Commission, in adopting article 19, paragraph 2, had somewhat overstressed the right of passage and Mr. Córdova's proposal might re-establish the equilibrium. The suggestion was a compromise which he hoped would give satisfaction to Mr. Córdova, without modifying unduly the Special Rapporteur's text.

8. Mr. PAL preferred the article as submitted by the Special Rapporteur and thought that having accepted article 19, the Commission should oppose any change in the position of article 20. He proposed that the words "to protect itself" should follow the words "in the territorial sea" instead of preceding them. Moreover, the words "to the security, public policy, or fiscal interests of the State" in the article should be replaced by the words "to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect", in conformity with the formula proposed by Mr. Scelle and adopted by the Commission in a similar context in article 18 relating to the meaning of the right of passage.⁵

9. The CHAIRMAN suggested that Mr. Córdova's proposal relating to the temporary suspension of the right of passage might be mentioned in the Commission's report on the current session.

10. Mr. CORDOVA was unable to agree.

11. Mr. GARCÍA-AMADOR proposed that in article 20 the words "The right of passage does not prevent" should be deleted and that the beginning of the clause should be amended to read: "The coastal State may take all..." That proposal might satisfy the Special Rapporteur and Mr. Córdova.

12. Mr. CORDOVA agreed with Mr. García-Amador's proposal but said that the right of temporary suspension of the right of passage should be mentioned specifically. Two ideas should be incorporated, the one relating to the temporary nature of the suspension, and the other to the fact that the right of passage could be suspended "in certain definite areas". The article as it stood was dangerous, and his proposal would benefit shipping.

13. Mr. SCELLE regretted that Mr. García-Amador should have acceded to the theory that the suspension of the right of passage should precede the right of passage as such. An important principle affecting the territorial sea was involved, and he (Mr. Scelle) would support the views expressed by the Special Rapporteur and Mr. Lauterpacht.

14. Mr. ZOUREK agreed with Mr. Córdova and considered the sequence proposed by him a logical one. It was based on the principle that sovereignty extended to the territorial sea, and it was right that freedom of passage should be mentioned only after all measures taken by virtue of full sovereign rights. The Commission had already adopted the principle of sovereignty over the territorial sea, and he saw no reason why the proper order should be reversed in chapter III and the right of passage mentioned before sovereignty. He could not agree that the principle of sovereignty should become an exception, and would accordingly vote against the amendment proposed by Mr. García-Amador. In order to avoid misunderstanding he proposed the addition after the words "in the territorial sea" of a sentence reading: "It may, in particular, close certain areas of its territorial waters to shipping, provided that recognized maritime routes are left open."

15. Mr. SALAMANCA did not share Mr. Córdova's view, but agreed with the Special Rapporteur and Mr. Lauterpacht. The sovereign rights of a State were not identical with the rights exercised by a State over its territorial waters. He agreed that the principle of passage should be the main rule.

16. Mr. LAUTERPACHT thought Mr. García-Amador's proposal an improvement which could be accepted. If the Commission agreed that Mr. Córdova's amendment, preceded by the words "in particular", should be inserted in the body of article 20, the temporary suspension of the right of passage would become an example of the measures a State could take

⁴ *Vide supra*, 263rd meeting, para. 65.

⁵ *Vide supra*, 262nd meeting, paras. 68 and 70.

to protect itself against acts prejudicial to its security. He did not think the addition a necessary one, but would not oppose it if Mr. Córdova insisted on its inclusion.

17. It might be possible to add, in connexion with the last sentence of Mr. Córdova's amendment, a further provision to the effect that the coastal State was also bound to publish information of any dangers to shipping of which it had knowledge.

18. He said that the title of article 20 should be revised by the Drafting Committee.

19. Mr. FRANÇOIS, Special Rapporteur, did not object to the proposal made by Mr. García-Amador or to the proposal that Mr. Córdova's amendment should be included in the body of article 20. He objected, however, to such an amendment being introduced by the words "in particular" as that might suggest that it was one of the first things a State might do and not a very exceptional measure.

20. Mr. CORDOVA said that his draft clause should be inserted in article 20 after the words "to protect itself", or else it could become a separate paragraph.

21. Mr. AMADO said that the adoption of so many changes completely altered the spirit of the original article. The purpose of article 20 was only the verification of the fact that the passage of a vessel was indeed innocent. No other considerations should be included in the article. He would vote for it in the form in which it had been submitted by the Special Rapporteur.

22. Mr. LIANG, Secretary to the Commission, agreed with Mr. Amado. Indeed, he added, if the article as submitted by the Special Rapporteur was widened it would conflict with the principle adopted by the Commission at its fifth session in connexion with the contiguous zone,⁶ which would be most unfortunate. The right of passage should stand as the principle, as laid down in the Special Rapporteur's draft; amendments, if any, should relate merely either to the limitation of that right of passage or to the verification of its being innocent.

23. Mr. SPIROPOULOS agreed with Mr. Liang.

24. Faris Bey el-KHOURI thought Mr. García-Amador's proposal reasonable. He did not object to the addition of a provision relating to the temporary suspension of the right of passage by the coastal State, but added that in the case of such suspension due publicity should be given.

25. Mr. SCELLE regretted that the Special Rapporteur had agreed to the deletion of the introductory words of the draft article. The Commission had to decide whether to emphasize the right of passage or the principle of sovereignty. He was opposed to a series of minor

amendments which were likely to stultify the original purpose of the article.

26. Mr. ZOUREK was surprised that Mr. Córdova's proposal had been so strongly criticized, for it only expressed existing law. He recalled that at its fifth session the Commission, in draft article 6 relating to the continental shelf,⁷ had admitted that the right of passage could be permanently suspended above the continental shelf, or in other words outside the area of the territorial sea in the case of installations used for the exploration and exploitation of the natural resources of the continental shelf. It was therefore illogical that States should be prevented from suspending temporarily the exercise of that right in the territorial sea. The coastal State possessed that right by virtue of their sovereignty over the territorial waters.

27. Mr. FRANÇOIS, Special Rapporteur, pointed out that, if he had accepted certain amendments to his draft he nevertheless retained in its entirety the principle it embodied.

28. The CHAIRMAN put to the vote Mr. García-Amador's proposal that the introductory words "The right of passage does not prevent" should be deleted and that the beginning of the article should be amended to read: "The coastal State may take all..."

The proposal was adopted by 10 votes to 4.

29. The CHAIRMAN put to the vote Mr. Pal's amendment to the effect that the words "in the territorial sea" should precede the words "to protect itself".

The amendment was adopted by 10 votes to 1, with 3 abstentions.

30. The CHAIRMAN put to the vote the second amendment proposed by Mr. Pal to the effect that the words "to the security, public policy or fiscal interests of the State" should be replaced by the words "to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect".

The amendment was adopted by 9 votes to 1, with 4 abstentions.

31. The CHAIRMAN put to the vote the proposal that Mr. Córdova's amendment should, subject to drafting changes, be included in article 20 as paragraph 2.

The proposal was adopted by 9 votes to 5.

32. The CHAIRMAN said he took it that the Commission wished to refer to the Drafting Committee Mr. Lauterpacht's amendment relating to the obligation of the coastal State to publish information of any dangers to shipping of which it had knowledge. Mr. Córdova's reference to due publicity regarding the temporary suspension of the right of passage should be treated separately.

33. He put to the vote the principle of article 20, paragraph 1, which in its amended form read:

⁷ *Ibid.*

⁶ See articles 3 and 6 of the draft articles on the continental shelf, in chapter III of the Commission's report on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

"The coastal State may take all necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect, and, in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject."

Article 20, paragraph 1, was adopted in principle by 6 votes to 4, with 4 abstentions.

34. Mr. ZOUREK said he had abstained because, although in agreement with the principle of the paragraph just adopted, he did not approve of its drafting.

Proposed additional clause relating to the right of the coastal State to close certain areas of the territorial sea

35. Mr. ZOUREK proposed the addition of a new clause along the following lines:

"The coastal State may close permanently to shipping certain areas of its territorial sea, provided recognized sea lanes essential to international navigation shall be left free. In this case, the coastal State is bound to give due publicity to the measure."

36. He said that the clause was in keeping with article 6 of the draft articles on the continental shelf.⁸ The only restriction under the draft adopted by the Commission on the freedom of a State to establish safety zones in the high seas around installations for the exploitation of the continental shelf was the proviso safeguarding recognized sea lanes essential to international navigation. *A fortiori*, the coastal State should have the right to close the territorial sea.

37. Mr. SCALLE was surprised that the Commission, which had begun its task with the aim of codifying international law, should be demolishing, step by step, the freedom of the high seas. The Commission should not encourage the disintegration of a freedom recognized by international law. Otherwise, the Commission would end by accepting in respect of the sea the extremely undesirable situation now obtaining in connexion with air navigation. Any aeroplane not travelling along the recognized air corridors ran the risk of being shot down; if one carried to their logical conclusion the ideas to which the Commission was giving acceptance, ships sailing on the territorial sea would run the risk of being sunk if they strayed from narrow channels prescribed by coastal States.

38. Mr. LAUTERPACHT said that the safety zones provided for by article 6 on the continental shelf did not entail the right for the coastal State to interfere with the freedom of passage. The right of that State to issue regulations to safeguard installations for the exploitation of the continental shelf was an exceptional privilege. Mr. Zourek's proposal amounted to transforming that exceptional case into a general rule.

⁸ *Ibid.*

39. Mr. CORDOVA suggested that the provisions of article 6 on the continental shelf—which by definition concerned only the high seas—should be extended to the territorial sea.

40. Mr. FRANÇOIS, Special Rapporteur, could not agree to extending to the territorial sea the rule embodied in article 6 on the continental shelf. A safety zone around installations in the high seas was unlikely to interfere much with navigation. On the high seas, a ship could alter course so as to avoid such installations. But in the narrow belt of the territorial sea, shipping had not the same freedom to manoeuvre. Accordingly, the right of passage through the territorial sea had to be safeguarded even more carefully than freedom of shipping in the vicinity of installations in the high seas.

41. Mr. AMADO said that Mr. Zourek's far-reaching proposal was the direct consequence of the Special Rapporteur's regrettable acceptance of Mr. García-Amador's amendment earlier in the meeting.

42. Mr. PAL said that Mr. Zourek's proposal in effect made the right of passage illusory. That proposal would abolish altogether the freedom of the seas in respect of the territorial sea, with the minor exception of recognized sea lanes.

43. Mr. ZOUREK said that, by embodying his proposal in a separate paragraph, he had clearly indicated that it dealt with an exceptional case. It was not his intention to destroy the principle of freedom of passage. He had referred to article 6 on the continental shelf mainly as an argument in support of a provision safeguarding recognized sea lanes. The leading principle was that the coastal State was sovereign in its territorial sea and that its sovereignty was qualified only by the needs of international navigation. The right of passage had never been construed as implying the complete freedom of ships to hover in the territorial sea of a foreign State. Indeed, the Hovering Acts promulgated in certain States were intended to apply even outside territorial waters. The purpose of the paragraph which he proposed to insert was the codification of an international usage which the Commission should acknowledge.

44. The CHAIRMAN put Mr. Zourek's proposal to the vote.

The proposal was rejected by 10 votes to 1, with 3 abstentions.

45. The CHAIRMAN, at the request of Mr. Lauterpacht, asked the Special Rapporteur to draft an article concerning the establishment of safety zones around installations for the exploitation of the continental shelf situated under the territorial sea.

Proposed new article relating to the right of passage in favour of land-locked States

46. Mr. SALAMANCA said he would propose a clause providing that, if a State had undertaken international obligations relating to freedom of transit over its territory, either as a general rule or by a convention,

the obligations so assumed also applied to passage through the territorial sea. Article 6 of a 1904 treaty between Bolivia and Chile guaranteed Bolivia in perpetuity complete freedom of passage through Chilean territorial waters even in time of war. A servitude of that type in favour of land-locked States would be a useful provision in all such cases. He would, however, stress that unless some provision of the kind he had suggested were included, the present regulation, when adopted, might leave it in doubt whether existing rights of passage of the type embodied in the 1904 treaty were to be maintained.

47. Mr. CORDOVA said that the general rules which the Commission was adopting could in no way affect rights existing under particular treaties.

48. Mr. SALAMANCA said that what he had in mind was not only the case of the 1904 treaty but any instance in which there existed an accepted custom granting the right of passage to a land-locked State.

49. Mr. ZOUREK said that Mr. Salamanca's remarks raised the important question of the future relationship between the draft articles, if adopted, and the existing regulations in respect of particular cases.

50. Mr. LAUTERPACHT said that the draft articles would give a coastal State the right to enact certain restrictions to the right of passage. But there was nothing to prevent a State from abandoning that right in whole or in part as Chile had done in favour of Bolivia by the 1904 treaty. A statement, along the lines of that contained in the report of the Second Committee⁹ of the 1930 Codification Conference, could now be embodied by the Commission in the comment to the relevant article. Such a statement in the comment would meet Mr. Salamanca's requirements. Apart from that, any incursion into the general question of facilities for land-locked States was outside the scope of the present work of the Commission.

51. Mr. SALAMANCA said that the various articles adopted by the Commission had narrowed the right of passage so much that the territorial sea would be almost completely controlled by the coastal State. That being so, he would press for the adoption of the provision he had suggested.

⁹ See *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal 1930.V.16), p. 213. The statement read as follows:

"It should, moreover, be noted that when a State has undertaken international obligations relating to freedom of transit over its territory, either as a general rule or in favour of particular States, the obligations thus assumed also apply to the passage of the territorial sea. Similarly, as regards access to ports or navigable waterways, any facilities the State may have granted in virtue of international obligations concerning free access to ports or shipping on the said waterways, may not be restricted by measures taken in those portions of the territorial sea which may reasonably be regarded as approaches to the said ports or navigable waterways."

52. Mr. SCALLE agreed with Mr. Salamanca that the draft regulation would not be without effect on pre-existing treaty rights. If a particular treaty was repugnant to a principle of general international law or to a principle embodied in a general convention, that principle prevailed over the provisions of the treaty. Since it had adopted a number of provisions restricting the freedom of passage, it was doubtful whether the Commission still regarded the freedom of the sea as the established general rule of international law. And if the freedom of the seas was no longer the general principle, the special rights of States under existing agreements or practices might perhaps be regarded as no longer valid in international law.

53. Mr. HSU said the Commission was codifying international law. Therefore any pre-existing principle of international law which had not stood in the way of the provisions of the 1904 Chilean-Bolivian treaty, would no more stand in their way if it were codified by the Commission.

54. Mr. FRANÇOIS, Special Rapporteur, said it was unthinkable for the Commission to abandon the principle adopted in 1930. His acceptance of the amendments adopted earlier in the meeting did not mean a weakening of his support of the right of passage as construed by the 1930 Codification Conference.

55. With regard to Mr. Salamanca's remarks, he would draw special attention to paragraph 2 of article 21 forbidding a coastal State to discriminate between foreign vessels of different nationalities.¹⁰ Any special conventions extending the right of passage might in accordance with that paragraph be invoked by all other States. In order to cover the case mentioned by Mr. Salamanca, article 21 should be modified.

56. The CHAIRMAN said that at the next meeting Mr. Salamanca would submit his proposal in writing.

*Provision relating to publicity of dangers to shipping
(to be added to article 19)*

57. The CHAIRMAN put to the vote Mr. Lauterpacht's draft provision reading:

"The coastal State is bound to give due publicity to any dangers to navigation of which it has knowledge."¹¹

The amendment was adopted by 11 votes to none, with 3 abstentions.

*Proposed new article on freedom of passage
in certain internal waters*

58. Mr. LAUTERPACHT proposed the adoption of a new article to read:

"The principle of the freedom of innocent passage governing the territorial sea shall also apply to areas of water enclosed between the coastline and any

¹⁰ *Vide infra*, 265th meeting, para. 15.

¹¹ *Vide supra*, 263rd meeting, para. 41.

straight base-lines drawn in accordance with article 6.”

59. He said that some such provision was rendered necessary by the possible implication of the judgement of the International Court of Justice in the Fisheries case.¹² The original issue in that case had been the question whether the Norwegian decree of 1935 delimiting the Norwegian fisheries zone was in conformity with international law. The International Court had, however, acknowledged certain waters, covered by those decrees, as internal waters of Norway in general terms. The result was that the decision had unexpected repercussions on the right of passage. The reasons which militated in favour of the Court's decision so far as fisheries and similar economic rights were concerned did not necessarily—or properly—apply to the question of the right of passage. The Commission should make it clear that the character of internal waters attributed to the sea zones situated between straight base lines and the coast did not impair the freedom of passage therein.

60. Mr. SCALLE said that the sea had to be treated as a single unit. The rights of the coastal State decreased to seaward as the distance from the coast increased. A State could close a port; it could not interfere with freedom of passage in the territorial sea. Internal waters were a zone in which the State had greater powers than in the territorial sea, but they were nonetheless part of the sea.

61. The CHAIRMAN said that the concept of internal waters had been adopted by the International Court simply to provide for the special case of the Norwegian *skjaergaard*. In view of the peculiar character of the archipelagoes off the Norwegian coast, the Court had accepted the notion that the coast of Norway was constituted by the outer line of the *skjaergaard*. The waters thus left within Norway, which constituted internal waters, were extremely dangerous to navigation because of the many rocks and shoals. In practice, it was impossible for foreign ships to navigate therein except along the course indicated to them by the Norwegian authorities. There was no point in making any provision for freedom of passage in such waters. The internal waters recognized by the International Court included a series of channels, some of which, like the Indreleia, constituted routes prepared by means of artificial aids to navigation provided by Norway.

62. Mr. LAUTERPACHT said that straight base lines had been accepted by the International Court in cases other than the *skjaergaard*. The object of the straight base lines system was to safeguard the legitimate interests of coastal States. The question before the Commission was whether the reasons underlying the straight base lines system justified interference with the freedom of navigation. He considered that the full jurisdiction of a coastal State over the internal waters in question should extend to such matters as the protection of resources and the regulation of fisheries; freedom of navigation should, however, be safeguarded.

It was therefore necessary for the Commission to adopt an article providing for the right of passage through these internal waters.

63. Mr. ZOUREK said that under existing international law the waters between straight base lines and the coast were internal waters of the coastal State. It would go beyond the scope of the Commission's task to draft a detailed regulation concerning internal waters. The base lines constituted demarcation lines between the internal waters and the territorial waters. Such waters included ports and it was universally agreed that the régime of ports was different from that of the territorial sea. It was unnecessary, and indeed undesirable, to make special provision for the right of passage through internal waters. Such a provision would constitute an undesirable innovation in existing international law.

The meeting rose at 1 p.m.

265th MEETING

Friday, 9 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

¹² *I.C.J. Reports 1951*, p. 116.

Order of business

1. The CHAIRMAN said he did not think the Commission could complete the examination of the articles on the territorial sea in the current session. Moreover, as the General Assembly at its next session was to debate the question of defining aggression and the establishment of an international criminal court, the Commission should discuss forthwith Mr. Spiropoulos' report on the draft Code of Offences against the Peace and Security of Mankind. He therefore suggested that the Commission should begin the consideration of that report on Monday, 12 July; it would also endeavour to finish, before the end of the session, the study of those articles on the territorial sea which did not concern the breadth of the territorial sea, and also to deal with the item relating to nationality to the extent agreed earlier.¹

2. Mr. FRANÇOIS, Rapporteur, said the Commission might perhaps submit to Governments the articles which it had adopted and invite their comments on the question of the breadth of the territorial sea and on the articles relevant thereto.

3. Mr. HSU said the Commission should not submit an incomplete text to Governments, particularly as the question of the breadth of the territorial sea decisively affected all the articles of the regulation.

4. Mr. LIANG, Secretary to the Commission, said the General Assembly was anxious that the Commission should discuss the draft Code of Offences against the Peace and Security of Mankind during the current session. He added that the Secretariat did not expect to receive any further comments from Governments on the Code.

5. After an exchange of views, the CHAIRMAN put to the vote his proposal that the debate on Mr. Spiropoulos' report should begin on Monday, 12 July 1954.

The proposal was adopted by 6 votes to 3, with 5 abstentions.

6. Faris Bey KHOURI said he had voted against the President's proposal because he felt that the Commission should not discuss a report which it would be unable to deal with exhaustively during the session.

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

CHAPTER III: RIGHT OF PASSAGE (continued)

Proposed new article on freedom of passage in certain internal waters (continued)

7. Mr. LAUTERPACHT said that provisionally he wished to withdraw his draft new article relating to the

area of water comprised between the coastline and straight base lines, which he had submitted at the 264th meeting.³ He reserved the right to resubmit it at a later meeting.

Proposed new article relating to the right of passage in favour of land-locked States

(resumed from the 264th meeting)

8. Mr. SALAMANCA said he had proposed at the 264th meeting⁴ that a new article be inserted providing that, when a State undertook international obligations relating to freedom of transit over its territory, either as a general rule or in a convention, the obligations thus assured also applied to passage of the territorial sea. He wished to amend his proposal in view of the Special Rapporteur's objection that such a provision would be tantamount to an interpretation of conventions between States. Nevertheless, in certain cases, the right of passage was much more important than the respect due to the sovereign rights of a coastal State over the territorial sea. For example, upon the completion of the St. Lawrence Seaway it would be absolutely essential for United States vessels to be able to pass freely through the territorial waters of Canada. Moreover, in practice, innocent passage was the rule and non-innocent passage the exception, whatever the Commission's somewhat negative attitude might suggest to the contrary.

9. The CHAIRMAN said it might be sufficient to insert the explanations referred to by Mr. Salamanca in the report on the present session.

10. Mr. SALAMANCA said that some such provision as he had suggested should actually form part of the regulation.

11. Mr. FRANÇOIS, Special Rapporteur, said that article 20 did not, of course, prevent a coastal State from granting to another State, by a special convention, rights more extensive than those contemplated in the draft regulation. That was self-understood, but he would not object to an express provision to that effect being inserted in the article.

12. The CHAIRMAN said a coastal State could hardly waive its right to restrict the right of passage in cases in which restrictions were necessary for security reasons.

13. Mr. SALAMANCA, replying to a question by Mr. Córdova, said that under its 1904 treaty with Chile, Bolivia had in perpetuity the absolute right of transit not only over Chilean territory proper, but also in the territorial sea of Chile. At a later stage in the debate, he would submit a new draft article along the lines he had indicated.

¹ *Vide supra*, 252nd meeting, para. 53.

² *Ibid.*, para. 54 and footnotes.

³ *Vide supra*, 264th meeting, paras. 58-63.

⁴ *Ibid.*, paras. 46-56.

*Article 20 : Steps to be taken by the coastal State
(article 16 of A/CN.4/61)*

(resumed from the 264th meeting)⁵

14. The CHAIRMAN put to the vote the whole of article 20, as amended:

"1. The coastal State may take all necessary steps in the territorial sea to protect itself against any act prejudicial to the security or public policy of that State or to such of its interests as the territorial sea is intended to protect, and in the case of vessels proceeding to inland waters, against any breach of the conditions to which the admission of those vessels to those waters is subject.

"2. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of innocent passage on the ground that it is necessary for the maintenance of public order and security. In this case, the coastal State is found to give due publicity to the suspension."

Article 20, as amended, was adopted by 9 votes to 2, with 2 abstentions.

*Article 21 : Duty of foreign vessels during their passage
(Article 17 of A/CN.4/61)⁶*

15. Mr. GARCÍA-AMADOR said that the laws and regulations enacted by the coastal State should conform not only to international usage but also to the provisions of the regulation itself. He proposed that paragraph 1 should be amended accordingly.

16. Mr. FRANÇOIS, Special Rapporteur, did not oppose such an amendment.

17. Mr. LAUTERPACHT felt that the words "international usage" in the English text did not correspond exactly to the French expression *coutume internationale* and were difficult to interpret. It would be simpler to say "international law". He proposed an amendment reading: "... in conformity with international law, including the articles of this regulation."

18. Mr. CORDOVA thought that if the expression "international law" was used, it would be unnecessary

⁵ *Vide supra*, 264th meeting, paras. 1-34.

⁶ Article 21 read as follows:

"1. Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted in conformity with international usage by the coastal State, and, in particular, as regards:

- (a) The safety of traffic and the protection of channels and buoys;
- (b) The protection of the waters of the coastal State against pollution of any kind caused by vessels;
- (c) The protection of the products of the territorial sea;
- (d) The rights of fishing, shooting and analogous rights belonging to the coastal State.

"2. The coastal State may not, however, apply these rules or regulations in such a manner as to discriminate between foreign vessels of different nationalities, nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels."

to refer to the regulation which, if adopted, would become an integral part of international law.

19. Mr. AMADO pointed out that the words "international usage" covered many practices and customs which were of the greatest importance in maritime law. It would therefore be preferable to retain the word "usage".

20. Mr. FRANÇOIS, Special Rapporteur, said that that was why he had used the word which had, moreover, been adopted by the 1930 Codification Conference.

21. Mr. LAUTERPACHT pointed out that the Special Rapporteur's report⁷ reproduced the observations of the experts of the 1930 Codification Conference who had referred to "international law". The word "usage" was not sufficiently precise and would weaken the article.

22. Mr. CORDOVA also preferred the words "international law". It was impossible to make a mere practice adopted by seamen into a rule of international law binding upon States.

23. Mr. PAL proposed the words "international law and usage".

24. Mr. GARCÍA-AMADOR proposed the formula: "... in conformity with the articles of this regulation and with the other rules of international law."

25. Mr. SCELLE agreed with Mr. Amado. He proposed the following wording: "... in conformity with usage and with the articles of this regulation."

26. Mr. ZOUREK said the Commission was expected to codify all the existing international law relating to the territorial sea. It could therefore not refer to international usage. He proposed the words "... in conformity with the present articles."

27. Mr. FRANÇOIS, Special Rapporteur, thought Mr. Zourek's proposal would grant the coastal State excessive rights. The coastal State undoubtedly had the right to regulate passage through its territorial sea, but only within the limits of international law. Besides, the Commission could not possibly codify the vast number of rules, based on usage, concerning the passage of foreign ships. He accepted Mr. Scelle's proposed formula.

28. Mr. PAL also supported Mr. Scelle's proposal and withdrew his own amendment.

29. Mr. GARCÍA-AMADOR preferred his own proposal to Mr. Scelle's as the latter did not cover either conventional law or the general principles of international law.

30. Mr. LAUTERPACHT and Mr. CORDOVA supported Mr. García-Amador's proposal.

Mr. Zourek's proposal that the words "international

⁷ A/CN.4/61 in *Yearbook of the International Law Commission, 1953, vol. II.*

usage" should be replaced by "the articles of this regulation" was rejected by 9 votes to 1, with 4 abstentions.

Mr. García-Amador's proposal that the words "in conformity with international usage" should be replaced by the words "in conformity with the articles of this regulation and with the other rules of international law" was adopted by 7 votes to 5, with 2 abstentions.

31. The CHAIRMAN said that in view of the adoption of Mr. García-Amador's amendment, which was further removed from the original text than Mr. Scelle's proposal, the latter did not have to be put to the vote.

32. Mr. AMADO expressed surprise at the Commission's decision to drop the expression "international usage"; in international law the *opinio juris* carried as much weight as conventional law.

33. Mr. ZOUREK explained that he had voted against Mr. García-Amador's amendment because he took the view that the draft articles should embody a complete codification of existing international law; otherwise they would not be of any great value.

34. Mr. SCELLE explained that he had voted against the amendment because the terms adopted were at variance with the language usual in conventions.

35. Mr. SPIROPOULOS said that he had voted against the amendment because he saw no valid reason for altering the text drafted at the 1930 Codification Conference by experts in maritime law.

36. The CHAIRMAN invited further comments on article 21, paragraph 1.

37. Mr. LAUTERPACHT asked what was meant by "shooting rights" in sub-paragraph (d).

38. Mr. FRANÇOIS, Special Rapporteur, replied that the words referred to sealing and under-water fishing.

39. Mr. LAUTERPACHT said that the enumeration of the cases in which foreign vessels were under a duty to comply with the laws and regulations enacted by the coastal State did not include the most important obligations, namely, those relating to public order and security. The point was dealt with in article 20;⁸ he proposed that a new sub-paragraph should be inserted at the beginning of paragraph 2 which would refer expressly to the laws and regulations enacted under article 20.

40. Mr. CORDOVA supported Mr. Lauterpacht's proposal. Article 21 clearly had to mention the most important cases in which a State regulated the passage of vessels through its territorial sea.

41. Mr. LIANG, Secretary to the Commission, pointed out that articles 20 and 21 were not as closely connected as one might believe. As stated in the comments, article 20 gave States the right to verify innocent

character of passage and to take all necessary security measures; it gave States the right to take action even if no specific law or regulation existed, while article 21 merely enumerated a number of cases which were governed by usage. Logically, therefore, the two articles should remain quite distinct.

42. Mr. CORDOVA said he was not convinced by that argument; he did not understand why the Commission should emphasize the cases covered by usage and not even mention the all-important obligations of ships with regard to security.

43. Mr. SPIROPOULOS said it would be imprudent to upset the order of clauses drafted by experts in maritime questions.

44. Mr. AMADO pointed out that if the Commission formulated a rule which strengthened the rights of States, it would first and foremost be adding to the power of the great maritime nations. Article 21 referred to questions governed by international usage which embodied a multitude of rules.

45. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the enumeration contained in article 21, paragraph 1, should be preceded by the words "Those enacted under article 20".

The proposal was rejected by 5 votes to 4, with 5 abstentions.

46. The CHAIRMAN put to the vote article 21, paragraph 1, as amended by the adoption of Mr. García-Amador's amendment.

Article 21, paragraph 1, as amended, was adopted by 8 votes to 3, with 3 abstentions.

47. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Salamanca, by giving the example of the St. Lawrence Seaway, had shown that in certain special cases a State might grant privileges in its territorial sea to another State. That possibility should be taken into consideration. In its work of codification, the Commission had to ensure that States granted certain minimum rights in their territorial sea, but it could not oblige them to extend equal treatment to all flags. Accordingly, he felt inclined to withdraw paragraph 2 of article 21.

48. Mr. SCELLE agreed that the point raised by Mr. Salamanca had to be allowed for. Paragraph 2, at least in the form in which it had been proposed, was therefore too far-reaching.

49. Faris Bey el-KHOURI agreed that paragraph 2 might be dispensed with. States could always sign a convention providing for reciprocity of treatment.

50. Mr. AMADO pointed out that paragraph 2 did not impose any obligations upon foreign vessels, whereas the whole purpose of article 21 was precisely to deal with the duties of foreign vessels in the territorial sea. In view of that anomaly, he agreed that paragraph 2 should be omitted.

⁸ *Vide supra*, para. 14.

51. Mr. LAUTERPACHT agreed that paragraph 2 was inconsistent with international practice; a State often granted special rights in its territorial sea to other States. Moreover, the Commission should not regard the articles adopted by the 1930 Codification Conference as sacrosanct. Nevertheless, if paragraph 2 was dropped altogether, States might consider themselves free to discriminate in the matter of safety of shipping, and that would be going too far.

52. Mr. FRANÇOIS, Special Rapporteur, gathered that the Commission wished paragraph 2 to be deleted. Ideally, of course, all forms of discrimination as between ships of different nationalities should have been barred, but in practice that was hardly feasible, even in respect of safety of shipping, for a State might conceivably require foreign ships, but not its own ships, to carry pilots in treacherous channels. By deleting paragraph 2, the Commission was not in any way acknowledging the right of States to take discriminatory measures. The question would merely be left to the discretion of each State. In view of the opinion expressed, he formally withdrew paragraph 2 of article 21; he would explain in the comment that although the Commission had in that respect departed from the text prepared at the 1930 Codification Conference, it did not mean to imply that States were entitled to make unjustified discriminations.

53. Mr. ZOUREK pointed out that paragraph 2 contained two quite distinct principles; firstly non-discrimination between foreign vessels of different nationalities, and secondly, non-discrimination between national vessels and foreign vessels. The latter principle could not be retained; it was normal for a State to grant preferential treatment to its own nationals in its territorial sea. Non-discrimination between different flags was, however, a cardinal principle which could hardly be disregarded. Accordingly, he proposed that the second phrase of article 21, paragraph 2 ("nor, save in matters relating to fishing and shooting, between national vessels and foreign vessels") should be deleted but that the first phrase should be retained.

54. Mr. LAUTERPACHT said the distinction between the two principles was a legitimate one; one of them could be retained while the other should be rejected.

55. Mr. FRANÇOIS, Special Rapporteur, said that one consequence of Mr. Zourek's proposal would be that two Scandinavian countries with very similar coastlines would be debarred from granting each other's vessels certain privileges in their respective territorial waters.

56. Mr. SCELLE said that the term "discrimination" had been variously interpreted; preferably the first phrase should specify that discrimination between foreign vessels "by reason of nationality" was forbidden. Such a formula would leave a coastal State free to stipulate, in the general interest, that ships with inadequately qualified personnel had to satisfy certain conditions before they could be admitted into territorial waters. He gathered that all members of the Commis-

sion were agreed that the second phrase should be deleted.

57. Mr. AMADO said that article 21 dealt only with the right of passage in the territorial sea; it was therefore normal for States to impose certain obligations upon vessels in order to ensure normal traffic. But a provision relating to possible discrimination was out of place in the article under reference.

58. Mr. LAUTERPACHT said that some degree of discrimination as between national vessels and foreign vessels was quite understandable in matters relating to fishing, as the Commission had acknowledged. It would, however, be a serious decision to admit possible discrimination in matters connected with the safety of shipping.

59. Mr. SCELLE explained that his proposal for retaining the first phrase in an amended form was based on a generally accepted rule: the policing of the high seas was the common responsibility of all the powers, whereas in the territorial sea, it was the coastal State which had that responsibility; it should therefore be allowed some latitude in the discharge of that responsibility.

60. Mr. ZOUREK recalled that Mr. Amado had stressed that article 21 dealt only with right of passage. The Commission had already decided, in connexion with article 20, that that right might be curtailed. He failed to see the connexion between the right of passage and the work of policing the territorial waters.

61. Mr. SCELLE replied that it was one of the essential functions of the State responsible for policing to ensure safety of passage. According to Mr. Zourek, in order to cross the territorial sea of a State, a vessel would have to follow clearly defined channels; in reality, the territorial sea should be regarded as a public thoroughfare where freedom of traffic was as complete as on public highways on land.

62. Mr. CORDOVA suggested that the Special Rapporteur might draft a new paragraph in the light of the remarks made during the discussion. There were undoubtedly cases in which States were entitled to discriminate, even as between foreign vessels of different nationalities; such was the case of a coastal State which had a treaty of alliance with another State or States.

63. Mr. AMADO said that political considerations should not influence the codification of international law. Yet, it was a fact that often States were guided by political motives and in consequence adopted discriminatory measures. Accordingly, he did not think that paragraph 2, even if consisting of the first phrase only, could be adopted.

64. Mr. FRANÇOIS, Special Rapporteur, said that it was practically impossible to draft a clause which would allow discrimination in certain cases while forbidding it in other cases. He therefore confirmed his intention of withdrawing paragraph 2.

65. Mr. ZOUREK pointed out that, in practice, the deletion of that paragraph would not prevent the rule it embodied from operating by virtue of the most favoured nation clause.

66. Mr. CORDOVA said that the most favoured nation clause was an exceptional one and only appeared in certain treaties. The Commission's duty was to lay down a general rule.

67. Mr. SCELLE pointed out that in practice the most favoured nation clause had never prevented a State from adopting discriminatory measures. If, however, the Special Rapporteur thought that in order to allow for the cases referred to by Mr. Salamanca, it was necessary to delete paragraph 2 completely, he would agree to that course.

68. The CHAIRMAN put to the vote Mr. Zourek's proposal that the first phrase of article 21, paragraph 2, should be retained.

The proposal was rejected by 8 votes to 1, with 5 abstentions.

69. The CHAIRMAN put to the vote article 21 as a whole, which, after the Special Rapporteur had withdrawn paragraph 2, consisted only of paragraph 1.

Article 21, as amended, was adopted by 10 votes to 1, with 3 abstentions.

The meeting rose at 12.55 p.m.

266th MEETING

Monday, 12 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85)

1. The CHAIRMAN invited the Commission to consider the draft Code of Offences against the Peace and Security of Mankind, adopted by the Commission at its third session (1951),¹ in the light of the comments of governments² and the proposals for modifications submitted by the Special Rapporteur in his third report.³

2. Mr. SPIROPOULOS, Special Rapporteur, said that he had on the whole retained the draft adopted by the Commission at its third session and had only departed from it where the few comments from governments gave good reason for doing so. Most of those comments referred to the definition of aggression; only six concerned the articles of the draft Code.

Title

3. Dr. Manuel Duran of Bolivia had suggested the inclusion in the title of the word "integrity". He (Mr. Spiropoulos) personally considered, for reasons given by the Netherlands Government and because the title as submitted had been adopted by the General Assembly itself, that no change was necessary.

4. Mr. CORDOVA regretted that the comments of the Belgian Government had arrived too late to be considered in detail. They mentioned an alternative title which included the notion of "war crimes". Such an addition was logical and he proposed that the title of the draft Code as submitted should be replaced by the title proposed by the Belgian Government: "Code of offences against peace and humanity, and war crimes".

5. The CHAIRMAN put to the vote Mr. Córdova's proposal that the title should be amended on the lines suggested by the Belgian Government.

The proposal was rejected by 6 votes to 3, with 2 abstentions.

¹ See chapter IV of the Commission's report on its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858). The draft Code is also reproduced in *Yearbook of the International Law Commission, 1951*, vol. II, p. 134.

² See *Official Records of the General Assembly, Seventh Session, Annexes, Agenda item 54*, document A/2162 and Add.1. Document A/2162/Add.2, containing comments by the Government of Belgium, is in mimeographed form only. The comments of the governments (except those of Belgium which arrived too late to be included) are summarized in the Special Rapporteur's third report (see footnote 3).

³ A/CN.4/85 in *Yearbook of the International Law Commission, 1954*, vol. II.

*Article 1*⁴

6. Mr. CORDOVA pointed out that whereas the English version of the Special Rapporteur's redraft of article 1 contained a specific reference to punishment, the French text⁵ contained no such reference. He thought the meaning of the French text of the last phrase of the redraft was not sufficiently clear, while the corresponding English phrase should be made more emphatic.

7. Mr. ZOUREK said that an article should be included making it mandatory for governments to punish the crimes defined in the Code. Otherwise the Code would serve no useful purpose. He pointed out that under the draft article, as submitted, States would not be under a duty to punish offences against the peace and security of mankind.

8. Mr. SPIROPOULOS, Special Rapporteur, replied that such an obligation might be contained either in the statute of the international tribunal which would eventually be set up, or in the final clauses of the draft Code. In his opinion the draft Code should not be presented in the form of an international convention, because if so presented it would encounter considerable opposition in the General Assembly.

9. Mr. ZOUREK recalled that the Commission had already in the report covering its third session⁶ (A/1858) established a certain relationship between an international criminal court and the draft Code of Offences, which in his opinion, was absolutely unjustified. War crimes had long been punished by national courts and he did not see why the present draft Code could not be applied without an international court.

10. Mr. SPIROPOULOS, Special Rapporteur, said that if no tribunal were set up it would make the punishment of offenders virtually impossible. He agreed that the words "shall be liable to punishment" in his draft article 1 might be replaced by the words: "shall be punished".

11. Mr. HSU supported the draft article submitted by the Special Rapporteur as it did not depart to any great extent from the text originally adopted by the Commission. The General Assembly was not likely to accept the draft Code submitted to it by the Commission, but

⁴ The Commission's 1951 draft of article 1 read as follows: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable."

The Special Rapporteur, in A/CN.4/85, proposed the following text:

"The offences against the peace and security of mankind defined in this Code are crimes under international law, for which the responsible individuals shall be liable to punishment."

⁵ See document A/CN.4/85 in *Yearbook of the International Law Commission, 1954*, vol. II.

⁶ Cf. para. 58 (d) of the report. See reference in footnote 1, above.

as the latter would be wholly responsible for the final text, it should exercise particular care in its drafting.

12. Mr. CORDOVA said it was important to specify whether offenders would be punished under national law or by an international tribunal. With regard to the drafting of article 1 of the draft Code he preferred the text adopted by the Commission at its third session subject to the words "shall be punishable" being replaced by the words "shall be punished".

13. Mr. GARCÍA-AMADOR said that the Commission was dealing only with the question of the criminal liability involved in offences against the peace and security of mankind, and the draft Code as submitted gave the impression that after the offender's punishment no other form of liability remained. In fact, however, the offender might also be civilly liable, for example, for reparations. Such a contingency was not covered in the draft. Accordingly, the Commission should explain that its draft covered only criminal liability and should also explain why the draft did not mention civil liability.

14. Mr. SPIROPOULOS, Special Rapporteur, agreed with Mr. García-Amador. He personally preferred the words "shall be liable to punishment" to stand as it was dangerous to be more precise. If States did not wish to punish an offender they could not be compelled to do so.

15. Mr. SALAMANCA said three variants of the final phrase of article 1 had been proposed: "shall be punishable" as adopted at the third session; "shall be liable to punishment" as proposed by the Special Rapporteur in his third report; and "shall be punished" as proposed by Mr. Córdova, a formula which would remove the ambiguity criticized by the United Kingdom Government in its comments. He preferred the third variant: "shall be punished".

16. Mr. AMADO said that the substance of the article was more important than the form in which it was expressed. It was significant that for the first time a body of jurists had stated that individuals could be held criminally liable for international crimes committed by them in the performance of their functions.

17. Mr. SCHELLE agreed that the formula should be a precise one such as "shall be punished". It would, however, not have very much meaning if the Commission did not specifically state how and by whom offenders should be punished. He therefore proposed the addition, at the end of the draft article, of the words: "by each State until such time as an international criminal court is set up".

18. Mr. ZOUREK agreed that the words "shall be punished" should replace the words "shall be liable to punishment". However, he opposed any tendency to make the formulation of the Code of offences contingent on the establishment of an international criminal court.

19. Mr. CORDOVA agreed with Mr. Scelle that it was important to specify the organ which would be responsible for the punishment of offences, but thought that it would be very dangerous to entrust that function to individual governments. That would result in the national courts becoming one-party tribunals as had been the case at the Nürnberg trials. It was most important that courts should not be composed in such a way as to enable them, in the case of war, for example, to deal with the crimes committed by one party while ignoring those committed by the other. He proposed that the words "by an international court" should be added at the end of article 1.

20. Mr. HSU said that the article as redrafted by the Special Rapporteur in his third report was an improvement on the article originally adopted by the Commission. In reply to Mr. Córdova he said that if Mr. Scelle's proposal were adopted, the States would only be responsible for the punishment of offenders until an international court was set up.

21. Mr. SCELLE said that it was not unimportant or irrelevant to refer to the responsibility of States as such, since it was conceivable, for example, that state authorities might be called upon to punish members of a former government of the same State. Governments should be under a duty to punish offences against the peace and security of mankind committed in their territory.

22. Mr. SALAMANCA said that if the Commission adopted Mr. Scelle's proposal it would have to make provision for an international organ competent to punish international crimes. At present the situation was most unsatisfactory as the Code which the Commission was drafting dealt, as far as he could see, with crimes as yet undefined which would be punished by a court which would probably not be set up for a very long time. If the Commission agreed that the establishment of an international tribunal was a very remote possibility, he would be in favour of Mr. Scelle's proposal.

23. Faris Bey el-KHOURI pointed out that the Commission was drafting a penal code and not a code of procedure. The implementation of the Code was a matter of procedure and the Commission should restrict itself to the task of defining crimes against the peace and security of mankind. He recalled that another organ was at present studying the question of the establishment of an international criminal court. If the Commission thought it necessary, a provisional article might be added providing for the implementation of the Code until an international tribunal was set up.

24. He proposed that the words "shall be liable to punishment" should be replaced by "should be punished".

25. The CHAIRMAN put Faris Bey el-Khourî's proposal to the vote.

The proposal was not adopted, 5 votes being cast in favour, 5 against, with 3 abstentions.

26. Mr. SCELLE and Mr. ZOUREK explained that they had voted against the proposal because the word "should" was not mandatory.

27. The CHAIRMAN put to the vote the proposal that the words "shall be liable to punishment" should be replaced by the words "shall be punished".

The proposal was adopted by 11 votes to none, with 2 abstentions.

28. The CHAIRMAN put to the vote Mr. Scelle's proposal that the phrase "by each State until such time as an international criminal court is set up" should be added at the end of article 1.

The proposal was rejected by 6 votes to 2, with 5 abstentions.

29. The CHAIRMAN put to the vote Mr. Córdova's proposal that the words "by an international court" should be added to article 1.

The proposal was adopted by 6 votes to 3, with 4 abstentions.

30. Mr. AMADO said that the adoption of that proposal would necessitate the creation of an international police force to arrest offenders.

31. Mr. ZOUREK said he had voted against Mr. Córdova's proposal because the application of the clause as modified would imply that international crimes could only be prosecuted and punished by an international criminal court, a situation he was not prepared to consider. Moreover, if that were to be the case, the Code would probably be unacceptable to States.

32. The CHAIRMAN put to the vote article 1, as a whole, as amended: "The offences against the peace and security of mankind defined in this Code are crimes under international law, for which the responsible individuals shall be punished by an international court."

Article 1 as amended was adopted by 7 votes 1, with 4 abstentions.⁷

Article 2 (1)⁸

33. Mr. SPIROPOULOS, Special Rapporteur, said that he was proposing the shorter wording "Any act

⁷ See however above, 267th meeting, paras. 64 *et seq.*

⁸ The Commission's 1951 draft of article 2(1) read as follows:

"The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

The Special Rapporteur, in A/CN.4/85, proposed the following text:

"The following acts are offences against the peace and security of mankind:

"(1) Any act of aggression."

of aggression" for the first offence on the list, in deference to the criticisms of the United Kingdom Government. The article, as adopted by the Commission at its third session, employed such a term as "self-defence" which itself required definition.

34. Mr. CORDOVA said that the same problem existed in municipal criminal law. In self-defence force was justified, but no general definition of self defence could be given: it was the courts which, in each special case, decided whether the plea of self-defence was admissible or not. There was, therefore, no valid reason for omitting the reference to self-defence from article 2 (1).

35. Mr. HSU said he agreed with the Special Rapporteur's simplified version. The General Assembly was dealing with the problem of defining aggression: a mere reference to aggression in general was therefore sufficient in article 2 (1).

36. Mr. SPIROPOULOS, Special Rapporteur, said that the question of defining aggression came within the competence of the Special Committee appointed under General Assembly resolution 688 (VII). That Committee had not yet been able to frame a definition of aggression; the General Assembly and the Special Committee would continue to deal with the matter, and when a definition was eventually worked out, it would apply to the offence referred to in article 2 (1). It was unthinkable that self-defence or enforcement measures under the Charter could be described as aggression. He therefore maintained his modified draft.

37. Mr. SCELLE said that the original draft was better than the shorter amended text. Self-defence ceased as soon as the danger had been countered; any further action amounted to aggression. It was necessary to make that clear and also to make provision for enforcement action under the Charter of the United Nations. Accordingly, he proposed that article 2 (1) as drafted by the Commission at its third session should be adopted.

38. Mr. AMADO approved of the shorter draft. In municipal penal codes the definition of murder and the provisions regarding self-defence were usually contained in different articles.

39. Mr. ZOUREK said that to make the draft complete it would be necessary to include a definition of aggression. The question of whether it was possible or desirable to elaborate such a definition was no longer relevant, since it had been settled by the General Assembly which in its resolution 599 (VI) had stated that such a definition was possible and desirable. Unfortunately, there were two reasons why the Commission would not be able at its present session to deal with the definition of aggression. Firstly, the General Assembly had set up a Special Committee to study the question and would itself be dealing with it at its forthcoming ninth session. Secondly, the Commission did not have the necessary time at its disposal during the current session. The best course for the Com-

mission would therefore be to indicate that the term "aggression" would be construed in accordance with the definition to be adopted by the General Assembly. Mr. Zourek recalled that the General Assembly had before it a draft resolution submitted by the Union of Soviet Socialist Republics and reproduced in the annex to the Report of the Special Committee on the Question of Defining Aggression.⁹ The said definition was very comprehensive in that it covered not only armed aggression but also economic, indirect and ideological forms of aggression as well.

40. He could not agree to the shorter draft of article 2 (1); among other things, the term "aggression" used without any further qualification was ambiguous. In some countries the term "aggression" in criminal law meant a personal physical attack. It would be necessary to say "war of aggression" so as to avoid any possible confusion.

41. Even the full original draft of the Special Rapporteur was incomplete.¹⁰ It covered aggression and the preparation of aggression but did not cover the final planning of aggression as distinct from a commencement of execution of such a plan. In that respect the draft was narrower than the Nürnberg Charter and the Nürnberg Judgment.

42. Mr. SPIROPOULOS, Special Rapporteur, said that it went without saying that any further definition of aggression that might be adopted in future by the international community would naturally apply to the article under discussion.

43. The CHAIRMAN put to the vote Mr. Scelle's proposal that the longer form of article 2 (1) as drafted by the Commission at its third session should be adopted.

The proposal was adopted by 6 votes to 1, with 4 abstentions.

44. The CHAIRMAN put to the vote article 2 (1) as a whole, reading as follows, document A/1858:

"The following acts are offences against the peace and security of mankind: (1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

Article 2 (1) was adopted by 9 votes to 2, with 2 abstentions.

45. Mr. ZOUREK said he had abstained in both votes because the wording of that clause implied that enforcement measures might be recommended by a United Nations organ other than the Security Council, which alone was competent to order such measures.

⁹ *Official Records of the General Assembly, Ninth Session, Supplement No. 11 (A/2638).*

¹⁰ See *Yearbook of the International Law Commission, 1951, vol. II, p. 58.*

*Article 2 (2)*¹¹

46. The CHAIRMAN put to the vote article 2 (2) as drafted at the third session, in 1951.

Article 2 (2) was adopted by 11 votes to none, with 1 abstention.

Article 2: proposed new clause

47. Mr. GARCÍA-AMADOR said he proposed an additional clause listing as an offence against the peace and security of mankind: "The intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures of an economic or political character in order to force its will and obtain from it advantage of any kind".

48. His proposal was based on the combined provisions of articles 15 and 16 of the Charter of the Organization of American States signed on 30 April 1948 at Bogotá,¹² which had been adopted and ratified by twenty-one American States. Article 15 denied to any State or group of States the right to intervene directly or indirectly in the internal or external affairs of another State, and article 16 stated that "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind".

49. Since the American nations, representing one-third of the membership of the United Nations, had adopted articles 15 and 16 of the Charter of Bogotá, and in view also of the Belgian Government's reference in its comments to economic blockade, the Commission should include a provision relating to intervention. He proposed that the clause in question should be inserted immediately after article 2.

50. The CHAIRMAN said that the new clause proposed by Mr. García-Amador would be discussed immediately after article 2 (8).¹³ That would not, however, prejudice the final order in which the various offences would be listed by the Drafting Committee.

*Article 2 (3)*¹⁴

51. The CHAIRMAN put to the vote article 2 (3) as drafted at the third session in 1951.

¹¹ The Commission's 1951 draft of article 2 (2) read as follows:

"The following acts are offences against the peace and security of mankind:

...

"(2) Any threat by the authorities of a State to resort to an act of aggression against another State."

The Special Rapporteur did not propose any modification of that text.

¹² *United Nations Treaty Series*, vol. 19, p. 56.

¹³ *Vide infra*, 268th meeting, para. 57.

¹⁴ The Commission's 1951 draft of article 2 (3) read as follows:

Article 2 (3) was adopted by 9 votes to none, with 2 abstentions.

52. Mr. ZOUREK said he had abstained from voting because the draft provision did not refer to the planning of aggression.

*Article 2 (4)*¹⁵

53. Mr. SPIROPOULOS, Special Rapporteur, proposed article 2 (4) as redrafted in his third report in the light of the comments of the Governments of the United Kingdom and Yugoslavia. He also referred to the Belgian suggestion that the phrase "outside frontiers" condensed the expression "into the territory of a State from the territory of another State".

54. Mr. HSU proposed the following amendments to article 2 (4) as redrafted by the Special Rapporteur:

(i) The initial words "The toleration, encouragement or organization" should be replaced by "The organization, or the encouragement or toleration of such organization";

(ii) The words "the purpose of effecting" should be deleted;

(iii) A comma should be added between the word "State" and the word "or".

(iv) The final phrase "or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure

"The following acts are offences against the peace and security of mankind:

...

"(3) The preparation by the authorities of a State for the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

The Special Rapporteur proposed the following modification:

"The following acts are offences against the peace and security of mankind:

...

"(3) The preparation by the authorities of a State of aggression against another State."

¹⁵ The Commission's 1951 draft of article 2 (4) read as follows:

"The following acts are offences against the peace and security of mankind:

...

"(4) The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose."

The Special Rapporteur, in A/CN.4/85, proposed the following text:

"The following acts are offences against the peace and security of mankind:

...

"(4) The intoleration, encouragement or organization by the authorities of a State of armed bands for the purpose of effecting incursions into the territory of another State or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in such incursion."

for incursion into the territory of another State, as well as direct participation in such incursion" should be replaced by the words: "or the support by the authorities of a State of such armed bands after the incursions."

55. Apart from mere drafting changes, the amendments were concerned with providing for the case in which armed bands, although organized without the support of the authorities of a State, received help from within that State after their incursion into another State had begun, namely, at a time when they were no longer within the territory of the State from which they were receiving aid.

56. Mr. ZOUREK proposed that instead of article 2(4) as proposed by the Special Rapporteur, the Commission should adopt the following provision:

"Support of armed bands organized in the territory of a State, which invade the territory of another State, or the refusal of the former, on being requested by the invaded State, to take in its own territory any action within its power to deny such bands any aid or protection."

57. That wording was taken from the London Conventions of 1933¹⁶ on the definition of aggression; it had therefore the great merit of being drawn from international law in force. It was also reproduced in substance in the USSR draft resolution previously referred to.¹⁷

58. Mr. SPIROPOULOS, Special Rapporteur, said that Mr. Zourek's proposal put the emphasis on state action, whereas the aim of his redraft was to provide clearly both for individual and for state liability, in keeping with the comments of the Governments of the United Kingdom and Yugoslavia.

59. Mr. CORDOVA proposed that the words "within its territory or in any other territory" should be inserted after the words "of armed bands".

60. Mr. SPIROPOULOS, "Special Rapporteur", said that the Belgian suggestion to use the terms "outside frontiers" seemed to cover Mr. Córdova's proposal.

61. Mr. ZOUREK said that the clause as drafted at the third session referred to individual criminal liability for the actions of armed bands. He pointed out that the amended draft proposed by the Special Rapporteur began by a reference to "the toleration, encouragement or organization by the authorities of a State", thus placing the emphasis also on state action. The structure of the text had therefore been modified by the Special Rapporteur himself.

62. Mr. HSU stressed that his proposal would cover the case in which armed bands were organized even without the knowledge of the authorities of a State. Those authorities, once the incursion had begun and become

known to them, would be committing an offence by allowing such bands to be supported from the territory within their jurisdiction.

63. Mr. SCALLE pointed out that Mr. Zourek's draft provision did not cover the case in which armed bands were organized in the territory of a third State.

64. The CHAIRMAN put to the vote Mr. Hsu's first amendment to the effect that the words "toleration, encouragement or organization" as proposed by the Special Rapporteur should be replaced by: "organization, or the encouragement or toleration of such organization".

The amendment was adopted by 6 votes to 2, with 5 abstentions.

65. The CHAIRMAN put to the vote Mr. Hsu's second amendment, proposing the deletion of the words "the purpose of effecting" in the Special Rapporteur's redraft.

The amendment was adopted by 6 votes to none, with 7 abstentions.

66. The CHAIRMAN put to the vote Mr. Hsu's third amendment, proposing the addition of a comma between the word "State" and the word "or" in the text proposed by the Special Rapporteur.

The amendment was adopted by 4 votes to none, with 4 abstentions.

67. The CHAIRMAN put to the vote Mr. Hsu's fourth proposal for the deletion of the final phrase of article 2(4) as redrafted by the Special Rapporteur, from the words "or the toleration of the use" and for replacing them by: "or the support by the authorities of a State of such armed bands after the incursions".

The proposal was rejected by 3 votes to 2, with 7 abstentions.

68. The CHAIRMAN put to the vote Mr. Córdova's proposal that the words "within its territory or in any other territory" should be inserted after the words "of armed bands" in the Special Rapporteur's redraft.

The proposal was adopted by 7 votes to none, with 6 abstentions.

69. The CHAIRMAN said that after the various amendments were adopted article 2(4) now read:

"(4) The organization, or the encouragement or toleration of such organization, by the authorities of a State of armed bands within its territory or in any other territory for incursions into the territory of another State, or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in such incursion."

70. Mr. Zourek's proposal for replacing the whole of article 2(4) by his alternative draft would be dealt with at the next meeting.

71. Mr. AMADO said he had abstained in the preceding votes because, no doubt like other members,

¹⁶ *League of Nations Treaty Series*, vol. 147, p. 73; vol. 148, pp. 83 and 215.

¹⁷ *Vide supra*, para. 39.

he had not been quite certain of the implications of the series of amendments put to the vote.

The meeting rose at 1 p.m.

267th MEETING

Tuesday, 13 July, 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK.

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

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) ¹ (continued)

Article 2 (4) (continued)

1. The CHAIRMAN recalled that the draft adopted by the Commission at its third session had been redrafted by the Special Rapporteur in the light of comments by Governments.² At its 266th meeting³ the Commission had further amended the text so that article 2 (4) now read:

“(4) The organization, or the encouragement or toleration of such organization, by the authorities of a State, of armed bands within its territory of another

State, or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in such incursion.”

2. Mr. CÓRDOVA proposed that in the last phrase, after the words “direct participation in” the words “or support of” should be added.

Mr. Córdova's proposal was adopted by 9 votes to none, with 4 abstentions.

3. The CHAIRMAN put to the vote article 2 (4) as a whole as amended.

Article 2 (4) as amended was adopted by 8 votes to none, with 5 abstentions.

Article 2 (5)⁴

4. Mr. HSU proposed the insertion of the following additional paragraph immediately before paragraph 5.

“The organization, or the encouragement or toleration of such organization by the authorities of a State, of fifth columnists for activities in another State, or the support by the authorities of a State of organized groups serving for them as fifth columnists in another State.”

5. The CHAIRMAN pointed out that the Commission was discussing amendments proposed to its 1951 draft in the light of comments by governments. It might accordingly be questioned whether additional clauses which had not been proposed by any government should be considered.

6. Mr. FRANÇOIS agreed with the Chairman. The second reading of the draft did not mean that a minority was to be given an opportunity of reopening issues discussed and settled by the Commission at earlier sessions.

7. Mr. SPIROPOULOS, Special Rapporteur, pointed out that section XVII of his third report⁵ dealt with proposals by certain Governments for the insertion, in the draft Code, of offences other than those already defined in it. The Commission could deal with Mr. Hsu's proposal in the course of the discussion of section XVII.

8. Mr. HSU said that the Commission should not consider itself bound by the draft voted three years

⁴ The Commission's 1951 draft of article 2 (5) read:

“The following acts are offences against the peace and security of mankind:

...

“(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.”

The Special Rapporteur did not propose any modification of that text.

⁵ A/CN.4/85, in *Yearbook of the International Law Commission, 1954*, vol. II.

¹ *Vide supra*, 266th meeting, para. 1 and footnotes.

² *Ibid.*, para. 53 and footnote 15.

³ *Ibid.*, paras. 64-69.

previously. The Commission had adopted the method of enumerating the offences. It might perhaps have been better to adopt some other method, because an enumeration could never be exhaustive. The Commission had relied on League of Nations documents and the judgements of the Nürnberg Tribunal and the Tokyo Tribunal. There was, however, a serious gap in the list it had drawn up: the question of the "fifth column". That form of subversive activity was much more important than terrorism or incursions by armed bands. Moreover, the existence of a "fifth column" involved the direct responsibility of the State which had organized it.

9. Mr. SPIROPOULOS, Special Rapporteur, said that in his comments⁶ on article 2(5) he had mentioned the problem of a "fifth column". The mere existence of a "fifth column" could not be regarded as a criminal act; it only became criminal if its direct object was to prepare for an aggression.

10. Mr. HSU said that a "fifth column" invariably had the object of preparing an aggression.

11. Faris Bey el-KHOURI said he would abstain from the vote on paragraphs 5 and 6; indeed, he had abstained from the votes on the preceding paragraphs. He did not think that offences against the peace and security of mankind should be held to include activities which might, for example, be of an economical or an ideological nature and which did not constitute a direct threat to peace or a violation of the Charter of the United Nations.

12. Mr. ZOUREK thought that paragraph 5 did not go far enough. The expression "organized activities" in the last phrase was difficult to define and did not appear to cover all the activities which constituted a threat to the peace and security of mankind. He therefore proposed that the following sentence should be added at the end of paragraph 5: "as well as the encouragement in another State of revolution or of changes of policy favourable to the aggressor."

13. Mr. SPIROPOULOS, Special Rapporteur, thought that under such a provision nobody would be allowed to publicize his political views.

14. Mr. CORDOVA pointed out that "fifth column" activities were only criminal in so far as they were supported by a foreign State. Similar activities, if unsupported from abroad, could be perfectly lawful.

15. Mr. AMADO said that a mere intention was not a crime. The Commission had adopted the text of paragraph 5 as it stood after much discussion and he saw no reason why it should reverse its decision.

16. Mr. ZOUREK withdrew his amendment. He said he would raise the question again after the Commission had finished its study of the Special Rapporteur's draft.

17. Mr. CORDOVA asked if Mr. Hsu might not also be disposed to withdraw his amendment. After all, paragraph 5 laid down the principle of the non-intervention of one State in the affairs of another, and that was tantamount to a ban on the organization of a "fifth column".

18. Mr. HSU disagreed. In drafting a code the Commission should to the fullest extent possible, make provisions for all contingencies; the organization of a "fifth column" was a specific form of preparing aggression.

19. The CHAIRMAN put to the vote Mr. Hsu's proposed additional paragraph.

The proposed addition was rejected by 6 votes to 3, with 4 abstentions.

20. Mr. SALAMANCA explained that he had voted in favour of the proposal as it coincided with the views of Professor Duran, which had been communicated to the Commission by the Bolivian Government.

21. Mr. GARCÍA-AMADOR said that perhaps the following phrase might be added at the end of paragraph 5: "or the encouragement or fomenting of fifth columns".

22. Mr. SPIROPOULOS, Special Rapporteur, pointed out that he had explained in his comments that the organization of a fifth column was not a crime unless it constituted an act preparatory to aggression.

23. The CHAIRMAN put to the vote article 2(5) as drafted at the third session, in 1951.

Article 2 (5) was adopted by 10 votes to none, with 3 abstentions.

Article 2(6)⁷

24. Mr. ZOUREK proposed that the following words should be added at the end of the paragraph: "as well as the encouragement of subversive activities directed against another State."

25. The CHAIRMAN said that, in view of the procedure adopted by the Commission, Mr. Zourek's proposed amendment could not be considered until after all the articles of the draft Code had been discussed.

26. Mr. CORDOVA pointed out that the expression "terrorist activities" was as vague as the term "fifth

⁷ The Commission's 1951 draft of article 2(6) read:

"The following acts are offences against the peace and security of mankind:

...

"(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."

The Special Rapporteur did not propose any modification of that text.

⁶ A/CN.4/85, in *Yearbook of the International Law Commission, 1954*, vol. II.

column", which the Commission had declined to insert in paragraph 5.

27. Mr. SALAMANCA pointed out that similar doubts were expressed in the United Kingdom's comments.

28. Mr. SPIROPOULOS, Special Rapporteur, recalled that the words "terrorist activities" had a fairly precise meaning in international law. In 1937 many States had signed a convention for the prevention and punishment of terrorism.⁸

Article 2 (6) as drafted at the third session in 1951, was adopted by 10 votes to none, with 3 abstentions.

29. Mr. ZOUREK said he had abstained because he thought the paragraph incomplete; it did not cover certain types of subversive activity which were as dangerous as terrorism.

Article 2 (7)⁹

30. Mr. SPIROPOULOS, Special Rapporteur, said that in his third report he had slightly redrafted the text adopted by the Commission in 1951 in that, at the suggestion of the United Kingdom Government, he had replaced the words "in violation" by the words "constituting a major breach".

31. Mr. GARCÍA-AMADOR inquired how a major breach could be distinguished from a minor violation of obligations. Germany had rearmed despite the Versailles Treaty without committing a major breach of the letter of that Treaty.

32. The CHAIRMAN put to the vote the Special Rapporteur's amendment to article 2 (7).

The proposed redraft was rejected by 9 votes to 2, with 1 abstention.

33. The CHAIRMAN put to the vote article 2 (7) as drafted at the third session, in 1951.

Article 2 (7) was adopted by 8 votes to 1, with 2 abstentions.

Article 2 (8)¹⁰

34. The CHAIRMAN did not understand why the words "or of territory under an international régime" appeared only in paragraph 8. The Belgian Govern-

⁸ Hudson, *International Legislation*, vol. VII, p. 862.

⁹ The Commission's 1951 draft of article 2 (7) read :

"The following acts are offences against the peace and security of mankind :

...
 "(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character."

¹⁰ The Commission's 1951 draft of article 2 (8) read :

"The following acts are offences against the peace and security of mankind :

...
 "(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory

ment had suggested that a reference to such territories should appear in all the relevant clauses of the draft Code.

35. Mr. SALAMANCA criticized the Belgian Government's suggestion as likely to hamper the liberation of colonial peoples. History showed that the colonies had not infrequently obtained their independence as the result of rivalry between the great Powers.

36. Mr. SCALLE pointed out to Mr. Salamanca that paragraph 8 referred exclusively to acts committed in violation of international law.

37. Mr. FRANÇOIS said the Commission ought to express an opinion on the Belgian suggestion. He, personally, had no objection to it.

38. Mr. SPIROPOULOS, Special Rapporteur, suggested that a suitable comment should be inserted in the Commissions's report on the current session.

Article 2 (8) as drafted at the third session, in 1951, was adopted by 12 votes to none, with 1 abstention.

Article 2 (9)¹¹

39. Mr. SPIROPOULOS, Special Rapporteur, said that as Governments' comments on the paragraph were conflicting he had not changed the 1951 text.

Article 2 (9) as drafted at the third session, in 1951, was adopted by 10 votes to none, with 1 abstention.

Article 2 (10)¹²

40. Mr. HSU proposed that the last phrase, beginning

belonging to another State or of territory under an international régime."

The Special Rapporteur did not propose any modification of that text.

¹¹ The Commission's 1951 draft of article 2 (9) read :

"The following acts are offences against the peace and security of mankind :

...
 "(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including :

(i) Killing members of the group ;
 (ii) Causing serious bodily or mental harm to members of the group ;
 (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ;
 (iv) Imposing measures intended to prevent births within the group ;
 (v) Forcibly transferring children of the group to another group."

¹² The Commission's 1951 draft of article 2 (10) read :

"The following acts are offences against the peace and security of mankind :

...
 "(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article."

The Special Rapporteur did not propose any change.

with the words "when such acts", should be deleted so that the text of the paragraph would read:

"Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds."

41. He pointed out that his proposal was in keeping with the comments of the Governments of Yugoslavia and Belgium. The Commission could not apply in that case the principles of the Charter of the Nürnberg Tribunal, as the latter had dealt with a specific situation. The interests of mankind as a whole, not only in time of war, had to be considered. Changes of régime were frequently accompanied by wholesale massacre and persecution; in certain cases a majority of the population was victimized.

42. Mr. AMADO recalled that the acts enumerated in paragraph 10 were all punishable under the domestic criminal law of the various States. They could not be regarded as international crimes unless they were committed in connexion with other acts enumerated in article 2. Accordingly he felt that the Commission should reject Mr. Hsu's proposed amendment and retain the paragraph as it stood.

43. Mr. HSU, while appreciating Mr. Amado's extensive knowledge of criminal law, pointed out that the Commission should consider the crimes in question from the international point of view, as they affected the community generally. Mr. Amado's argument would be equally applicable to the crime of genocide to which paragraph 9 related. Having adopted that paragraph the Commission should *a fortiori* amend paragraph 10 along the lines he (Mr. Hsu) had proposed. If it retained the text of the paragraph as it stood, the Commission might be criticized for condemning persecutions of small groups, while tolerating those involving vast numbers of human beings.

44. Mr. SCELLE agreed with Mr. Hsu. The acts referred to in paragraph 10 might well lead to war even if they were not connected with the other crimes enumerated in article 2.

45. Mr. GARCÍA-AMADOR also supported Mr. Hsu's proposed amendment; firstly, a large number of inhuman and criminal acts were not covered by paragraph 9 even though they constituted a potential threat to peace; secondly, if the last phrase of paragraph 10 were deleted, the article would apply also to cases where the inhuman acts referred to in the paragraph were committed in connexion with other crimes.

46. Mr. SPIROPOULOS, Special Rapporteur, recalled that when the Commission had adopted paragraphs 9 and 10 in 1951 it had borne in mind both the Convention on the Prevention and Punishment of the Crime of Genocide and article 6 of the Charter of

the Nürnberg Tribunal¹³ which covered only war crimes and other acts committed in connexion with an international war. The Commission had decided that inhuman acts committed in connexion with other offences defined in the draft Code should also be punishable. Mr. Hsu was now proposing that the Commission should go much further and treat inhuman acts, regardless of the circumstances in which they were committed, as crimes against the peace and security of mankind. The acts in question were of course abominable. However, the Commission's draft was not a general international criminal code, but a code of offences against peace and the security of mankind. All the crimes enumerated in the preceding clauses of the draft were international in character, with the possible exception of genocide which had to be included because it was already the subject of an international convention. For all those reasons he thought that the original 1951 text should stand.

47. Mr. SCELLE said the case of the Nürnberg Tribunal was not a conclusive argument. That Tribunal had dealt with one particular situation whereas the Commission was formulating a general rule. Secondly, the final phrase of paragraph 10 was in effect a *proviso* which was out of place and which, indeed, did not recur in any other clause of the draft Code. Finally, the offences in question were clearly crimes against humanity.

48. Before the Commission had taken up its work of codification, such situations as the paragraph was meant to cover had been dealt with by what was known to international law as humanitarian intervention; on several occasions governments had intervened in foreign countries on humanitarian grounds. The Commission was merely endeavouring to ensure that action by the international community would take the place of individual action by States.

49. Mr. AMADO said the whole point of the Code was that it shifted the responsibility, which was theoretically that of the State, to the authorities which committed the acts defined in paragraph 10 with a view to perpetrating the offences defined in article 2.

50. Mr. CORDOVA said that the Commission might be given the unfortunate impression of not condemning inhuman acts which were not connected with other offences defined in article 2.

51. Mr. ZOUREK proposed that, in keeping with the comment by the Belgian Government, the word *assassinat* should be replaced by *meurtre* in the French text. The offence in question would thus be declared punishable whether committed with premeditation or not.

52. He realized why it was being proposed that the final phrase of paragraph 10 should be deleted; he

¹³ For Genocide Convention see *Official Records of the General Assembly, Third Session, Part I, Resolutions*, p. 174. For Nürnberg Charter see *The Charter and Judgment of the Nürnberg Tribunal* (United Nations publication, Sales No. 1949.V.7).

would point out, however, that the draft Code related only to crimes against the peace and security of mankind. There were, indeed, other international crimes, such as piracy, drug trafficking, white slave traffic, and others which were punishable by virtue of international custom or international conventions, but within the limits of its draft the Commission could hardly go beyond the principles of Nürnberg. The Nürnberg Tribunal had in any case interpreted those principles sufficiently broadly.

53. He did not think that the so-called interventions for humanitarian reasons referred to by Mr. Scelle were a valid precedent. Such interventions had never been dictated by genuinely humanitarian motives, but had most often taken place for political or economic purposes, while humanitarian considerations had merely served as a pretext.

54. Mr. SPIROPOULOS, Special Rapporteur, said that Mr. Hsu's proposal meant in effect that any violation of human rights that constituted an ordinary crime was to be treated as an international offence. Under the terms of reference it had received from the General Assembly, however, the Commission was expected to prepare a draft code based on the Nürnberg principles, simply by adding to the crimes mentioned in the Charter of the Nürnberg Tribunal other international crimes. There would, in itself, be nothing absurd in contemplating the possibility of the victims of any ordinary crime applying to an international court. Nevertheless, however attractive it might be, that idea was entirely outside the scope of the draft under discussion.

55. Mr. SCELLE said that it had never been suggested that all ordinary offences without distinction should be tried by an international court.

56. Mr. ZOUREK inquired whether under the terms of paragraph 10 as it stood a State would be debarred from deporting persons guilty of acts of terrorism.

57. Mr. AMADO, in reply to Mr. Scelle's last remark, said that the offences referred to in paragraph 10 were in fact ordinary crimes unless committed in connexion with other offences enumerated in article 2.

58. The CHAIRMAN put to the vote Mr. Zourek's proposal that in the French text the word *assassinat* should be replaced by the word *meurtre*.

The proposal was adopted by 7 votes to none, with 4 abstentions.

59. Mr. Hsu's proposal that the words "*when such acts are committed in execution of or in connexion with other offences defined in this article*" should be deleted from paragraph 10 was adopted by 6 votes to 5, with 1 abstention.

Article 2(10) was adopted, as amended, by 7 votes to 4, with 1 abstention.¹⁴

60. Mr. AMADO said that he had voted against the amended paragraph 10 because it would convert all ordinary crimes into international crimes.

61. Mr. FRANÇOIS said he had voted against the amended paragraph for the same reason as Mr. Amado had given. The provision as adopted was incapable of being applied.

62. Mr. ZOUREK said he had cast an adverse vote, although he was convinced that the crimes against humanity, referred to in the paragraph, should be defined, because the text was incomplete. Moreover, it discriminated quite unjustifiably between inhuman acts committed for political, racial, religious or cultural motives and inhuman acts committed for other motives.

Article 1 (resumed from the 266th meeting)

63. Mr. LIANG, Secretary to the Commission, pointed out that under article 1 as adopted at the previous meeting¹⁵ all the offences referred to in the draft Code were potentially subject to the jurisdiction of the future international criminal court; such a provision was obviously not applicable to a number of provisions of the Code, including article 2(11). For example, violation of the laws or customs of war were, by tradition, punished by the State which apprehended the offenders. Similarly, the offences mentioned in article 2(10) were clearly within the jurisdiction of the courts of the State in whose territory they had been committed. The Commission should perhaps reconsider article 1.

64. Mr. ZOUREK agreed that it would be preferable to redraft article 1 along the lines of article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide.

65. The CHAIRMAN put to the vote the procedural question raised by the Secretary and Mr. Zourek.

By 9 votes to none, with 1 abstention, the Commission decided to reconsider article 1.

66. Mr. CÓRDOVA pointed out that the draft adopted at the previous meeting did not state that the offences in question came exclusively within the jurisdiction of the international criminal court. So long as that court had not been established, national tribunals would not lose the jurisdiction they possessed over such offences by virtue of conventions or of international custom. When that court was established, it would have exclusive jurisdiction over the offences mentioned in the draft Code. If the Commission were to make no reference to the international criminal court, the States would have an excuse for not establishing such a court; and one possible consequence of leaving national tribunals to deal with offences against the peace would be that different bodies of case law would be built up in respect of one and the same offence.

¹⁴ See, however, above, 268th meeting, paras. 1 *et seq.*

¹⁵ *Vide supra*, 266th meeting, para. 32.

67. Mr. LIANG, Secretary to the Commission, while appreciating the force of Mr. Córdova's remarks, said it would be difficult to specify in the draft Code which tribunal would be competent. Preferably the Commission should revert to the original draft of article 1, which allowed for some latitude of interpretation. The draft adopted by the Commission at its previous meeting could only be interpreted as meaning that the international criminal court would have exclusive jurisdiction over the offences concerned.

68. Faris Bey el-KHOURI said that the Commission could not strip the national tribunals of the jurisdiction which they in any case possessed. He preferred the draft adopted by the Commission in 1951 which contained no reference to any international criminal court.

69. Mr. PAL said he had not taken part in the discussion and had abstained from the vote because the draft articles had been originally adopted as early as 1951 before he became a member of the Commission, and had since been submitted for consideration to governments. He did not wish at the present stage to raise questions which might jeopardize the final adoption of the draft Code, but he, personally, was fundamentally opposed to the introduction of criminal liability which in the present stage of international development would not give the accused fair treatment.

70. Referring to the subject under discussion he pointed out that a national court could only deal with an act punishable under the draft Code if that act was also a criminal offence under the municipal criminal law of the country in which the Court was constituted.

71. Mr. SCELLE agreed that article 1 as adopted by the Commission at its previous meeting was defective for it seemed to stipulate that the offences mentioned in the draft Code could not be tried by any court whatsoever so long as an international criminal court did not exist. Yet those acts were undeniably within the jurisdiction of the national courts, not only of the country in which they had been committed, but also of the country which succeeded in arresting the alleged offender. If the Commission's draft Code were adopted by the States, it would become an integral part of the municipal law of all the parties, and the tribunals of all those countries would hence be competent to try the offences mentioned in that Code. The Code should state expressly that the offences covered by it came within the jurisdiction of the national courts pending the establishment of an international criminal court, and would, after the latter had been established, come within its jurisdiction.

72. Mr. CORDOVA agreed that article 1 should be redrafted; at the very least, the remarks of the Secretary and of Mr. Scelle should be mentioned in the comments. At the same time, the Commission should add in the comment that it considered the establishment of an international criminal court essential.

73. Mr. SPIROPOULOS, Special Rapporteur, pointed out that the establishment of an international criminal

court and its procedure were the subject of two reports submitted to the General Assembly by special committees.¹⁶ At the moment the Commission should merely define the offences to which the draft Code under discussion was to relate.

74. Mr. ZOUREK said that not inconceivably the draft Code could become operative even if an international criminal court was not established. He pointed out that the establishment of an international criminal court and its effective operation would entail the abandonment by States of important sovereign powers. That was the main reason why he considered it impossible to establish a permanent criminal court. At the moment, however, the question of an international criminal court should not be discussed, for it was on the provisional agenda of the General Assembly's ninth session.

75. Mr. SCELLE said the international criminal court had to be mentioned in article 1.

76. The CHAIRMAN put the question to the vote.

By 8 votes to none, with 2 abstentions, it was decided that the words "by an international court" should be deleted from article 1 as adopted at the previous meeting.

The meeting rose at 1 p.m.

¹⁶ *Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136), and Ninth Session, Supplement No. 12 (A/2645).*

268th MEETING

Thursday, 15 July, 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK.

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

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85)¹ (continued)

Article 2 (10)

(resumed from the 267th meeting)²

1. Mr. SCELLE said that without the words "when such acts are committed in execution of or in connexion with other offences defined in this article" paragraph 10 was unsatisfactory, for as it stood practically any offender could claim to have acted for political motives, a provision of which a criminal would not fail to take advantage. It should be left to the court in each particular case to decide if the crime was subject to municipal criminal law or if it came within the category of crimes against humanity. As a general rule crimes against humanity were committed by the authorities of a State; where individuals were concerned the situation was more complex and he therefore proposed that the following sentence should be added at the end of the paragraph: "If such acts are committed by private persons the court competent to impose the penalty shall decide whether they constitute crimes against humanity or crimes under ordinary criminal law."

2. Mr. SPIROPOULOS, Special Rapporteur, agreed that Mr. Scelle's proposal contained a valuable idea although he did not think it should be included in the paragraph under consideration; it would make it unnecessarily cumbersome. He preferred paragraph 10 as it stood. International crimes would be dealt with by an international court. The Nürnberg Tribunal had made no distinction between the various crimes, considering as war crimes all those committed in connexion with the war.

3. Mr. CÓRDOVA thought the Commission had been mistaken in deleting the last phrase of the paragraph. Mr. Scelle's proposal, however, did not solve the problem either, because it left unanswered the question which court was competent to try a particular offence. The Commission had to provide a criterion enabling the court to distinguish ordinary from international offences. It was not enough to say that the court should make such a distinction. He proposed that the Commission should reconsider its decision regarding the

deletion of the last phrase of the paragraph and should agree to certain drafting changes.

4. Mr. PAL gathered that the Commission regretted its earlier decision to delete the last phrase of paragraph 10. If it wished to repair the damage done, it should do so directly by restoring the phrase in question.

5. Mr. FRANÇOIS agreed with Mr. Pal. The paragraph as adopted at the previous meeting had become meaningless. He approved Mr. Scelle's proposed addition but agreed with Mr. Córdova that it did not entirely solve the problem. It was important to specify to which court offenders would be subject, but that was not easy because everything hinged on the question whether a particular act was an ordinary or an international offence. A common criminal should not be given the possibility of applying to an international court and thereby availing himself of certain privileges and advantages. He agreed with the Special Rapporteur that the paragraph should be adopted as drafted at the third session and not as modified by the Commission at the 267th meeting.

6. Faris Bey el-KHOURI thought Mr. Scelle's proposal added nothing to the paragraph. Every court determined its own competence. If a court considered that paragraph 10 was applicable to a particular offence, the latter would be an international crime; if not, it would be treated as an ordinary offence. He was in favour of retaining the text of the paragraph as drafted at the third session.

7. Mr. HSU asked whether it was proposed to revise the substance or merely the wording of paragraph 10. The text was not perfect but that was hardly a reason for a complete revision of the paragraph. He pointed out that paragraph 9 provided for punishment in the case of the destruction of a minority group, while paragraph 10, if the deleted phrases were restored, would not be applicable in the case of the mass annihilation of a larger group. He would not oppose any attempt to improve the text, but he hoped that the Commission would not overrule its earlier decision to delete the last phrase of the paragraph as drafted in 1951.

8. Mr. GARCÍA-AMADOR agreed with Mr. Hsu. The General Assembly had not specified in the Genocide Convention that genocide had to be committed in connexion with another particular offence. The Commission should maintain its earlier decision to delete the last phrase of paragraph 10, so that that paragraph would cover all inhuman acts not already covered by paragraph 9. If the last phrase was restored these would be a contradiction between paragraphs 9 and 10.

9. Mr. SCELLE, replying to Mr. Córdova, said that, from a court's point of view, it would be insufficient if the paragraph referred merely to acts committed "in execution of or in connexion with other offences defined in this article". He pointed out that the analogy with the Nürnberg Tribunal was not a correct one, as the latter had tried offences which had already taken

¹ *Vide supra*, 266th meeting, para. 1 and footnotes.

² *Vide supra*, 267th meeting, paras. 40-63.

place, whereas the Commission was providing for the future. National courts should be empowered to try international crimes in accordance with the provisions of the draft Code until an international court was established.

10. Mr. ZOUREK said there had been no difficulties until the Commission had included offences committed by individuals in the category of international offences. If an individual committed one of the acts enumerated in paragraphs 9 and 10, he would surely be an accomplice of the authorities of a State. The question which court was competent to try individuals would not be answered by restoring the phrase deleted earlier, while Mr. Scelle's proposed addition left that question to the court's discretion but did not say by what principles the court should be guided in deciding the issue.

11. The CHAIRMAN put to the vote the proposal that the Commission should reconsider its earlier decision relating to article 2, paragraph 10.

The proposal was adopted by 11 votes to none, with 2 abstentions.

12. The CHAIRMAN, at Mr. Hsu's suggestion, proposed that paragraph 10 should be referred to a small committee composed of Mr. Scelle, Mr. Pal and himself.

*It was so agreed.*³

*Article 2(11)*⁴

13. Mr. ZOUREK noted that the Belgian Government had made an important comment on the definition of the term "war crime".⁵ War crimes were by defini-

³ *Vide supra*, 269th meeting, para. 17.

⁴ The Commission's 1951 draft of article 2(11) read:

"The following acts are offences against the peace and security of mankind:

...

"(11) Acts in violation of the laws or customs of war."
The Special Rapporteur did not propose any change.

⁵ The Belgian Government proposed that war crimes should be defined as follows:

"A war crime is an act committed in violation of the laws and customs of war, and of the principles of the law of nations, derived not only from international conventions and the usages established among civilized peoples, but also from the laws of humanity and from the dictates of the public conscience."

This definition was accompanied by the following comment:

"In order to give [this definition] the widest possible scope, the Belgian Government suggests that it should be based on the last paragraph of the preamble of the fourth Hague Convention of 1907, so that the term 'war crime' should not be restricted to crimes defined by the international conventions and by custom as defined in those conventions but should also include all other acts which violate the laws of humanity and the dictates of the public conscience. The Belgian Government would rely on the competent courts to refrain from condemning as offences acts of lesser gravity which, although prohibited under the conventions, in reality are only offences against military criminal law or mere breaches of the military regulations in force in the States signatories to those conventions."

tion offences committed in the course of hostilities but it was wrong to say that in the absence of international conventions, belligerents had absolute freedom in their choice of the means of destruction. He pointed out that the belligerents were not absolutely free in the choice of means whereby to harm the enemy. That point was expressly stipulated in article 22 of The Hague Regulations respecting the laws and customs of war on land,⁶ which had codified the established practice. Article 23 of the Regulations prohibited the use of poison or poisoned arms, as also of arms, projectiles or material of a nature to cause superfluous injury. Moreover, the preamble to the Fourth Hague Convention of 1907 respecting the laws and customs of war on land declared that in cases not included in the Regulations the inhabitants and belligerents remained under the protection and the rule of the principles of the law of nations, as they resulted from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience. That rule must be regarded as the expression of the customary law in effect at the time of The Hague Conferences. Under that rule, not only were acts committed in violation of its specific provisions to be regarded as war crimes, but also all acts, committed during hostilities, that violated the laws of humanity and the dictates of the public conscience. Among such international crimes was, first and foremost, the use of asphyxiating, poisonous or similar gases, liquids, material and other such means, as also bacteriological weapons, whether or not the Party at war was bound by the Geneva Protocol of 17 June 1925.⁷ Another category of crimes that was prohibited by reason of the rule laid down in the preamble to the Fourth Hague Convention was the use of means of mass destruction, whatever their nature: atom bombs, hydrogen bombs or others. There could not be the shadow of a doubt that the use of such weapons, which could wipe out whole populations, was in flagrant opposition to the laws of humanity and was rejected by public opinion throughout the world. Any propaganda in favour of the use of asphyxiating, poisonous or similar gases, any incitement to the use of bacteriological or atomic weapons or other means of mass destruction was likewise an international crime in that it constituted a psychological and political preparation for war crimes.

14. He proposed that the idea should be stated more explicitly in the Code, by the following text:

"Acts in violation of the laws or customs of war, whether these are laid down in international conventions or follow from the laws of humanity or from the dictates of the public conscience."

15. Mr. FRANÇOIS thought that paragraph 11 as submitted covered the cases envisaged by Mr. Zourek. There already existed a protocol which dealt with poison gas. As for weapons of mass destruction, it was not for

⁶ Scott: *The Hague Conventions and Declarations of 1899 and 1907*, p. 116.

⁷ *League of Nations Treaty Series*, vol. 94, p. 65.

the Commission to prohibit their use. He proposed that the paragraph should be left as submitted and that its terms should, if desired, be interpreted in the comments.

16. Mr. ZOUREK agreed that the ideas that he had just expounded should be included in the comments.

Article 2 (11) as drafted at the third session, in 1951, was adopted unanimously.

Article 2 (12)⁸

17. Mr. PAL said he favoured the deletion of the paragraph altogether. National systems of criminal law admittedly provided for the punishment of conspiracy, but that was because there existed machinery within States to curb conspiracies. The provisions of the paragraphs were primarily aimed at preventing criminal designs; they, however, also showed difficulty of punishing mere intent. Indeed, in municipal law conspiracy was considered a crime only in so far as penalizing conspiracy provided the authorities with a practical possibility of obviating a potential danger. In the present stage of international development, however, there existed no means by which the international community could, by punishing intent, safeguard itself from such a danger.

18. The CHAIRMAN agreed that the best course was to delete paragraph 12.

19. Mr. ZOUREK said that most of the criticism that had been directed against the paragraph was unjustified and he would prefer to retain the paragraph as drafted at the third session. The gravity of the offences enumerated in paragraphs 1 to 11 made it essential that all forms of criminal activity should be punished, so as to strike at the very roots of aggression. It had been pointed out that it was difficult to conceive of an attempt to threaten aggression or an attempt to prepare for the employment of armed force against another State. Such cases, however, might well arise: for example, a plan to resort to the threat of aggression or to the employment of force had been thwarted at the very moment that an attempt was being made to prepare it. The only clarification that would be necessary would be to give a definition of such technical terms as conspiracy, attempt and complicity, which were

not given the same meaning in different legislative systems.

20. Mr. SCELLE said the paragraph should stand. It would be for the competent court to overcome any difficulties by means of a reasonable interpretation.

21. Mr. AMADO agreed with Mr. Scelle; it was necessary to ensure that any accessory to the offence of aggression did not escape just punishment.

22. Mr. SPIROPOULOS, Special Rapporteur, said he had long hesitated between the four possible courses outlined in comments (i) to (iv) in his third report.⁹ Although at first he had been inclined to prefer solution (iv), he would now propose that paragraph 12 should be retained as drafted at the third session.

23. The CHAIRMAN put to the vote the various clauses of paragraph 12 (A/1858).

Clause (i) was adopted by 10 votes to none, with 3 abstentions.

Clause (ii) was adopted by 9 votes to none, with 4 abstentions.

Clause (iii) was adopted by 7 votes to none, with 6 abstentions.

Clause (iv) was adopted by 10 votes to none, with 3 abstentions.

Article 2 (12) as drafted at the third session, in 1951, was adopted by 9 votes to none, with 4 abstentions.

Article 3¹⁰

24. Mr. SPIROPOULOS, Special Rapporteur, said that for the reasons given in his third report the redrafted article proposed therein contained no reference to Heads of State.

25. Mr. SCELLE said the Head of a State was surely a responsible government official. The case of Hitler was an obvious example.

26. Mr. SPIROPOULOS, Special Rapporteur, said that a Head of State was not responsible unless so declared by the constitution of his country.

27. The CHAIRMAN said that the Genocide Convention¹¹ referred to "constitutionally responsible rulers".

⁸ The Commission's 1951 draft of article 2 (12) read:

"The following acts are offences against the peace and security of mankind:

...

"(12) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
 (ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
 (iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or
 (iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article."

Regarding the position taken by the Special Rapporteur, *vide infra*, para. 22.

⁹ A/CN.4/85 in *Yearbook of the International Law Commission, 1954*, vol. II.

¹⁰ The Commission's 1951 draft of article 3 read:

"The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."

The Special Rapporteur, in A/CN.4/85, proposed the following text:

"The fact that the author of one of the offences defined in this Code acted as a responsible government official does not relieve him of his responsibility under international law."

¹¹ Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, *Official Records of the General Assembly, Third Session, Part I, Resolutions*, p. 175.

28. Mr. SPIROPOULOS, Special Rapporteur, said that those terms had been substituted at the request of the Swedish delegation to the third session of the General Assembly for the reference to Heads of State in the original draft of the Genocide Convention.

29. The CHAIRMAN said that the Belgian Government's comments contained an interesting reference to "*les gouvernants constitutionnellement ou effectivement responsables*".

30. Mr. AMADO said that whether a Head of State was to be held responsible or not was a question that could safely be left to the competent court. In the American Republic, the President was the effective and responsible head of the government. On the other hand, a constitutional monarch could hardly be said to have any share in shaping the decisions of his government.

31. Mr. CORDOVA said that the case of Hitler was not an argument in favour of retaining the reference to a Head of State, for Hitler had certainly been the responsible and not merely the nominal ruler of Germany.

32. Mr. PAL said that there was no need to delete the reference to a "Head of State". The paragraph only applied to a person who committed an offence; such a person, if his offence were proved, would not be able to escape punishment merely because he was the Head of a State. But, naturally, the competent court would first have to decide that the Head of State concerned had committed an offence—something which it would not say if the person concerned had had no real authority and had played no part in shaping the criminal decision.

33. Mr. ZOUREK said that a ruler might not be politically responsible under the constitution of his country. That did not mean, however, that such a Head of State was exonerated from liability under criminal law if he committed a criminal offence. In fact, some constitutions even laid down the procedure to be followed for the trial of the Head of a State.

34. He would go further than article 3 as drafted at the third session. He proposed that a phrase should be added providing that the official position of the offender should not be considered either as exoneration, or even in mitigation of punishment. That had been specified in the charter of the Nürnberg Tribunal.¹²

35. Mr. SCALLE said that the Head of a State was not immune under municipal criminal law. Nor should he enjoy immunity under international criminal law. Indeed, to admit such an immunity would hamper the progress of international law as a whole.

36. Mr. SPIROPOULOS, Special Rapporteur, said that, in the light of the discussion, he had decided to withdraw his proposed redraft. He would propose the adoption of article 3 as drafted at the third session, in 1951.

¹² See *The Charter and Judgment of the Nürnberg Tribunal* (United Nations publication, Sales No. 1949.V.7).

37. The CHAIRMAN put to the vote Mr. Zourek's proposal for adding the words: "nor shall it be considered as grounds for mitigating the penalty".

The proposal was rejected by 7 votes to 1, with 5 abstentions.

38. The CHAIRMAN put to the vote article 3 as drafted at the third session.

Article 3 as drafted at the third session, in 1951, was adopted by 11 votes to none, with 2 abstentions.

Article 4¹³

39. Mr. SPIROPOULOS, Special Rapporteur, referred to the article 4 proposed in his third report. Since writing that report he had read the Belgian comments. His new proposed wording would, he thought, satisfy the requirements of the various governments.

40. Mr. ZOUREK said he would prefer the wording of the article to be identical with that of article 8 of the charter of the Nürnberg Tribunal,¹⁴ which the latter had found no difficulty in applying.

41. Mr. AMADO said that the Commission had to make allowance for human weakness. It was a very difficult question to decide how far a person could be expected to resist an order from a superior to commit an offence.

42. Mr. SALAMANCA favoured the Special Rapporteur's proposal because it would not be reasonable to expect officials to be fully aware of the rules of international law.

43. The CHAIRMAN put to the vote the Special Rapporteur's proposal that the words "provided a moral choice..." in the 1951 text should be replaced by "if, in the circumstances at the time, it was possible for him not to comply with such order".

The proposal was adopted by 8 votes to none, with 5 abstentions.

44. The CHAIRMAN put to the vote article 4 as a whole, as amended:

"The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with such order."

¹³ The Commission's 1951 draft of article 4 read:

"The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him."

The Special Rapporteur, in his third report (A/CN.4/85), proposed the following text:

"The fact that a person charged with an offence defined in this Code acted pursuant to order of his Government or of a superior does not relieve him from responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with such order."

¹⁴ *Vide supra*, footnote 12.

Article 4 as amended was adopted by 11 votes to none, with 2 abstentions.

*Article 5*¹⁵

45. Mr. SPIROPOULOS, Special Rapporteur, said that, as explained in his third report, he proposed, in deference to comments by Governments, that article 5 should be deleted altogether.

46. The CHAIRMAN said that the Belgian Government, in its comments, had proposed that a scale of penalties should be laid down.

47. Mr. SCELLE said that the rule *nulla poena sine lege* could only be applied in a society which had attained a very advanced stage of legal organization. The international community had not yet reached that stage. In a society which was only in the early stages of its organization, it was absolutely essential to give the court complete discretion in this respect. The general interest prevailed in that case over the interests of the defence of the accused. Historically, the judge had always come before the legislator, and in the early stages of the development of law, judges had to make their own laws.

48. Mr. ZOUREK said that the Nürnberg judgment had not transgressed the principle *nullum crimen sine lege* and had expressly stated that all the crimes tried by it, including aggression, constituted breaches of the international law in force at the time when the offences were committed. If the draft Code came to be adopted by the States, they would have to enact legislation laying down penalties for the international offences specified in that code, in so far as such penalties were not already laid down.

49. Mr. SPIROPOULOS, Special Rapporteur, said that there were two distinct problems: one was to define the crime, in keeping with the rule *nullum crimen sine lege*; that requirement was fully satisfied by the various paragraphs of article 2. The second problem was to provide for the penalty, in compliance with the rule *nulla poena sine lege*. If the Commission was not in a position to lay down a clearly defined scale of penalties, it would be preferable to say nothing at all on the question.

50. Mr. SALAMANCA agreed that article 5 was not technically indispensable. If the offences in question were to be tried by a national court, that court would necessarily have to apply penalties laid down in the particular State's criminal law. If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime. No doubt that problem would be dealt with when such a court came to be set up.

51. Mr. CORDOVA said that, while he favoured the deletion of article 5, he felt some reference should be made in the comment to the obligation of States to make provision for penalties in their municipal criminal law.

52. Mr. SCELLE said that to delete article 5 would be tantamount to saying that the offences in question would go unpunished. The Commission should say that the penalties laid down by municipal criminal legislation applied to those offences. That, however, would give rise to a serious difficulty; there was no real comparison between, say, kidnapping in ordinary criminal law, and the corresponding international offence of forcible removal of persons. If a corresponding municipal law crime had to be found in the case of each international offence, the result would be that the penalties would sometimes be too heavy and sometimes too light.

53. The CHAIRMAN put to the vote the Special Rapporteur's proposal that article 5 should be deleted.

The proposal was adopted by 6 votes to 3, with 2 abstentions.

54. The CHAIRMAN said that the report would contain a reference to the duty of States to make provision for penalties in their municipal law.

55. Mr. SCELLE said that the deletion of article 5 made the whole code illusory. The competent courts would find it impossible to determine what penalties were applicable. For that reason, he had voted against the proposal.

Proposals made by certain governments in their comments to insert additional provisions in the draft Code

56. The CHAIRMAN said that, since no member of the Commission had taken up the proposals in question, no vote would be taken on them.

Article 2: proposed new clause
(resumed from the 266th meeting)¹⁶

57. Mr. GARCÍA-AMADOR referred to the proposal he had made at the 266th meeting for the insertion of an additional paragraph to article 2 dealing with interventions.

58. Mr. SPIROPOULOS, Special Rapporteur, said he did not approve of the proposal. Violent forms of intervention were covered by the various paragraphs of article 2 adopted by the Commission. It was uncommon for States to employ political and economic pressure in order to influence other States: it would be unrealistic to declare such action, however morally reprehensible, an offence in international law. Not every violation of international law was necessarily a criminal action.

59. Mr. PAL said that, although he did not support Mr. García-Amador's proposal, he would like to point out that in ordinary criminal law, extortion which

¹⁵ The Commission's 1951 draft of article 5 read:

"The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence."

¹⁶ *Vide supra*, 266th meeting, paras. 47-50.

meant obtaining an advantage by means of pressure was a punishable offence.

60. Mr. SALAMANCA said that the proposal was not concerned with peaceful intervention. It referred, for example, to the use of the financial resources of the government of one State for the purpose of overthrowing the government of another State.

61. Mr. ZOUREK said that under Article 2, paragraph 4, of the United Nations Charter, all Members of the United Nations were under a duty to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. That was a very wide provision indeed, and the paragraphs of article 2 of the draft Code as adopted by the Commission did not cover every case in which the use of force was illegal. The United Nations Charter declared illegal the use of force in general, including not only military but also economic measures. He supported Mr. García-Amador's proposal, because it was in line with his own view that any use of force in violation of the Charter should be declared an international offence.

62. Mr. HSU said he would approve of Mr. García-Amador's proposal if it could be redrafted in less sweeping terms. The declaration that all forms of political or economic intervention were a crime needed some qualification.

63. Mr. GARCÍA-AMADOR, with reference to the Special Rapporteur's criticism, said he had little to add to his remarks at the 266th meeting. The paragraph he had drafted was directly based on articles 15 and 16 of the charter of the Organization of American States signed at Bogotá in 1948.

64. The CHAIRMAN put to the vote Mr. García-Amador's proposal for an additional paragraph to article 2, reading: "The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and obtain from it advantages of any kind."

The proposal was adopted by 6 votes to 4, with 2 abstentions.

The meeting rose at 1.20 p.m.

269th MEETING

Friday, 16 July 1954, at 9.30 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) ¹ *(continued)*

Article 2: proposed additional paragraph

1. Mr. HSU proposed that the following new paragraph should be added to article 2:

"The organization, or the encouragement or toleration of such organization, by the authorities of a State, of subversive activities in another State, or the support by the authorities of a State of organized subversive activities in another State."²

2. He attached particular importance to the reference to subversive activities. Whereas acts of terrorism, for example, might be committed by an individual against another individual, subversive activities imperilled the existence of the State against which they were directed and engaged the responsibility of the States by which they were organized, encouraged or tolerated; therefore such activities were more directly relevant to the subject under discussion. Subversive activities were particularly dangerous to countries with a régime of political freedom, in other words the great majority of the Members of the United Nations, including most of the great Powers. It was not without reason that the Government of the United States had enacted legislation to prevent and punish subversive activities. No clause in the paragraphs of article 2 already adopted covered such activities; they constituted a new factor in modern politics against which States needed protection. If the Commission wished international law to be truly effective, it should include such criminal activities in the enumeration contained in article 2.

3. Mr. FRANÇOIS thought the proposal was too sweeping. The expression "subversive activities" in

¹ *Vide supra*, 266th meeting, para. 1 and footnotes.

² *Cf. supra*, 267th meeting, paras. 4-29.

the broader sense, might include ordinary propaganda against an established government; democratic countries would decline to ban, in their territory, such propaganda against a foreign government. The clause proposed was in effect a denial of freedom of thought and expression.

4. Mr. GARCÍA-AMADOR said that without the words "or the toleration of such organization", Mr. Hsu's amendment would satisfy a real need. The offence so defined was comparable to cases of non-military aggression, where a State organized or encouraged subversive activities in another State as acts preparatory to an aggression. A number of inter-American resolutions and declarations had been adopted to cover such cases, some of them before the war to counteract the Nazi activities, and the others after the war to counteract the activities of international communism. The subject had been scientifically studied by the Montevideo Committee on Political Defence and by the Legal Department of the Pan-American Union.³ In short, under the inter-American security system, the organization and encouragement of subversive activities were considered acts of political aggression, and therefore assimilated to international crimes.

5. Mr. CORDOVA thought that Mr. François' fears were perhaps not justified. It was permissible in a democratic State to carry on propaganda against the established government but not to attempt to overthrow it by illegal means; those were two quite distinct forms of opposition which could hardly be confused. If the expression "subversive activities" was taken to refer to the second form of opposition, Mr. Hsu's amendment was acceptable; a government which attempted by violence to overthrow the government of a foreign State would be endangering the peace between the two countries concerned.

6. Mr. LAUTERPACHT said, with reference to Mr. Hsu's proposal, that the international community was no longer a society for the mutual protection of established governments. A revolution might be a crime against the State, but it was no longer a crime against the international community. So long as international society did not effectively guarantee the rights of man against arbitrariness and oppression by governments, it could not oblige States to treat subversive activities, when they did not amount to hostile expeditions, as a crime. He was in agreement with article 2(4) relating to incursions by armed bands, but it would be most regrettable if the Commission adopted a provision which might lead to the restriction of the freedom of speech and political opinion. States should not allow their territory to be used as a base for armed raids, but propaganda in favour of a political theory was a very different matter. If Mr. Hsu's amendment was intended also to cover that form of opposition, he hoped that the Commission would not adopt it.

7. Mr. SPIROPOULOS, Special Rapporteur, agreed with Mr. Lauterpacht. There was a great difference between the organization of armed bands and subversive activities. Any attempt to ban the latter would run counter to the recent evolution of the guiding principles of the international community which governed the very life of modern States. It was essential that the draft Code should not be unacceptable to the States.

8. The CHAIRMAN gave an example from his own experience. About twenty years earlier, the Swedish Government had asked him to conduct an inquiry into subversive activities in Sweden and to propose measures to curb them. By the time that inquiry was completed, it had become clear that legislation to curb such activities would inevitably infringe fundamental democratic liberties, and that the only result of repressive measures would have been to drive these activities underground. It might be objected that Sweden was a special case, but he did not think so. Any provision against subversive activities merely demonstrated the impotence of a State to deal with the problem they created. The organization of armed bands and the fomenting of civil strife which were the subject matter of paragraphs 4 and 5 of article 2, were really international crimes; but the term "subversive activities" was so vague that it did not warrant a special paragraph in article 2.

9. Mr. HSU pointed out that the case mentioned by the Chairman referred to internal opposition; the conclusions drawn from the Chairman's experience did not therefore necessarily apply to the case of subversive activities directed against a foreign State.

10. Mr. Lauterpacht's remarks on the evolution of the international community were certainly pertinent. In the present state of international relations, however, no peace was possible if States were not protected against subversive activities organized by foreign governments.

11. In answer to Mr. Spiropoulos, he pointed out that the Commission, which was composed of experts, was under a duty to draft as complete a code as possible, irrespective of the draft's chances of being accepted by the States.

12. Mr. CORDOVA agreed with the Chairman. Paragraphs 4 and 5 of article 2 already dealt with attempts to overthrow a foreign Government by violence; the subversive activities referred to in Mr. Hsu's proposal could therefore only consist of propaganda. Respect for freedom of speech demanded that any form of propaganda in favour of political opinions should be permitted. He would therefore not vote in favour of Mr. Hsu's amendment.

13. Mr. HSU agreed that if the scope of paragraph 5 were construed broadly, it might also apply to subversive activities. It was, however, preferable to insert a special paragraph in article 2 to cover cases in which a government endeavoured to overthrow the government of a

³ See its *Report on Strengthening of Internal Security* (1953).

foreign State, not so much with the object—as in the past—of conquering the country, as of integrating it into a new political system.

14. THE CHAIRMAN put to the vote Mr. Hsu's proposal for adding a new paragraph in the terms set forth earlier in the meeting.

The proposal was rejected by 7 votes to 2, with 4 abstentions.

15. Mr. GARCÍA-AMADOR said he had voted in favour of Mr. Hsu's proposal for the reasons he had given in the course of the discussion.

16. Faris Bey-el KHOURI said he had voted against the amendment because he considered that the term "civil strife" comprised subversive activities. Mr. Hsu's proposal should, of course, be mentioned in the Commission's report on its current session.

Article 2 (10)

(resumed from the 268th meeting)⁴

17. The CHAIRMAN said that at its 267th meeting⁵ the Commission had decided to delete the last phrase from paragraph 10 ("when such acts are committed in execution of or in connexion with other offences defined in this article."). It had become apparent, however, that in its amended form the paragraph might be construed as applying to all ordinary crimes, a result which was clearly inconsistent with the purpose of the Code. A sub-committee had been appointed to re-draft paragraph 10 so as to restrict its scope solely to crimes which violated international law. The sub-committee had received a proposal from Mr. Hsu that paragraph 10 should be drafted to read:

"Inhuman acts by the authorities of a State, or by private individuals acting under the instigation or toleration of the authorities, against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds."

18. The sub-committee had agreed that the enumeration in Mr. Hsu's draft was insufficient. Moreover, the sub-committee had agreed that even if the deleted phrase were restored in paragraph 10, the international character of the offences concerned would still not be clearly defined; it was apparent that the offences listed in paragraph 9 could be committed only in the course of a war, while the offences listed in paragraph 10 as adopted by the Commission could be committed at any time. The sub-committee had reached the conclusion that it would be somewhat illogical to have two distinct paragraphs to define offences which were, in fact, similar in character, one of the paragraphs being merely broader in scope. It would be better to delete paragraph 10 and to retain only paragraph 9

which had been taken from the Convention on the Prevention and Punishment of the Crime of Genocide.

19. Mr. HSU disagreed. His proposal was simply that the words: "acting under the instigation or toleration of the authorities" should be inserted in paragraph 10. Those words were sufficient to avoid any confusion between ordinary crimes and crimes violating international law. The Code should punish all inhuman acts, even those which did not constitute the crime of genocide properly so called. The Commission had refused to include in the Code provisions relating to "fifth column" and subversive activities; those two types of activities might, however, be thought as implicitly provided for in the other paragraphs of article 2. But to delete paragraph 10 would be tantamount to tolerating inhuman acts.

20. Mr. AMADO said the Commission was still, quite improperly, confusing crimes in international law and ordinary crimes. The only solution was to restore the phrase which had been deleted at the end of paragraph 10.

21. Mr. LAUTERPACHT supported Mr. Hsu's proposal. Paragraph 9 applied only to crimes committed with the intention of destroying groups of individuals. But it was also possible to subject a group of persons to a reign of terror, to humiliate it, to stifle its growth; and paragraph 9 contained no reference to such acts. Moreover, paragraph 9 did not refer to political groups or to social groups, and those groups could also be the subject of inhuman treatment and attempts at extermination. He drew attention to the United Kingdom Government's comments on paragraph 10, which stressed the importance of that paragraph as adopted at the third session, while expressing certain reservations concerning those passages which seemed to render crimes against humanity subject to the exclusive jurisdiction of States. He considered that paragraph 9 was not sufficient and that it was necessary to retain a paragraph 10, which should be drafted along the lines proposed by Mr. Hsu.

22. Mr. GARCÍA-AMADOR also supported Mr. Hsu's proposal. If the Commission really intended to afford individuals full protection against any violation of their rights, it was essential to maintain paragraph 10 without the limiting clause embodied in the last phrase of the 1951 text. It was true that the paragraph would then be different from the corresponding clause in the Nürnberg Charter, but the latter had been drafted for a specific purpose, whereas the Commission should draft rules of general application.

23. Mr. SPIROPOULOS, Special Rapporteur, noted that opinions were still divided regarding paragraph 10. The real issue was how to protect civilian population by provisions consistent with the Universal Declaration of Human Rights. Perhaps the Commission should postpone its decision until its next session.

24. Mr. CORDOVA agreed that paragraph 9 was insufficient and had to be supplemented. The limiting

⁴ *Vide supra*, 268th meeting, paras. 1-12.

⁵ *Vide supra*, 267th meeting, para. 59.

clause proposed by Mr. Hsu ("acting under the instigation or toleration of the authorities"), however, seemed insufficient for the purpose of distinguishing between a crime in violation of international law and an ordinary crime. Inhuman acts were committed in connexion with all revolutions and it was difficult to determine which of those acts came within the internal jurisdiction of States and which constituted offences against the peace and security of mankind.

25. Mr. SCELLE said that a crime constituted an international offence if it was reproved by international public opinion. That was the only reliable test. As Mr. Lauterpacht had pointed out, paragraph 9 was not exhaustive for it made no reference to political, social and cultural groups. The Commission had wished to retain the wording of paragraph 9 which corresponded to a clause of the Convention on the Prevention and Punishment of the Crime of Genocide. He did not see why the Commission should regard the latter text as sacrosanct and add a new paragraph instead of supplementing paragraph 9 by inserting the essential provisions contained in paragraph 10.

26. Mr. HSU, replying to Mr. Córdova, said that criminal offences committed in connexion with revolutions were international crimes if committed by a government; if committed by private persons, they constituted ordinary crimes.

27. Mr. ZOUREK pointed out that the question of the punishment of violation of human rights was one which should rather be dealt with in the draft covenants of human rights which were under consideration. The difficulties encountered by the Commission in connexion with paragraph 10 were the result of the inclusion of the words: "or by private individuals". If the offences mentioned in that paragraph were committed by private individuals, with the complicity of the authorities of the State, they were ordinary crimes. Indeed, even if those words were deleted, private individuals who were accomplices to the offences concerned would still be punishable under article 2, paragraph 12 (iv). He formally proposed that the words "or by private individuals" should be deleted.

28. Mr. GARCÍA-AMADOR suggested, as a compromise, that the final phrase of paragraph 10, as from the words: "when such acts are committed...", should be replaced by: "when such acts endanger the maintenance of international peace and security".

29. Mr. SALAMANCA agreed with the motive underlying Mr. Hsu's proposal but feared that under the provision in question any inhuman act, or any act in violation of the Universal Declaration of Human Rights, would become an international crime. Mr. Lauterpacht's cogent arguments concerning paragraph 9 were equally applicable to paragraph 10. Mr. Hsu's proposal was not satisfactory as to form, and Mr. García-Amador's proposed wording did not make the position clear either; it would still be necessary to state on what basis, and by whom, offences would be defined as dangerous to international peace.

30. Mr. SCELLE opposed the deletion of the words: "or by private individuals" from paragraph 10. There was no reason for deleting those words from paragraph 10, while retaining them in paragraph 9. And if they were deleted also from paragraph 9, that would constitute a departure from the wording of the Genocide Convention. The inhuman acts referred to in paragraph 10 could only be committed by States acting through private individuals. Accordingly, the words "or by private individuals" should stand and paragraphs 9 and 10 should be amalgamated into a single paragraph.

31. Mr. HSU, replying to Mr. Salamanca, said that his proposed text would not transform every violation of human rights into an international crime, but only such inhuman acts as were committed by the authorities of a State or by private individuals against certain groups of a civilian population.

32. In reply to members who had adversely alluded to his earlier proposal, regarding subversive activities,⁶ he said that the point involved there did not relate to the right to revolt or to freedom of thought. In fact, the provision only dealt with subversive action by the authorities of one State on the territory of another.

33. Faris Bey el-KHOURI said that the acts referred to in paragraph 10 were international offences, with the single exception of murder, the first offence on the list. The final provision of the 1951 text, "when such acts are committed in execution of or in connexion with other offences defined in this article", which had raised so many difficulties, was essential only because of the presence of the words "murder". It would therefore be preferable to delete that word as well as the final phrase. Mr. Hsu's proposal seemed to him acceptable. If that proposal were rejected, however, he would submit an amendment along the lines he had indicated.

34. Mr. ZOUREK did not agree with Mr. Scelle that, if the Commission deleted the words "or by private individuals" from paragraph 10, it should logically also delete them from paragraph 9. Paragraph 9 dealt with offences which, by their nature, could only be committed with the connivance of the State, whereas the same could not be said of the acts mentioned in paragraph 10. From a legal point of view, moreover, a murder was always a crime, whatever the motives. It would be difficult to admit that the nature of the act changed if the motive of the crime changed.

35. Mr. SCELLE said that intention was a material factor in crime.

36. Mr. ZOUREK replied that the test of intention was not sufficient for the purpose of distinguishing between an international crime and a crime against the ordinary national law.

37. Mr. SCELLE said that according to his proposal paragraph 9 would read:

⁶ *Vide supra*, paras. 1-16.

“Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social, political, or cultural group as such, including:

- (i) Killing members of the group ;
- (ii) Causing serious bodily or mental harm to members of the group ;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ; enslavement, or deportation or persecutions ;
- (iv) Imposing measures intended to prevent births within the groups ;
- (v) Forcibly transferring children of the group to another group ; and
- (vi) Generally all inhuman acts against members of the civilian population belonging to the groups above referred to.”

38. Mr. LAUTERPACHT, in answer to a question by Mr. Córdova, said that crimes in violation of international law could be distinguished from crimes in municipal law by means of the following test: all inhuman acts committed by the organs of the State, or other individuals employed by the State to commit those acts, were international offences if prescribed or authorized by the law of the State or if left unpunished by it. In those cases, the sanctity of human rights prevailed over the sovereignty of the State.

39. He could not agree to Mr. García-Amador's suggestion, for it begged the question. He would tentatively suggest the following draft :

“Inhuman acts, whether provided for in paragraph 9 or not, which are committed by the authorities of a State or by private individuals against groups of the civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, social, religious or cultural grounds.”

40. By proclaiming that certain fundamental human rights transcended internal legislation, the Commission would be continuing the work commenced at Nürnberg and would be taking a great step forward in the progress of international law.

41. Mr. HSU suggested that a Drafting Committee, composed of the Chairman, Mr. Lauterpacht and Mr. Scelle, should be asked to redraft paragraphs 9 and 10.

42. Mr. SPIROPOULOS, Special Rapporteur, supported Mr. Hsu's suggestion. He recalled that when the Commission had commenced drafting the code of offences, it had considered it essential to include the relevant clause of the Convention on the Prevention and Punishment of the Crime of Genocide. The Commission had considered it preferable not to add to the list of groups mentioned in that convention two new ones—social and political groups—because of the difficulties to which those words had given rise during the

debate in the General Assembly on the Genocide Convention. The Commission had also taken into consideration the Charter of the Nürnberg Tribunal ; it had decided to go further than that Charter, which had only related to offences committed in connexion with an international war, and to war crimes proper. Mr. Hsu's present proposal went much further still ; while not unacceptable in principle, it was far too revolutionary in the present state of international law.

43. The CHAIRMAN said that a Drafting Committee composed of Mr. Lauterpacht, Mr. Scelle and himself would redraft paragraphs 9 and 10 of article 2.

QUESTION OF RECOMMENDATIONS TO THE GENERAL ASSEMBLY REGARDING THE DRAFT CODE

44. The CHAIRMAN asked the members to consider what recommendations should be transmitted to the General Assembly with the draft Code of Offences.

45. Mr. SPIROPOULOS, Special Rapporteur, said that at its forthcoming session the General Assembly would consider two items which were related to the Code of Offences against the Peace and Security of Mankind, firstly, the question of defining aggression, and secondly, the question of the establishment of an international criminal court. On several occasions, the Commission had considered presenting its draft Code in the form of a convention. A simple resolution of the General Assembly would not of course be sufficient in law to establish the acts referred to in the Code as international crimes. Perhaps the General Assembly itself should decide the question of the presentation of the draft Code, in keeping with its decisions concerning the two closely connected items which it would consider at the same time.

46. Mr. LIANG, Secretary to the Commission, referred to the terms of reference laid down for the Commission by General Assembly resolution 177(II) of 21 February 1947. The Commission had already performed the first part of its task by transmitting to the General Assembly a formulation of the Nürnberg principles. The Commission had not submitted that text in the form of a draft convention nor had the General Assembly contemplated embodying it in such an instrument. Clearly, if the Commission proceeded otherwise in the matter of the draft Code, it could not be criticized by the General Assembly. A convention was certainly a desirable but not the only possible form of presentation.

47. Mr. LAUTERPACHT was not sure that it was desirable to embody the solemn declaration of fundamental principles established by the Commission in a draft convention as such a course would expose the draft Code to all the vicissitudes to which draft conventions were subject.

48. The CHAIRMAN pointed out that there was a considerable difference between the formulation of the Nürnberg principles and the draft Code. The Nürnberg

principles could only serve as the basis for a code, but the scope of the latter had to be much wider.

49. Mr. CORDOVA said that no real progress would have been accomplished so long as Governments did not bind themselves by a convention to respect the provisions of the Code. Governments should undertake to punish persons who committed the offences referred to in the Code, either through their national courts or by means of an international criminal tribunal. That was why a convention containing only the definition of the offences, but not making any provision for their punishment, would be insufficient. The draft Code was intimately linked to the legislative provisions relating to penalties. Accordingly, the Commission should simply transmit its draft to the General Assembly while drawing attention to the connexion between that draft and the proposed international criminal court.

50. The CHAIRMAN drew attention to paragraph 58 (d) of the Commission's report on its third session,⁷ which might serve as a precedent.

51. Mr. SPIROPOULOS, Special Rapporteur, also thought that the Commission might reproduce, *mutatis mutandis*, the same passage in the report on the current session.

52. Mr. ZOUREK said that the draft Code should not be related directly to the establishment of an international criminal court. The Code could without difficulty be adopted and its provisions implemented without such a court, the establishment of which could run counter to the basic principles of contemporary international law. A large number of the acts enumerated in the draft were international crimes under existing law and States were already obliged to punish them. It would be preferable to adopt one of the solutions mentioned in article 23, paragraph 1, of the Commission's statute.⁸

53. Mr. LAUTERPACHT said that in any case the Commission could not recommend the General Assembly to take no action (article 23, paragraph 1 (a) of the Statute). On the other hand, it might leave the General Assembly free to choose between the three other solutions mentioned in article 23, paragraph 1. A recommendation by the General Assembly was not of course binding on States but it would nevertheless add considerable authority to the draft Code.

⁷ Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858), p. 11. Also in *Yearbook of the International Law Commission, 1951*, vol. II, p. 134.

⁸ Article 23, paragraph 1, of the Commission's Statute (United Nations publication, Sales No. 1949.V.5) reads:

"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."

54. Mr. GARCIA-AMADOR pointed out that, under article 2 of the draft statute for an international criminal court⁹ which was to be considered by the General Assembly, that court was to apply international law, including international criminal law, and in certain circumstances, municipal law. The question of the law to be applied by the court was also discussed at length in a comment to paragraph 38 of the same document. Consequently, the General Assembly itself should determine what was to be the function of the draft Code drawn up by the Commission.

55. Mr. CORDOVA agreed that it was for the General Assembly to decide in the final resort what further action it would take with regard to the document submitted to it by the Commission, but the latter should nevertheless point out in its report that it would be most regrettable if the General Assembly did no more than take note of the draft.

56. Mr. FRANÇOIS agreed with the Special Rapporteur that paragraph 58 (d) of the Commission's report on its third session¹⁰ should be reproduced, *mutatis mutandis*, in the report on the current session.

57. Mr. ZOUREK thought that the Commission should recommend the General Assembly to adopt the report by a resolution. The draft Code was largely the codification of the Nürnberg principles and on occasion it did not even go nearly as far as those principles. A resolution adopted by the General Assembly, even if it could not lay down new rules, would nevertheless add authority to the principles on which the draft was based.

58. Mr. LIANG, Secretary to the Commission, recalled that, from the very beginning, the Commission had considered the preparation of the draft Code as a special task which was strictly speaking neither codification nor development of international law. The possible actions by the General Assembly mentioned in article 23 of the Commission's statute were hence not necessarily applicable to the draft Code. The case of the draft Code was comparable to that of the draft declaration of the rights and duties of States which the Commission had submitted to the General Assembly without recommendation for action.

59. Mr. SPIROPOULOS, Special Rapporteur, said the Commission was spending too much time on discussing what recommendations should be addressed to the General Assembly. Experience showed that the General Assembly rarely adopted the Commission's recommendations. The Commission should simply transmit its draft to the General Assembly and leave the latter free to determine what action to take.

60. Mr. PAL referred to General Assembly resolution 177 (II)¹¹ containing the terms of reference relating to the formulation of the Nürnberg principles and the

⁹ *Vide supra*, 267th meeting, para. 73 and footnote.

¹⁰ *Vide supra*, footnote 7.

¹¹ Quoted in paragraph 54 of the Commission's report on its third session; *vide supra*, footnote 7.

preparation of "a draft code of offences against the peace and security of mankind". The Commission should reproduce those terms in the title of its draft and transmit the latter to the General Assembly with a reference to that resolution.

61. Mr. LAUTERPACHT supported the Special Rapporteur's proposal.

62. Mr. ZOUREK, replying to the Secretary, said that the Commission's statute was applicable in all cases, even if the General Assembly itself asked the Commission for an advisory opinion. He saw no objection, however, to the Special Rapporteur's proposal.

63. The CHAIRMAN proposed that the Commission should adopt, in principle, the Special Rapporteur's proposal that the draft Code prepared by the Commission should be transmitted to the General Assembly without any specific recommendation concerning the form of the Code.

It was so agreed.

The meeting rose at 1.5 p.m.

270th MEETING

Saturday, 17 July 1954, at 9.30 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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

Provisional agenda of seventh session

1. The CHAIRMAN invited the Commission to consider the provisional agenda of its seventh session. A number of items would be held over from the current session and it was important to know if any additional items should be taken up.

2. Mr. FRANÇOIS, Rapporteur, said that among the items held over were those relating to the régime of the territorial sea and the régime of the high seas. He suggested that governments should be requested to give their views on those subjects the study of which could then be finally completed in some four weeks at the seventh session.

3. Mr. LAUTERPACHT thought it was optimistic to hope that the items relating to the territorial sea and to the high seas would be disposed of in four weeks. At least one or two weeks should be set aside for the study of the law of treaties. If any additional items were to be placed on the agenda of the next session, he suggested that the Commission might, in accordance with the wishes of the General Assembly, place on its priority list the questions of codifying the topic of diplomatic intercourse and immunities and the codification of the principles of international law governing state responsibility.

4. Mr. SPIROPOULOS said that a number of new subjects should be added to the Commission's agenda so as not to leave it empty-handed in the case of the absence of one or more of its special rapporteurs. It was important that a report should not be studied by the Commission in the absence of the special rapporteur concerned.

5. Mr. LAUTERPACHT disagreed with Mr. Spiropoulos; a sufficiently detailed report could very well be discussed in the absence of the special rapporteur concerned; a report once submitted to the Commission became the property of the Commission. It was undesirable for a report to be too closely tied to the personality of its author.

6. Mr. FRANÇOIS said that a question could of course be dealt with in the absence of the special rapporteur, but on the whole it was undesirable to do so. If the special rapporteur on a particular topic withdrew from the Commission or was not re-elected, the Commission should decide on some means of ensuring continuity.

7. Mr. HSU suggested that if the special rapporteur on a particular subject was no longer able to participate in the Commission's work, he should notify the Chairman of his future departure and enable the latter to make tentative appointments to carry on the work. The newly appointed special rapporteur would communicate with his predecessor to ensure continuity in the presentation of the subject. He also wondered if at the present stage of the Commission's work a formal request should not be made to Mr. Lauterpacht to continue as Special Rapporteur on the law of treaties, and if possible to prepare a further report on that subject for the consideration of the Commission.

8. The CHAIRMAN agreed that Mr. Hsu's first suggestion was the only practical one. Replying to Mr. Hsu's second suggestion, he said that if the Commission assumed that Mr. Lauterpacht was remaining with the Commission, a formal request was perhaps out of place; however, he was sure that he reflected the

view of the Commission if he said that all members would be happy if Mr. Lauterpacht continued as Special Rapporteur on the law of treaties.

9. Mr. LAUTERPACHT said that the item relating to the codification of the topic of diplomatic intercourse and immunities should be placed on the provisional agenda. He proposed that Mr. Zourek should be appointed special rapporteur.

10. Mr. SPIROPOULOS supported Mr. Lauterpacht's proposal.

11. Mr. SCELLE also supported Mr. Lauterpacht's proposal.

12. Mr. ZOUREK thanked Mr. Lauterpacht. He was ready, in principle, to accept the offer, though he would like a few days to think the matter over.

13. Mr. SCELLE, referring to the proposed item relating to state responsibility, said the topic was too vast for a single rapporteur.

14. Mr. LAUTERPACHT disagreed with Mr. Scelle, but thought it unnecessary to include that topic in the Commission's work programme at the present stage.

15. The CHAIRMAN pointed out that the relevant General Assembly resolution 799 (VIII) did not actually direct the Commission to study the question forthwith. He put to the vote the question whether a special rapporteur on the subject of the codification of the principles of international law governing state responsibility should be appointed at the present session.

By 7 votes to 3, with 4 abstentions, it was decided that no special rapporteur on the particular topic should be appointed at the present session.

Interpretation from and into Spanish

16. Mr. CORDOVA submitted the following draft resolution:

"The International Law Commission,

"Taking into consideration that the Spanish language, according to resolution 247 (III) adopted by the General Assembly on 7 December 1948 has become a working language of the United Nations, and

"Taking also into consideration that three of the members of the International Law Commission are nationals of Spanish-speaking countries,

"Resolves to request the Secretary-General of the United Nations to make the necessary arrangements to ensure that, beginning with the forthcoming session of 1955, there will be also simultaneous interpretation from and into Spanish."

17. Mr. SPIROPOULOS pointed out that all the Spanish-American members of the Commission spoke either English or French. The addition of a further language would complicate the Commission's work and cause further expenditure. He hoped Mr. Córdova would be able to withdraw his draft resolution.

18. Mr. LIANG, Secretary to the Commission, remarked that, to adopt the draft resolution, it would be necessary to modify the first paragraph as Spanish was only a working language in the General Assembly and not in all the organs of the United Nations.

19. Mr. CORDOVA said that he and his Spanish-speaking colleagues frequently found great difficulty in expressing themselves in a language which was not their own. Furthermore, there were in Latin-America many eminent jurists who knew neither English nor French. That fact should not be allowed to prejudice their appointment to the Commission, nor should the fact that the Spanish-speaking members of the Commission had hitherto spoken English be considered as a precedent.

20. Mr. FRANÇOIS felt that simultaneous interpretation was very unsuited for the discussion of legal matters, so much so that the International Court of Justice at The Hague had refused to adopt it. It would make for greater clarity if the Spanish speaking members who spoke English or French continued, if possible, to use those languages.

21. Mr. LAUTERPACHT said that the Latin American members of the Commission were entitled to make a request of that nature and that he would vote for it if they insisted on it. He doubted whether in the present Commission the proposed innovation was, in fact, necessary. The members in question expressed themselves very well in English or French. Interpretation would have the effect of impairing the informal atmosphere which helped so much to smooth the work of the Commission. However, the members from Latin America should remain judges of the necessity of the proposed innovation.

22. Mr. GARCÍA-AMADOR said it was difficult for him to convey his thoughts fully in a foreign language. He felt that the provision of interpretation into Spanish was essential. If Mr. Córdova withdrew his proposal, he would formally take it up.

23. Mr. SALAMANCA said that if a resolution were not actually necessary, because the right to use the Spanish existed independently of any resolution, then the report should mention the matter.

24. After a further of views, the CHAIRMAN put Mr. Córdova's draft resolution to the vote.

The draft resolution was adopted by 10 votes to 3, with 1 abstention.

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85)¹ (continued)

Article 2 (10) (resumed from the 269th meeting)²

25. The CHAIRMAN said that four alternative proposals had been made:

¹ *Vide supra*, 266th meeting, para. 1 and footnotes.

² *Vide supra*, 269th meeting, paras. 17-43.

- (A) That paragraph 10 as adopted at the third session should be retained;
- (B) Mr. Hsu's amendments to the effect that after the words: "private individuals", the words "acting under the instigation or toleration of the authorities" should be inserted, and that the final phrase: "when such acts..." should be deleted;
- (C) Mr. Zourek's proposal that the words: "or by private individuals" should be deleted and that the final phrase: "when such acts..." be replaced by the words: "when such acts are committed in connexion with the crime of aggression or with war crimes."
- (D) His own proposal that the paragraph should be drafted on the following lines:

"Inhuman acts such as those envisaged in paragraph 9 committed, in other circumstances than there contemplated, by a State or by individuals against any civilian population, on account of their membership of a national, ethnic, racial, religious, social or political group."

26. Mr. LAUTERPACHT, while agreeing with the general purport of the Chairman's draft, said its wording was not sufficiently clear, particularly its reference to "other circumstances than there contemplated."

27. Mr. GARCÍA-AMADOR said that the proposal made by the Chairman restricted the application of paragraph 10 to cases where the victims were members of a particular group. That was the same concept already embodied in paragraph 9 which had been taken from the Convention on the Prevention and Punishment of the Crime of Genocide. The only difference consisted in the addition of "social or political" groups to the groups enumerated in paragraph 9. The purpose of paragraph 10 should be, however, to cover a wider field than the Genocide Convention and it was therefore necessary to adopt a paragraph 10 which protected populations or persons whether or not they could not be described as members of one of these groups.

28. Mr. ZOUREK said that paragraph 10 was both broader in scope and narrower in intention than paragraph 9. It was broader because whereas paragraph 9 related only to national, ethnic, racial or religious groups, paragraph 10 was meant to punish offences against individuals regardless of the group to which they belonged, as, for example, the assassination of an opposition leader. It was narrower because it dealt only with inhuman acts—murder, extermination, enslavement, deportation or persecution—in so far as they were committed in connexion with crimes against the peace (aggression) or with war crimes.

29. Mr. PAL preferred Mr. Hsu's proposed amendments. The other proposals would imply that the murder of an individual by another out of religious fanaticism would have to be considered as an international crime. That could certainly not be the intention of the Commission.

30. Mr. LAUTERPACHT agreed with Mr. Pal. He would suggest the following wording for paragraph 10:

"Any other inhuman acts committed by a State or by individuals acting under the instigation or toleration of the authorities of a State, against any civilian population on account of their membership of a national, ethnic, racial, religious, social or political group."

31. Mr. SPIROPOULOS, Special Rapporteur, said that paragraph 10 was intended to make provision for an offence distinct from genocide. He would suggest, as an improvement to the draft proposed by the Chairman, that the initial words should be "any inhuman act not covered by paragraph 9".

32. Mr. AMADO said that the only satisfactory text was that adopted at the third session. The paragraph should cover the case of persons who invited the populace to commit atrocities in time of war or threat of war, or when the authorities were powerless. Such persons could not be said to have acted at the instigation or with the toleration of the authorities. Yet the draft Code should cover such crimes, in so far as they were committed in connexion with aggression or another international offence. It was that connexion which transformed an ordinary crime into an international crime.

33. Mr. SCELLE said that he preferred Mr. Hsu's draft because it restricted the provisions of paragraph 10 to persons who acted "under the instigation or toleration of the authorities".

34. In view of the opinions expressed in the discussion the CHAIRMAN withdrew his own draft. He put to the vote Mr. Hsu's amendments to the effect that in paragraph 10, after the words "private individuals" the words: "acting under the instigation or toleration of the authorities" should be inserted, and that the final phrase commencing with the words: "when such acts..." should be deleted.

The amendments were adopted by 10 votes to 3, with 1 abstention.

35. Mr. LAUTERPACHT proposed that the word "social" should be added after the word "political".

The proposal was adopted by 8 votes to 1, with 4 abstentions.

36. The CHAIRMAN said that as Mr. Hsu's amendments were furthest removed from the original text, the other proposals did not have to be put to the vote. The adoption of Mr. Hsu's and Mr. Lauterpacht's amendments constituted approval of the paragraph as reading:

"(10) Inhuman acts by the authorities of a State or by private individuals acting under the instigation or toleration of the authorities against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, social, racial, religious, or cultural grounds."

The meeting rose at 1 p.m.

271st MEETING

Monday, 19 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. 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 territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (resumed from the 265th meeting)

CHAPTER II: LIMITS OF THE TERRITORIAL SEA
(resumed from the 263rd meeting)

Article 14: Straits (article 11 of A/CN.4/61)
(resumed from the 263rd meeting)²

1. The CHAIRMAN invited the Commission to resume debate on article 14. At the 262nd meeting of the Commission³ Mr. Zourek had proposed that article 14 should be redrafted as follows:

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 263rd meeting, paras. 1-22.

³ *Vide supra*, 262nd meeting, para. 72.

*"Delimitation of the territorial sea
in straits joining two parts of the high seas*

"1. In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on other parts of the coast.

"2. If the breadth of the straits referred to in paragraph 1 is less than the extent of the belt of territorial sea adjacent to the two coasts, the maritime frontier of the States in question shall be determined in conformity with article 16.

"3. If the breadth of the straits exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if as a consequence of this delimitation an area of the sea should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

"4. In the case of straits with only one coastal State which are used as a recognized shipping lane between two parts of the high seas, such straits shall be treated in the same way as the straits referred to in paragraph 1, and the provisions of paragraphs 1 and 3 hereof shall be applicable thereto."

2. Mr. FRANÇOIS, Special Rapporteur, proposed the following amendments to Mr. Zourek's text:

- (i) In paragraph 3 after the words "an area of the sea" the words "not more than two miles in breadth" should be inserted.
- (ii) The following text should replace Mr. Zourek's paragraph 4:

"Paragraphs 1 and 3 of this article shall be applicable to straits which join two parts of the high seas and which have only one coastal State if the breadth of the straits is greater than twice the breadth of that State's territorial sea. If the breadth of the straits is not greater than twice the breadth of the territorial sea these rules shall be applicable only if the straits are used as an international shipping lane."

3. Mr. ZOUREK said that the amendments proposed by the Special Rapporteur differed from his own draft in two respects. The first difference was that the Special Rapporteur allowed enclaves of high seas of more than two miles in breadth, whereas he himself proposed that such enclaves should be treated in the same way as the waters adjacent to the coasts. Such instances were very rare indeed and there was no reason to treat the areas in question differently from internal waters.

4. The two draft paragraphs 4 dealing with straits which had only one coastal State, differed more seriously. The Special Rapporteur wished to make the régime of paragraph 1 applicable to those straits if they were used as international shipping lanes, whereas he himself only provided for that régime in the case of straits which were recognized shipping lanes.

5. His own drafting seemed a more prudent one. The Special Rapporteur himself admitted that areas of water situated between the islands of an archipelago should be considered as inland waters,⁴ although they might link two parts of the high seas. The present tendency on the part of States was to treat the enclaves in the same way as the coastal waters when both coasts of the strait came under their sovereignty. His own draft was therefore just a codification of existing international law.

6. Mr. FRANÇOIS, Special Rapporteur, in reply to Mr. Zourek's first point, said that the preparatory committee of the Codification Conference at The Hague had proposed that enclaves of high seas enclosed within a strait should be shared by the coastal States. The Conference, however, had only accepted that proposal in respect of enclaves the breadth of which did not exceed two miles; the intention had been to avoid taking away from the high seas areas of water which were perhaps of considerable extent. All he had done was to reproduce the conclusions of the 1930 Codification Conference.⁵

7. If a strait had only one coastal State and was not a recognized shipping lane between two parts of the open sea, that State could hardly be permitted not to apply paragraph 1, particularly if the straits exceeded twice the breadth of the territorial sea. Even if the interests of navigation did not suffer, those of fishing, for example, might be affected. Mr. Zourek's draft paragraph 4, from being a codification of existing international law, was actually a dangerous innovation.

8. Finally, the case of archipelagoes was completely different from that of straits and hence not strictly comparable with the latter.

9. Mr. PAL inquired from the Special Rapporteur what was the exact purport of the last sentence he proposed for paragraph 4 ("if the breadth of the straits... international shipping lane"). Article 14 only concerned the delimitation of the territorial sea in straits, and he could not see any useful purpose in the sentence concerned. He proposed that it should be deleted.

10. Mr. FRANÇOIS, Special Rapporteur, said that the provision in question concerned narrow straits which were usually avoided by maritime traffic. For example, it was permissible to incorporate into the territorial sea of the United Kingdom the area of water situated between the Isle of Wight and the English coast.

11. Mr. ZOUREK agreed with Mr. Pal. Article 14 concerned the delimitation of the territorial sea and not the right of passage. His own draft paragraph 4 simply acknowledged the right of the coastal State of

both shores of a strait to carry out that delimitation itself.

12. Replying to a question by the Special Rapporteur, he said that there were always two belts of territorial sea, even where there was only one coastal State.

13. The CHAIRMAN put the various proposals to the vote with the following results:

Article 14, paragraph 1, as proposed by Mr. Zourek, was adopted by 11 votes to none, with 2 abstentions.

Article 14, paragraph 2, as proposed by Mr. Zourek, was adopted by 11 votes to none, with 2 abstentions.

Mr. François' amendment to Mr. Zourek's article 14, paragraph 3, was adopted by 4 votes to 2, with 7 abstentions.

Article 14, paragraph 3, as amended, was adopted by 4 votes to none, with 9 abstentions.

Mr. Pal's proposal for the deletion of the last sentence of the Special Rapporteur's draft for article 14, paragraph 4, was adopted by 5 votes to 3, with 4 abstentions.

Article 14, paragraph 4, as proposed by the Special Rapporteur but reduced to its first sentence following the foregoing vote, was adopted by 4 votes to 1, with 8 abstentions.

14. The CHAIRMAN said that the foregoing vote made it unnecessary to put Mr. Zourek's draft paragraph 4 to the vote.

Article 14 as a whole, as amended, was adopted by 4 votes to none, with 9 abstentions.

ORDER OF BUSINESS

15. Mr. LAUTERPACHT proposed that the discussion on the territorial sea should be suspended.

The proposal was adopted by 7 votes to 4, with 2 abstentions.

16. Mr. LAUTERPACHT hoped that that vote would not prevent the Commission from submitting to the General Assembly those articles relating to the territorial sea which it had so far adopted.

17. Mr. FRANÇOIS, Special Rapporteur, said that it would be impossible to submit the draft in such an incomplete state. He proposed that a questionnaire should be sent to Governments on the question of the breadth of the territorial sea.

The proposal was adopted by 6 votes to 1, with 6 abstentions.

18. Mr. LAUTERPACHT proposed that the draft articles relating to the territorial sea adopted during the current session should be included in the report on the current session.

The proposal was adopted by 6 votes to 4, with 3 abstentions.

⁴ Article 12 of A/CN.4/77 in *Yearbook of the International Law Commission*, 1954, vol. II.

⁵ *Vide supra*, 261st meeting, para. 26.

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85)⁶ (resumed from the 270th meeting)

Articles 1, 2 and 4

19. Mr. LAUTERPACHT regretted that he had been unable to attend some of the meetings at which the Commission had discussed the draft Code. He was grateful to the Chairman for allowing him to express his views on the subject at the present stage of the discussion.

20. He hoped the draft Code would be adopted during the present session but wished to make the following comments:

Article 1 read: "Offences against the peace and security of mankind, as defined in this Code are crimes under international law for which the responsible individuals shall be punished." The draft did not refer to the criminal liability of States as such. He did not, however, think it necessary to modify article 1; it would be sufficient to give explanations in the relevant comments.

Article 2, paragraph 5, read: ["The following acts are offences against the peace and security of mankind]... (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State." The words "civil strife" were ambiguous and too reminiscent of Mr. Hsu's proposal which the Commission had rejected at its 269th meeting.⁷ The words "civil war" would be preferable. In that case, also, the necessary explanation could be given in the comment.

Article 2, paragraph 8 read: "Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime." It should be specified that only annexations by force should be considered as international crimes.

Article 2, paragraph 11 read: "Acts in violation of the laws or customs of war." He recalled that the laws and customs of war incorporated a very large number of rules, some of which were only of minor importance. The Geneva conventions of 1949⁸ referred to "major violations" of the laws and customs of war. The passage should therefore read: "Acts which constitute a major violation..."

⁶ *Vide supra*, 266th meeting, para. 1 and footnotes.

⁷ *Vide supra*, 269th meeting, paras. 1-16.

⁸ *International Committee of the Red Cross, The Geneva Conventions of August 12, 1949* (Geneva, 1950).

Article 4 read: "The fact that a person charged with an offence defined in this Code acted pursuant to an order of his government or of a superior, does not relieve him from responsibility in international law if in the circumstances at the time, it was possible for him not to comply with such order." The second half of the sentence constituted a dangerously retrograde step. The defence was admissible in time of war, but not in time of peace. The draft code was, in fact, concerned primarily with peacetime conditions. Under the formulation as adopted the accused might escape punishment for the reason that "it was not possible for him" not to comply with the order for fear of losing his post, or forfeiting a chance of promotion, or displeasing his superiors, or incurring the odium of disobeying a decision of his party, and the like.

Finally, his main objection referred to *the new paragraph (intervention)* inserted in *article 2* of the draft Code on Mr. García-Amador's proposal: "The intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures of an economic or political character in order to force its will and obtain from it advantages of any kind."

He was no less opposed than the other member of the Commission to the intervention of one State in the affairs of another; but the text adopted by the Commission was far too broad for it meant that perfectly legitimate and normal manifestations of international life were to be regarded as offences. International political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will. International law should merely impose certain restrictions on these measures, or, in other words, prohibit the use of force.

If the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning. Intervention—assuming that the meaning of the term was clear—was an unlawful act. It was an excess of zeal to render it criminal. In the Corfu Channel case⁹ the International Court of Justice had declared that the United Kingdom had committed, in some respects, an act of intervention by ordering a destroyer to enter the Channel for the purpose of mine-sweeping. The Court had found that the declaration constituted a sufficient sanction. Under the Code, as proposed, the officers who had ordered the action would be guilty of a criminal act. He agreed that it was necessary to devise a formula forbidding brutal and unjustified acts of intervention, but thought it impossible to retain the text of the paragraph as it stood.

21. The CHAIRMAN drew Mr. Lauterpacht's attention to paragraph 58(c) of the Commission's report covering the work of its third session.¹⁰ By stating that it would deal only with the criminal liability of indi-

⁹ *I.C.J. Reports 1949*, p. 4.

¹⁰ *Vide supra*, 266th meeting, footnote 1.

viduals the Commission had implied that there could also be cases involving the criminal liability of States.

22. Mr. LAUTERPACHT replied that if that was so it would be sufficient to make a suitable remark in the comment.

23. The CHAIRMAN pointed out, with regard to Mr. Lauterpacht's second remark, that in the French text the words "civil strife" had been translated as "*guerre civile*"; clearly, therefore, only a drafting question was involved.

24. Mr. CORDOVA thought, on the contrary, that a question of substance was involved. He had voted against Mr. Hsu's amendment¹¹ because it had been pointed out to him that the amendment was intended to cover precisely "civil strife", which were the words used in article 2, paragraph 5. If that expression was replaced by the words "civil war", he would ask that Mr. Hsu's amendment should be put to the vote again.

25. Mr. SCELLE said he had assumed that it was generally admitted that a body corporate could not be held criminally liable. That principle had been confirmed by the Nürnberg Tribunal. In same cases such a body would conceivably be held civilly liable, though the fictitious personality to such bodies was purely a practical expedient; it would clearly be absurd to speak of the criminal liability of a fictitious person. He thought the Commission should retain article 1 as it stood and perhaps note in the comment that in certain cases a State if it was in a position to do so could be required to make good the damage caused.

26. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the new paragraph relating to intervention should be reconsidered.

The result of the vote was 7 in favour, 5 against, with 1 abstention.

The proposal was not adopted, having failed to obtain the required two-thirds majority.

27. Mr. HSU said he had voted in favour of Mr. Lauterpacht's proposal because he thought the scope of the new paragraph as adopted by the Commission was too broad.

28. Mr. LAUTERPACHT withdrew his proposal for reconsidering article 4.

Nationality, including statelessness (item 5 of the agenda)
(A/2456, A/CN.4/82 and Add. 1 to 8) (resumed from the 252nd meeting)

DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS¹² (resumed from the 251st meeting)

Final clauses (resumed from the 251st meeting)

29. The CHAIRMAN announced that the Sub-Committee appointed by the Commission¹³ to redraft the

text of the final clauses of the draft conventions concerning the elimination and the reduction of future statelessness, submitted the following draft for the final clauses of the first of those draft conventions:

Article 11

SIGNATURE, RATIFICATION AND ACCESSION

1. The present Convention, having been approved by the General Assembly, shall until (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign is addressed by the General Assembly.

2. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. After (the above date) the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

TERRITORIAL APPLICATION CLAUSE

1. Any Party may at any time, by written notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the international relations of which that Party is responsible.

2. Any such extension shall take effect on the ninetieth day after the date of receipt of the aforesaid notification by the Secretary-General or on the date of entry into force of the Convention for the State concerned, whichever is the later.

Article 13

RESERVATIONS

1. At the time of signature, ratification or accession any State may make a reservation permitting it to postpone, for a period not exceeding two years, the application of the Convention pending the enactment of necessary legislation.

2. No other reservations to the present Convention shall be admissible.

Article 14

ENTRY INTO FORCE

1. The present Convention shall enter into force on the ninetieth day following the date of the deposit of the (e.g., third or sixth) instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention subsequently to the latter date, the Convention shall enter into force on the ninetieth day following the deposit of the instrument of ratification or accession by that State.

¹¹ *Vide supra*, 269th meeting, paras. 1-16.

¹² *Vide supra*, 242nd meeting, para. 1 and footnotes.

¹³ *Vide supra*, 251st meeting, para. 62.

Article 15

DENUNCIATION

1. Any Party to the present Convention may denounce it at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the said Party one year after the date of its receipt by the Secretary-General.
2. Any Party which has made a notification under article 12 may at any time thereafter by a written notification to the Secretary-General of the United Nations declare that the Convention shall cease to be applicable to such territory one year after the date of receipt of the latter notification by the Secretary-General.

Article 16

NOTIFICATION BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States referred to in article 11 of the following particulars:

- (a) Signatures, ratifications and accessions under article 11;
- (b) Notifications received under article 12;
- (c) Reservations under article 13;
- (d) The date upon which the present Convention enters into force in pursuance of article 14;
- (e) Denunciations under article 15.

Article 17

DEPOSIT OF THE CONVENTION AND CIRCULATION OF COPIES

1. The present Convention shall be deposited in the archives of the United Nations.
2. A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States referred to in article 11.

Article 18

REGISTRATION

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

Article 11

30. The CHAIRMAN put article 11 to the vote.

Article 11 was adopted unanimously.

Article 12

31. Mr. ZOUREK proposed that article 12 should be deleted. In practice, its effect would be to remove colonial territories from the application of the convention, for very few States extended the application of conventions they accepted to the Non-Self-Governing Territories which they administered, and the Commission should not encourage them in that attitude. States

which administered Non-Self-Governing Territories could always, before accepting a convention, take the necessary measures to make it applicable to such Territories.

32. Mr. GARCÍA-AMADOR pointed out that the "colonial clause" embodied in article 12 had always raised difficulties of a political character at the General Assembly. The Commission should not deal with the question; it was better to delete article 12.

33. The CHAIRMAN pointed out that the article merely acknowledged the fact that there were certain territories which were not self-governing and that in certain cases a convention which was applicable to the mother country might not be applicable in a dependent territory.

34. The CHAIRMAN put to the vote Mr. Zourek's proposal for the deletion of article 12.

At the request of Mr. García-Amador, a vote was taken by roll call.

In favour: Mr. Amado, Mr. Córdova, Mr. Edmonds, Mr. García-Amador, Mr. Hsu, Faris Bey el-Khoury, Mr. Zourek.

Against: Mr. François, Mr. Lauterpacht, Mr. Pal, Mr. Salamanca, Mr. Sandström.

Present and not voting: Mr. Scelle.

The proposal was adopted by 7 votes to 5.

35. Faris Bey el-KHOURI said he had voted for the deletion of the article because he considered that it was always possible for States parties to a convention to extend its application to the territories they administered.

Article 13

36. Mr. ZOUREK said he did not wish to raise the general question of reservations to conventions which the Commission would consider in connexion with Mr. Lauterpacht's report on the law of treaties.¹⁴ Nevertheless, he wished to point out that article 13 did not agree with the generally accepted solution of the problem of reservations to conventions, a problem closely connected with the question of the sovereignty of States.

37. The CHAIRMAN pointed out that the Subcommittee had been guided merely by considerations of logical arrangement. If reservations other than that permissible under article 13, paragraph 1, were to be permitted, the purpose of the convention, which was the elimination of future statelessness, would be stultified. He put article 13 to the vote.

Article 13 was adopted by 12 votes to none, with 1 abstention.

¹⁴ A/CN.4/63, in *Yearbook of the International Law Commission, 1953*, vol. II.

Article 14

38. The CHAIRMAN put article 14 to the vote.

Article 14 was adopted unanimously.

Article 15

39. The CHAIRMAN said paragraph 2 had been dropped as the result of the elimination of article 12. He put to the vote article 15, which accordingly consisted of former paragraph 1 only.

Article 15 as amended was adopted unanimously.

Article 16

40. The CHAIRMAN pointed out that following the elimination of article 12, point (b) of article 16 should be deleted. He put article 16, as amended, to the vote.

Article 16 as modified was adopted unanimously.

Article 17

41. Mr. LIANG, Secretary to the Commission, said that draft paragraph 1 would be improved if altered to read:

“The present Convention shall be deposited with the Secretariat of the United Nations.”

42. Mr. LAUTERPACHT made a proposal to that effect.

That amendment to paragraph 1 and the paragraph, as amended, were adopted unanimously.

Paragraph 2 was adopted unanimously.

43. The CHAIRMAN said by those votes article 17 as a whole, as amended, had been adopted unanimously.

Article 18

44. The CHAIRMAN put article 18 to the vote.

Article 18 was adopted unanimously.

45. The CHAIRMAN said it was the intention of the Sub-Committee to submit draft final clauses to the draft Convention on the Reduction of Future Statelessness similar to those of the Convention on the Elimination of Future Statelessness. The Sub-Committee had, however, decided that the question of reservations to the second convention was outside its competence and could only be settled by the Commission itself.

46. Mr. LAUTERPACHT suggested that, having very rapidly disposed of the final clauses to the draft Convention on the Elimination of Future Statelessness, the Commission, notwithstanding its previous decision, might continue the study of the draft articles on the régime of the territorial sea.

47. The CHAIRMAN said there was no opposition to that proposal and ruled that the Commission would

spend two days in considering the articles relating to the régime of the territorial sea.

The meeting rose at 1.10 p.m.

272nd MEETING

Tuesday, 20 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. 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 territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (resumed from the 271st meeting)

CHAPTER III: RIGHT OF PASSAGE
(resumed from the 265th meeting)

Article 22: Charges to be levied upon foreign vessels (article 18 of A/CN.4/61)²

1. Mr. FRANÇOIS, Special Rapporteur, said the article was identical with article 7 of the report of the Second

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² Article 22 read as follows:

“1. No charge may be levied upon foreign vessels by reason only of their passage through the territorial sea.

Committee of the 1930 Codification Conference.³ He wished, however, to withdraw the last sentence of paragraph 2 providing for non-discrimination in the levying of charges, as it was impossible to treat all States in exactly the same manner.

2. Mr. ZOUREK pointed out that the withdrawal of the clause against discrimination was in direct violation of the principle of the equality of States. It might be argued that where special conventions had been concluded the clause would not apply; it was nevertheless important to stress that a general principle of international law was involved. The principle of equal treatment had been incorporated in many treaties and he therefore proposed that the last sentence of paragraph 2 should be retained and the article adopted as submitted.

3. Mr. SALAMANCA thought the article would be improved by the deletion of the sentence in question, for its presence would not prevent discrimination.

4. Mr. HSU said the sentence in question should be retained because otherwise the important principle of the freedom of innocent passage might suffer.

5. Mr. FRANÇOIS, Special Rapporteur, said that his proposal for deleting the last sentence should not be taken to mean that he favoured discrimination. The levying of charges would still be governed by the general principles of international law.

6. The CHAIRMAN put to the vote article 22 as modified in accordance with the Special Rapporteur's proposal.

Article 22 as modified was adopted by 11 votes to none, with 1 abstention.

7. Mr. ZOUREK said he had voted in favour on the understanding that the article would be interpreted in accordance with the principles of international law.

*Article 23 Arrest on board a foreign vessel
(article 19 of A/CN.4/61)⁴*

8. Mr. FRANÇOIS, Special Rapporteur, drew attention to the very limited scope of the article. It did not

attempt to resolve conflicts of jurisdiction between the coastal State and the flag State, but merely specified in what circumstances an arrest could be made by the coastal State on board a vessel passing through its territorial waters. In the case of a collision within the territorial sea the coastal State could order the vessel into one of its ports for the purpose of an inquiry, but was granted no jurisdiction to impose penalties.

9. The questions of criminal and civil jurisdiction had from the very beginning been omitted by the 1930 Codification Conference, while in 1952 a diplomatic conference held in Brussels had drawn up a convention on the subject of penal jurisdiction⁵ which was still being studied by Governments. He therefore considered it unwise to take up the question in the Regulation.

10. Other questions, however, were also involved. For example, was the coastal State entitled to remove from a vessel passing through its territorial waters persons who had allegedly committed offences in the territory of that State or against whom an extradition order had been issued? The preparatory committee of the 1930 Codification Conference had, in accordance with the principle of sovereignty, recognized that right,⁶ but the Plenary Conference had refused to admit it on the grounds that it restricted the freedom of passage; and had laid down that the coastal State could not remove persons from a foreign vessel unless the latter stopped in territorial waters.⁷ In his opinion, if the vessel was passing through the territorial waters, arrest by the coastal State should be subject to the provisions of paragraph 1.

11. Mr. LAUTERPACHT expressed surprise that the Special Rapporteur had not wished to deal in the draft regulation with the question of criminal jurisdiction in the territorial sea especially as he had dealt with it in detail in his sixth report on the régime of the high seas.⁸ If the Commission wished to deal with the question of criminal jurisdiction of the coastal State, it should do so in the report on the régime of the territorial sea and not in the report on the high seas.

12. Since the Brussels Conference of 1952 had drawn up a convention on the same subject, the Commission

"2. Charges may only be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination."

³ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal, 1930.V.16), p. 214.

⁴ Article 23 read as follows:

"1. A coastal State may not take any steps on board a foreign vessel passing through the territorial sea to arrest any person or to conduct any investigation by reason of any crime committed on board the vessel during its passage, save only in the following cases:

(a) If the consequences of the crime extend beyond the vessel; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been

requested by the captain of the vessel or by the consul of the country whose flag the vessel flies.

"2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign vessel lying in its territorial sea, or passing through the territorial sea after leaving the inland waters.

"3. The local authorities shall in all cases pay due regard to the interests of navigation when making an arrest on board a vessel."

⁵ See annex to document A/CN.4/69 in *Yearbook of the International Law Commission*, 1953, vol. II.

⁶ *Conference for the Codification of International Law, Bases of Discussion*, vol. II: Territorial Waters (League of Nations Publication, V. Legal, 1929.V.2), p. 86.

⁷ *Op. cit.* (supra, footnote 3), p. 215.

⁸ A/CN.4/79 in *Yearbook of the International Law Commission*, 1954, vol. II.

should consider the matter in the light of that convention. As a matter of principle, it was desirable that the codification of any particular subject should take into account and use to the best advantage the results of any multilateral convention on the subject. On the whole, however, there was no real conflict between the Special Rapporteur's draft and the convention drafted by the 1952 Conference, since article 4 of that convention left parties free to make all reservations with regard to collisions occurring in territorial waters, while the Special Rapporteur's draft was permissive in character and not mandatory. It was important to determine the relationship between the Commission's draft regulation and existing conventions.

13. Mr. CORDOVA was concerned about the interpretation of article 23 as a whole, particularly in so far as it related to the jurisdiction of the coastal State over crimes committed on board a vessel in the territorial waters. The Special Rapporteur only provided for arrest and inquiry in accordance with the provisions of paragraph 1. In his (Mr. Córdova's) opinion the coastal State should be granted the right of punishment to cover such cases as, for example, gun-running or the forging of money on board, or even gambling.

14. Mr. FRANÇOIS, Special Rapporteur, pointed out that all reference to judicial proceedings had been intentionally omitted from the article. The coastal State was clearly entitled by virtue of international law to enforce its anti-gambling laws on ships. That, however, was a matter outside the scope of the present regulation which only enumerated the cases in which arrest was possible. Furthermore, the reference in paragraph 1 (b) to disturbance of "The peace of the country" gave the coastal State a further possibility of taking measures to safeguard its interests.

15. In reply to Mr. Lauterpacht he said that judicial proceedings were governed by the general principles of international law or by the provisions of the 1952 Convention, but not by the Commission's regulations. He had mentioned the question of criminal jurisdiction in his report on the régime of the high seas and not in his report on the régime of the territorial sea, because the latter case always involved the jurisdiction of two States, and it was impossible to provide for all the contingencies which might arise in private international law. In his opinion all questions of private international law or international criminal law arising out of the right of passage should for the time being be omitted.

16. Mr. CORDOVA thought the draft somewhat unbalanced. If the Commission was engaged in codification it should codify both the rights of passing ships and the rights of the coastal State. If the Special Rapporteur accepted the principle that ships could be stopped for investigation there was no reason for refusing the coastal State the right to punish offenders on board.

17. Mr. LAUTERPACHT said that although he had not been entirely convinced by the Special Rapporteur's arguments, there was no substantial disagreement be-

tween the Special Rapporteur on the one hand and Mr. Córdova and himself on the other. The Commission could take up the question of criminal jurisdiction at some future date when the whole subject of the territorial sea was considered in greater detail.

18. Mr. PAL thought the intention of the Special Rapporteur had been to stress the principle of the freedom of passage through territorial waters. If that were the case, the Commission should express its opinion with regard to the jurisdiction of the coastal State over offences committed while the vessel was in territorial waters. If the vessel's presence in those waters in any way altered the legal status of the persons on board, the Commission should say so. The Commission should also specify if a vessel passing through the territorial sea after leaving the inland waters lost the immunity enjoyed by vessels merely passing through the territorial sea of the coastal State.

19. Mr. FRANÇOIS, Special Rapporteur, realized that the draft regulation was incomplete, but that was inevitable since no one document could cover every situation, particularly as many of the considerations to be taken into account were of a highly technical nature. He agreed in principle that provisions relating to collisions and determining jurisdiction should be included, but if criminal liability was dealt with there was no reason for omitting civil liability. He had drafted the regulation on the lines adopted by the 1930 Codification Conference.⁹ If the Commission wished to have a more detailed draft, such a draft could be prepared, but in that case the Commission would not be able to complete its study in one or even two sessions and the General Assembly's consideration of the questions relating to the territorial and high seas would be postponed indefinitely.

20. The CHAIRMAN pointed out that the commission of criminal jurisdiction from the draft regulation was not a serious matter. The Commission had already adopted the principle of the coastal State's sovereignty in the territorial sea. The criminal jurisdiction of the coastal State in cases of collision was, he thought, implied in article 23 and the Special Rapporteur had therefore been justified in omitting any specific reference to it. He, personally, would have no difficulty in agreeing to the draft as submitted by the Special Rapporteur.

21. Mr. HSU suggested that perhaps the Special Rapporteur could make provision in article 23 for the penal jurisdiction of the coastal States by commencing the article with a phrase along the following lines: "Without prejudice to the penal jurisdiction of the coastal State..."

22. Mr. LAUTERPACHT criticized the English text of article 23, paragraph 1 (b). The terms "peace" and "good order" were practically synonymous and

⁹ *Op. cit.* (*supra*, footnote 3), pp. 214-215.

there did not seem to be any valid reason for mentioning both terms.

23. Mr. FRANÇOIS, Special Rapporteur, agreed to insert in the comment to article 23 a reservation concerning penal jurisdiction of the coastal State in its territorial waters.

24. The CHAIRMAN put to the vote article 23, paragraph 1, subject to drafting changes.

Article 23, paragraph 1 was adopted by 9 votes to none, with 4 abstentions.

25. The CHAIRMAN put to the vote article 23, paragraphs 2 and 3.

Paragraph 2 was adopted by 9 votes to none, with 4 abstentions.

Paragraph 3 was adopted by 10 votes to none, with 3 abstentions.

Article 23 as a whole was adopted by 8 votes to none, with 5 abstentions.

Article 24: arrest of vessels for the purpose of exercising civil jurisdiction (article 20 of A/CN.4./61)¹⁰

26. Mr. LAUTERPACHT said that in May 1952 the diplomatic conference held in Brussels had also adopted a convention relating to the arrest of sea-going ships for the purposes of civil jurisdiction.¹¹ That convention only allowed the arrest of a ship in respect of certain specified cases. Article 24 as drafted by the Special Rapporteur, however, did not specify the cases; it stated in general terms that arrest was permitted "in respect of obligations or liabilities incurred by the vessel itself in the course of or for the purpose of its voyage through the waters of the coastal State." Probably the difference between the two texts was not of very great practical importance. It was, however, desirable that the articles to be adopted by the Commission should be in as complete accord as possible with an existing international convention,

the provisions of which had been the result of mature consideration by leading experts.

27. Mr. FRANÇOIS, Special Rapporteur, agreed to include in the comment a reference to the provisions of the 1952 Convention, and a statement to the effect that the draft regulation would eventually be brought into line with that convention.

28. In reply to a query by Mr. Zourek, he explained that article 24, paragraph 2, concerned in particular the case of a foreign vessel which had left a port as well as the inland waters of the coastal State and which the coastal authorities were anxious to stop for urgent reasons.

29. Faris Bey el-KHOURI said that provision should be made for civil proceedings in respect of liabilities incurred by the owners of the vessel, and not merely in respect of liabilities incurred by the vessel itself.

30. Mr. LAUTERPACHT pointed out that the 1952 Convention permitted the arrest of a vessel for the purpose of civil proceedings in respect of obligations or liabilities incurred by that vessel on a previous voyage or else by a sister ship of the vessel concerned. Article 24 was indeed more restrictive than the 1952 Convention in that it only permitted arrest for the purpose of civil proceedings in respect of obligations or liabilities incurred by the vessel itself in the course of the particular voyage.

31. Mr. PAL said that the arrest of a ship to satisfy liabilities of its owners could not be permitted, for otherwise the rights of charterers would be prejudiced. The only liabilities which could warrant arrest were those incurred by the vessel itself during the particular voyage.

32. Mr. FRANÇOIS, Special Rapporteur, said that the only liabilities normally incurred by the vessel itself in the course or for the purpose of its voyage through the waters of the coastal State were in practice pilot and harbour dues, salvage dues (if any), and possible liability in respect of a collision. It was only such obligations which could justify the arrest of a vessel exercising its right of innocent passage.

33. It was important to bear in mind that the restriction of the right of arrest only applied to vessels which were merely passing through the territorial sea. The right to arrest or seize a vessel in connexion with civil proceedings which called at a port was much broader.

34. The CHAIRMAN put article 24 to the vote.

Article 24, paragraph 1, was adopted by 10 votes to none, with 3 abstentions.

Paragraph 2 was adopted by 9 votes to none, with 4 abstentions.

Article 24 as a whole was adopted by 7 votes to none, with 5 abstentions.

¹⁰ Article 24 read as follows:

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

"2. The above provisions are without prejudice to the right of the coastal State in accordance with its laws to levy execution against, or to arrest, a foreign vessel in the inland waters of the State or lying in the territorial sea, or passing through the territorial sea after leaving the inland waters of the State, for the purpose of any civil proceedings."

¹¹ Cmd. 8954, p. 18.

*Article 25: Vessels employed in a governmental and non-commercial service (article 21 of A/CN.4/6)*¹²

35. Mr. FRANÇOIS, Special Rapporteur, said that the purpose of article 25 was to treat state-owned vessels in the same manner as private vessels if they were operated for commercial purposes. That rule had been adopted in the Brussels Convention of 1926 for the unification of certain rules relating to the immunity of state-owned vessels.¹³

36. Mr. LAUTERPACHT said that the provision in question was a progressive step. It agreed with the most recent tendencies in international law and practice. He would refer to the most recent official pronouncements of the United States Government, which reversed a previous tendency to grant immunity to commercial vessels owned by foreign States. He proposed, for the sake of clarity, that the article should be drafted more simply, to provide that government vessels operated for commercial purposes were treated as private vessels.

37. Mr. CORDOVA said that it was right and proper that a State which carried on a shipping business and conducted itself like an ordinary shipping company should not be treated differently from any other shipowner. It was quite inadmissible for a State to compete with private traders while claiming the privilege of immunity from the jurisdiction of the ordinary courts.

38. Mr. FRANÇOIS, Special Rapporteur, in reply to a question by Mr. Lauterpacht, said that article 25, like all the other articles on the territorial sea, only applied in peace time.

39. Mr. ZOUREK said that the rule of international law was that state-owned vessels were immune from the jurisdiction of the ordinary courts. Conventions such as the Brussels Convention of 1926 were instruments whereby States voluntarily waived that privilege.

40. Mr. FRANÇOIS, Special Rapporteur, said that the general trend of modern legal opinion was consistent with the view embodied in article 25 as he had drafted it.

41. The CHAIRMAN said that the Special Rapporteur would redraft the article in accordance with Mr. Lauterpacht's proposal before it was submitted for final approval by the Commission.

¹² Article 25 read as follows:

"The provisions of articles 23 and 24 are without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service, and of the persons on board such vessels."

¹³ Hudson, *International Legislation*, vol. III, p. 1837.

*Article 26: Passage [of warships] (article 22 of document A/CN.4/61)*¹⁴

42. Mr. FRANÇOIS, Special Rapporteur, said that the first three paragraphs of article 26 were identical with article 12 of the report of the Codification Conference of 1930. Paragraph 4 had been added to take into account the ruling of the International Court of Justice in the Corfu Channel case.¹⁵

43. Mr. SALAMANCA said that the article should contain some reference to the overriding force of the United Nations Charter, by virtue of its Article 103. For example if, under Article 43 of the Charter or otherwise, the Security Council ordered passage to be stopped or free passage to be granted, nothing should be allowed to interfere with such an order.

44. Mr. FRANÇOIS, Special Rapporteur, in reply to a suggestion by Mr. Lauterpacht, agreed to insert in the comment a statement to the effect that the words "under no pretext" in paragraph 4, however categorical, were without prejudice to Article 103 of the United Nations Charter.

45. Mr. CORDOVA said that he would propose a provision empowering the coastal State to stop passage as a temporary measure in the case of warships. On the lines of a clause he had proposed in respect of commercial vessels.¹⁶ The purpose of such a provision was to enable a State to remain neutral and avoid being drawn into complications owing to the presence of belligerent ships in its waters.

46. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Cordova's proposal was far too sweeping. With regard to straits, paragraph 4 of article 26 was a codification of existing international law which guaranteed freedom of passage through straits to a warship proceeding from one part of the high seas to another.

47. Mr. ZOUREK said that article 26 was not consistent with existing international law. He quoted a number of authorities who agreed with Gidel in considering the passage of foreign warships through the territorial sea as a concession on the part of the coastal State. He proposed that paragraph 1 of article 26 should be replaced by the following:

"The passage of foreign warships through the territorial waters shall be conditional on the consent

¹⁴ Article 26 read as follows:

"1. As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorization or notification.

"2. The coastal State has the right to regulate the conditions of such passage.

"3. Submarines shall navigate on the surface.

"4. Under no pretext, however, may there be any interference with the passage of warships through straits used for international navigation between two parts of the high seas."

¹⁵ *I.C.J. Reports 1949*, p. 4.

¹⁶ *Idem supra*, 263rd meeting, para. 26 and 265th meeting, para. 14.

of the coastal State. The right of passage shall not, in the absence of special authorization, imply the right to stop or to anchor in territorial waters.”

48. He further proposed that paragraph 4 of the same article should be replaced by the following :

“In time of peace, innocent passage shall not be obstructed, so far as warships are concerned, in international straits which form an indispensable shipping lane between two parts of the high seas.”

49. Mr. LAUTERPACHT said that all the authorities quoted by Mr. Zourek referred to the passage of warships through the territorial sea in general, as distinct from straits used as international shipping lanes between two parts of the high seas. Such straits were open to the passage of warships, as was generally accepted by eminent writers and as had been confirmed by the International Court of Justice. With regard to passage through the territorial sea, the views of writers were divided. Those selected by Mr. Zourek supported his case ; but there were others who affirmed the right of innocent passage. Generally speaking, whether by usage or custom, that was also the tendency of international practice.

50. So far as passage through territorial waters generally was concerned, the language of paragraph 1 (“as a general rule, a coastal State will not forbid the passage . . .”) should satisfy Mr. Córdova.

51. Mr. FRANÇOIS, Special Rapporteur, said that the Preparatory Committee of the 1930 Conference had received replies from governments¹⁷ which expressed the unanimous view that the right of passage of warships through territorial waters was generally recognized.

52. Unless Mr. Zourek was able to show in what manner international law could have changed so materially between 1930 and 1954, it was patent that the right of passage for warships was and had always been part of positive international law.

The meeting rose at 1 p.m.

¹⁷ *Op. cit.* (*supra*, footnote 6), pp. 65-75.

273rd MEETING

Wednesday, 21 July 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. 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 territorial sea (item 2 of the agenda) (A/CN.4/53, A/CN.4/61 and Add. 1, A/CN.4/71 and Add. 1 and 2, A/CN.4/77)¹ (*continued*)

CHAPTER III : RIGHT OF PASSAGE (*continued*)

Article 26 : Passage [of warships]
(article 22 of A/CN.4/61) (*continued*)²

1. Mr. LAUTERPACHT said he wished to make his position clear concerning Mr. Zourek's proposed amendment to paragraph 1 of the article.³ In Mr. Zourek's view, the international law in force did not acknowledge the right of passage of warships in the territorial sea of a foreign State ; that view was not accurate. It was true that the right of passage was not granted in the same unqualified terms for warships as it was for merchant ships. But international custom and usage in fact tended to acknowledge that right. That was the view expressed in a passage in which the controversial character of that right, as far as writers were concerned, was fully acknowledged in Oppenheim's *International Law*, vol. I, 7th edition, paragraph 188. It was also stated in the same textbook that Governments, in their replies to the questionnaire circulated in connexion with the Codification

¹ *Vide supra*, 252nd meeting, para. 54 and footnotes.

² *Vide supra*, 272nd meeting, paras. 42-52.

³ *Ibid.*, para. 47.

⁴ *Conference for the Codification of International Law, Bases of Discussion, vol. II: Territorial Waters* (League of Nations publication, V. Legal, 1929.V.2), pp. 65-75.

Conference at The Hague in 1930, had not made any marked distinction between the treatment of warships and that of merchant ships in the matter of passage through the territorial waters.

2. The words "As a general rule", which were the introductory words of paragraph 1, gave the coastal State sufficient latitude. The Commission might perhaps redraft the provision along the following lines:

(a) Warships were entitled to right of passage as authorized by international usage.

(b) Warships enjoyed unrestricted right of passage in those parts of the territorial sea which constituted international shipping lanes.

(c) Warships enjoyed unrestricted right of passage in straits forming part of international shipping lanes.

3. Mr. CORDOVA pointed out that the main purpose of the régime of the territorial sea was to safeguard the security of the coastal State. In article 20⁵ the Commission had stated that in certain case the coastal State had the right to forbid the passage of merchant ships through the territorial sea. It would not be logical to refuse them the same rights in respect of warships.

4. Mr. SCELLE said the negative phraseology of paragraph 1 was unfortunate. Moreover, the words "As a general rule" appeared too vague. He therefore proposed the adoption of the following draft: "Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification".

5. Freedom of navigation in the high seas was only possible if ships were able to call at ports.

6. Mr. LIANG, Secretary to the Commission, pointed out that when Oppenheim wrote, the world was enjoying an era of genuine peace; the whole question of warships visiting foreign ports came within the scope of international comity. The situation had unfortunately changed and it was understandable that States should wish to take greater precautions. The words "As a general rule" therefore seemed to him fully justified.

7. The CHAIRMAN said he preferred the Special Rapporteur's draft both to Mr. Lauterpacht's proposal and also to Mr. Scelle's. The Special Rapporteur's draft was much more in keeping with the principle, recognized both by custom and by jurisprudence, that the passage of foreign warships through the territorial sea was a concession rather than a right in the strict sense of the word.

8. Mr. LAUTERPACHT pointed out that none of the States which had replied to the 1930 questionnaire had denied the right of foreign warships to pass through their territorial sea.

9. Mr. ZOUREK replied that many of those States had pointed out that they considered themselves fully

authorized to regulate the conditions of such passage, a statement which implied the possibility of passage being forbidden in certain cases. Moreover, only some twenty States out of the approximate total of sixty maritime Powers had replied to the questionnaire.⁶

10. Mr. PAL agreed with Mr. Córdova that it would be sufficient to state that the rights of warships in that respect were not to exceed those of merchant ships.

11. Mr. FRANÇOIS, Special Rapporteur, considered the second sentence of Mr. Zourek's amendment to paragraph 1 superfluous, in view of the fact that article 18, paragraph 3,⁷ applied to all the articles of chapter III, including article 26.

12. The first sentence of Mr. Zourek's amendment proposed a rule which was absolutely contrary to international law.

13. Mr. ZOUREK said that his draft provision would not in any way prevent a coastal State giving its consent in advance by means of a regulation regarding territorial waters which would allow foreign warships to enter those waters without asking for a specific prior authorization. Moreover, article 18, paragraph 3, which the Special Rapporteur had mentioned, contained a reservation concerning cases in which stopping and anchoring were incidental to ordinary navigation. Such provisions were justifiable for merchant ships but they were unnecessary in the case of warships.

14. Mr. AMADO considered that the Commission should adhere to existing customary law, under which warships were required to request the authorization of the coastal State before they could enter its territorial waters.

15. Faris Bey el-KHOURI proposed that paragraph 1 of article 26 should be deleted. It was by no means certain that the provision it embodied was a generally accepted rule of international law. It would also be preferable to redraft the other provisions of the article, so as to empower the coastal State to forbid the entry of foreign warships into its territorial waters except when those waters were part of an international shipping lane.

16. Mr. LAUTERPACHT said that if the second sentence of Mr. Zourek's amendments to paragraph 1 also applied to the incidents of navigation dealt with in article 18, paragraph 3, it was absolutely unacceptable.

17. Mr. FRANÇOIS, Special Rapporteur, accepted Mr. Scelle's draft of paragraph 1.

18. The CHAIRMAN proposed, in his own name, the draft of article 26, paragraph 1, which the Special Rapporteur had just withdrawn.

19. The CHAIRMAN thereafter put the various proposals to the vote.

⁶ *Vide supra*, para. 1.

⁷ *Vide supra*, 262nd meeting, footnote 8 and para. 71.

⁵ *Vide supra*, 265th meeting, para. 14.

Faris Bey El-Khourî's proposal that paragraph 1 be deleted was rejected by 6 votes to 3, with 3 abstentions.

The first sentence of Mr. Zourek's amendment to paragraph 1 was rejected by 6 votes to 3, with 4 abstentions.

The second sentence of Mr. Zourek's amendment to paragraph 1 was rejected by 6 votes to 4, with 2 abstentions.

Mr. Scelle's draft paragraph 1, accepted by the Special Rapporteur, was adopted by 5 votes to 4, with 4 abstentions.

20. The CHAIRMAN said that in view of the foregoing vote it was no longer necessary to put to the vote the Special Rapporteur's original draft of paragraph 1 which he had put forward in his own name.

21. Mr. CORDOVA proposed that the following phrase be inserted at the end of article 26, paragraph 2, after the word "passage": "Subject to the exercise by the coastal State of the right to close its territorial sea on the grounds mentioned in article 20."

22. Mr. FRANÇOIS, Special Rapporteur, said that Mr. Córdova's draft was couched in more restrictive terms than his own, but he was prepared to accept it as a compromise solution.

23. The CHAIRMAN put paragraph 2, as amended by Mr. Córdova, in agreement with the Special Rapporteur, to the vote.

Article 26, paragraph 2 as amended was adopted by 10 votes to none, with 3 abstentions.

24. The CHAIRMAN put paragraph 3 of article 26 to the vote.

Article 26, paragraph 3 was adopted by 10 votes to none, with 3 abstentions.

25. Mr. CORDOVA proposed that paragraph 2 should be placed at the end of article 26. The rule laid down in that paragraph would thus apply to the whole article. He pointed out in that connexion that a State occupying both shores of a strait having a width of less than twice the breadth of the territorial sea had always the right to close that strait.

26. Mr. SCELLE said that such a reversal of the order of the paragraphs would be tantamount to transforming an exception into the general rule. In fact, the right of passage constituted the rule, and the coastal State's right to regulate the conditions of passage constituted an exception.

27. Mr. LAUTERPACHT pointed out that straits joining two parts of the high seas should always remain free.

28. Mr. FRANÇOIS, Special Rapporteur, said that the rule mentioned by Mr. Lauterpacht had been explicitly recognized by the International Court of Justice in its

decision in the Corfu Channel case.⁸ Indeed that rule has always been acknowledged by international usage. Mr. Córdova's proposal amounted to a retrograde step in international law and should not be adopted.

29. Mr. ZOUREK thought the sequence of the paragraphs proposed by Mr. Córdova a very logical one which the Commission should adopt.

30. Mr. LIANG, Secretary to the Commission, recalled that article 21 already imposed certain obligations on all foreign vessels exercising the right of passage.⁹ Article 26, paragraph 2, was therefore to some extent a corollary of article 21 and it would be enough to refer to that article. It could be maintained that the coastal State exercised more extensive rights in the case of the passage of warships; nevertheless he thought article 26 should emphasize the right of passage of those ships rather than the restrictions of that right by the coastal State.

31. The CHAIRMAN said that before determining the order of the paragraphs the Commission would study paragraph 4 as drafted by the Special Rapporteur.

32. Mr. CORDOVA proposed that the words "Under no pretext" in paragraph 4 should be deleted.

33. Mr. ZOUREK said that paragraph 4 claimed to lay down rules for the passage of warships which were not in conformity with international law. The draft was based only on the decision of the International Court in the Corfu Channel case; it was wrong to base a general rule on a decision in a particular and very controversial case, and especially to apply the rule formulated by the Court to all straits, even those with a single coastal State.

34. Accordingly he proposed that paragraph 4 should be replaced by the following draft:

"In time of peace, innocent passage shall not be obstructed so far as warships are concerned, in international straits, which form an indispensable shipping lane between two parts of the high seas."

35. Mr. LAUTERPACHT pointed out that the International Court of Justice had carefully weighed the terms of its judgement in the Corfu Channel case and that that judgement, which had been drafted in very broad terms, had stated that the coastal State was not allowed to close straits even though passage through them was not indispensable to international navigation; it was enough if those straits were useful to international navigation.

36. Mr. ZOUREK recalled that the most important straits, such as the Magellan Strait, the Bosphorus and the Dardanelles, had special régimes.

37. The CHAIRMAN put the various proposals to the vote.

⁸ *I.C.J. Reports 1949*, p. 4.

⁹ *Vide supra*, 265th meeting, paras. 15-69.

Mr. Zourek's amendment was rejected by 8 votes to 3, with 2 abstentions.

Mr. Córdova's proposal that the words "Under no pretext" in paragraph 4 should be deleted was adopted by 9 votes to none, with 4 abstentions.

Article 26, paragraph 4, as amended, was adopted by 8 votes to 3, with 2 abstentions.

Mr. Cordova's proposal that the order of paragraphs 2 and 4 should be changed was rejected by 7 votes to 2, with 4 abstentions.

Article 26 as a whole was adopted by 7 votes to 3, with 3 abstentions, in the following form:

- "1. Save in exceptional circumstances, warships shall have the right of innocent passage through the territorial sea without previous authorization or notification.
- "2. The coastal State has the right to regulate the conditions of such passage. It may prohibit such passage in the circumstances described in article 20.
- "3. Submarines shall navigate on the surface.
- "4. There may be no interference with the passage of warships through straits used for international navigation between two parts of the high seas."

38. Mr. ZOUREK said he had voted against article 26 because, contrary to state practice and existing international law, it applied the same rules to warships and merchant vessels, and appeared to regulate the passage of warships through straits in a way not in conformity with international law.

*Article 27: Non-observance of the regulations
(article 23 of A/CN.4/61)¹⁰*

39. Mr. ZOUREK proposed that the following sentence should be inserted before the Special Rapporteur's draft text:

"Warships shall be bound when passing through the territorial sea to respect the laws and regulations of the coastal State."

40. Indeed, he found it logical, since article 27 related to violations and possible penalties, to specify the rules to be obeyed by foreign warships.

41. Mr. FRANÇOIS, Special Rapporteur, thought the amendment perfectly acceptable. The sentence proposed by Mr. Zourek could be inserted as paragraph 1 of article 27 and the sentence in the original draft of that article would become paragraph 2. Nevertheless, perhaps a better formulation would be "the

laws and regulations of the coastal State relating to navigation in the territorial sea".

42. Mr. ZOUREK thought the formulation did not go far enough; the ships had also to comply with the regulations relating to health and other questions which were not exclusively concerned with the territorial sea.

43. Mr. FRANÇOIS, Special Rapporteur, said it would have to be stated in the comment that the provisions of article 27 in no way deprived warships of the benefit of extra-territoriality.

44. The CHAIRMAN put to the vote paragraph 1 of article 27 which consisted of the new sentence proposed by Mr. Zourek.

The paragraph was adopted by 10 votes to none, with 1 abstention.

45. The CHAIRMAN put to the vote article 27 as a whole, in the form of the two paragraphs which had been adopted.

Article 27, as amended, was adopted by 10 votes to none, with 1 abstention.

Procedure to be adopted with regard to the draft articles relating to the territorial sea

46. The CHAIRMAN noted that with the sole exception of the articles relating to the breadth of the territorial sea and the questions connected with those articles, the Commission had completed its study of the draft regulation on the territorial sea earlier than expected. The Commission might therefore reconsider what action should be taken with respect to the draft articles it had adopted.

47. Mr. FRANÇOIS, Special Rapporteur, proposed that the draft articles should be circulated to Governments for their consideration, with the request that in view of the differences of opinion which had arisen in the Commission concerning the breadth of the territorial sea, the Commission would be glad to know the views of the governments on that subject.

48. Mr. LAUTERPACHT proposed that the various proposals made concerning that question during debate should also be communicated to governments.

49. Mr. FRANÇOIS, Special Rapporteur, agreed to Mr. Lauterpacht's proposal.

50. Mr. HSU said he would communicate to the Special Rapporteur the text of a new draft proposal that article 4 on the breadth of the territorial sea as submitted by the Special Rapporteur should be adopted subject to the deletion of paragraph 2(b).

51. The CHAIRMAN put to the vote the proposal made by Mr. Lauterpacht and agreed to by the Special Rapporteur to the effect that the articles relating to the territorial sea which had been adopted by the Commission should be submitted to Governments together with the various possible solutions of the question of the

¹⁰ Article 27 read as follows:

"If a foreign warship passing through the territorial sea does not comply with the regulations of the coastal State and disregards any request for compliance which may be brought to its notice, the coastal State may require the warship to leave the territorial sea."

breadth of the territorial sea proposed by members of the Commission, and that Governments should be asked to comment.

The proposal was adopted by 11 votes to none, with 2 abstentions.

Nationality, including statelessness (item 5 of the agenda)
(A/2456) (resumed from the 271st meeting)

REDRAFT BY DRAFTING COMMITTEE OF THE DRAFT
CONVENTION ON THE ELIMINATION OF FUTURE STATE-
LESSNESS AND ON THE REDUCTION OF FUTURE
STATELESSNESS¹¹

52. The CHAIRMAN invited the Commission to consider the draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future Statelessness, as redrafted by the Drafting Committee.

Preamble

53. Mr. CORDOVA, Special Rapporteur, pointed out that the Drafting Committee had adopted for both drafts the same preambles as those adopted by the Commission in 1953 (A/2456).

Article 1

54. Mr. CORDOVA, Special Rapporteur, said that in the first article of the draft Convention on the Elimination of Future Statelessness, which was identical with article 1, paragraph 1, of the Convention on the Reduction of Future Statelessness, the Drafting Committee had replaced the word "child" by the word "person".¹²

55. The CHAIRMAN put this amendment to the vote.

The amendment was approved by the Commission.

The meeting rose at 1.10 p.m.

¹¹ See paragraph 162 of the Commission's report on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456). Also in *Yearbook of the International Law Commission, 1953*, vol. II.

¹² *Vide infra*, 274th meeting, para. 8.

274th MEETING

Friday, 23 July 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

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

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

Time and place of the seventh session

1. Mr. LIANG, Secretary of the Commission, informed the Commission that a reply had been received from the United Nations Headquarters in New York concerning the Commission's preliminary decision to hold its seventh session in Geneva.¹ The Secretary-General, for budgetary and other reasons, favoured the Commission's seventh session being held in New York for a period of eight, and not ten, weeks, as suggested by the Commission. If, however, the Commission confirmed its preliminary decision in favour of Geneva it was suggested that the seventh session open on 2 May 1955, and last eight weeks so as to avoid overlapping with the Economic and Social Council and its functional commissions.

2. The CHAIRMAN thought the Commission should maintain its decision to meet in Geneva, but in view

¹ *Vide supra*, 256th meeting, para. 2.

of the considerations put forward, should agree to reduce the duration of the session from ten to eight weeks, whilst stressing the inconveniences involved. The Commission might wish to give him a mandate to endeavour, during the General Assembly, to obtain a modification of the clause in its statute, which laid down New York as the Commission's headquarters; that would make it possible to regularize the holding of meetings in Geneva.

3. Mr. LAUTERPACHT agreed with the Chairman's proposal but thought that he should also be granted authority to have the date of the next session altered. If the Commission were to meet in April or May, several of its members who were active professors would be unable to attend. He proposed to mention that aspect of the question to the Government of the United Kingdom, and felt that if the General Assembly consented to alter the opening date of the session, the Chairman should be empowered to agree in the name of the Commission.

4. Mr. FRANÇOIS pointed out that the next session should not be allowed to conflict with the meetings of the Academy of International Law at The Hague in August, at any rate not with the second part of those meetings. The session would accordingly have to close by 1 August.

5. Mr. AMADO said the Commission might be compelled to agree to a session of eight instead of ten weeks, but it should not accept *a priori* the principle of the duration of its sessions being reduced.

6. The CHAIRMAN gathered that the Commission gave him authority at the General Assembly to press for the transfer of the main meeting place of the Commission from New York to Geneva; he would also transmit the Commission's wish that its seventh session should last ten or eleven weeks beginning after May and taking place mainly in June and July. If compelled to accept a session of eight weeks he would stress the difficulties such a decision involved for the Commission.

Nationality, including statelessness (item 5 of the agenda)
(A/2456) (continued)

REDRAFT BY THE DRAFTING COMMITTEE OF THE DRAFT CONVENTIONS ON THE ELIMINATION OF FUTURE STATELESSNESS AND ON THE REDUCTION OF FUTURE STATELESSNESS (continued)

7. The CHAIRMAN invited the Commission to continue the consideration of the draft Conventions on the Elimination and the Reduction of Future Statelessness as redrafted by the Drafting Committee.

Article 1 (continued)

8. The CHAIRMAN submitted article 1 of the elimination convention (article 1, paragraph 1, of the reduction convention), drafted as follows:

"A person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory he is resident."

Article 1 of the elimination convention and article 1, paragraph 1 of the reduction convention, as thus drafted, were adopted by 8 votes to none, with 3 abstentions.

9. The CHAIRMAN submitted article 1, paragraph 2, of the reduction convention, as redrafted:

"The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen years and on the further condition that on attaining that age he does not effectively opt for another nationality."

It had not been the intention of the Drafting Committee to add any subsidiary condition for the preservation of nationality by the person in question. Accordingly, he proposed that in the last phrase of the paragraph the word "further" should be deleted. He also proposed that the word "effectively" should be deleted, and that the words "and acquire" should be inserted after the words "opt for". The latter addition was in conformity with article 6, paragraph 1, of the Commission's original (1953) draft² which laid down that renunciation should not result in loss of nationality unless the person renouncing it had or acquired another nationality.

10. Mr. CORDOVA, Special Rapporteur, pointed out that the proposed change was also in conformity with the spirit of article 6, paragraph 2.

11. The CHAIRMAN put to the vote the proposal that the word "further" in the last phrase of article 1, paragraph 2, of the reduction convention, as redrafted, should be deleted.

The proposal was adopted by 6 votes to 1, with 2 abstentions.

12. The CHAIRMAN put to the vote the proposal that in the last phrase of article 1, paragraph 2, of the reduction convention, as redrafted, the word "effectively" should be deleted and the words: "and acquire" inserted after the words: "opt for".

The proposal was adopted by 10 votes to none, with 1 abstention.

13. Mr. ZOUREK said that he had not attended the meetings at which those draft articles had been considered; he maintained, however, the attitude he had outlined at the Commission's fifth session.

14. Mr. CORDOVA, Special Rapporteur, said with regard to article 1, paragraph 3, of the reduction

² The Commission's original (1953) draft is reproduced in paragraph 162 of the report of the Commission on its fifth session, *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*. Also in *Yearbook of the International Law Commission, 1953*, vol. II. Article 6 corresponds to article 7 of the Drafting Committee's redraft; *vide infra*, para. 33.

convention, that in the Commission's original (1953) draft³ the first part of the paragraph had referred to all the conditions envisaged in paragraph 2. That had been a mistake since only non-compliance with the condition of residence would make the person stateless, and the introductory phrase of the paragraph had accordingly been modified.

15. He recalled that the insertion of the phrase: "if such parent has the nationality of one of the parties," and the addition of the sentence: "Such party make the acquisition of its nationality dependent on the person having been normally resident in its territory," had been decided by the Commission itself.⁴

16. The last sentence of the paragraph dealt with the possibility of granting priority to the nationality of the mother in the case of a child being born out of wedlock.

17. Article 1, paragraph 3, of the reduction convention, as redrafted by the Drafting Committee, therefore read:

"If in consequence of the operation of paragraph 2, a person on attaining the age of eighteen years would become stateless, he shall acquire the nationality of one of his parents, if such parent has the nationality of one of the Parties. Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory. The nationality of the father shall prevail over that of the mother unless in the case of a child born out of wedlock, the national legislation of the mother grants her nationality to the child."

18. The CHAIRMAN put to the vote article 1, paragraph 3, of the reduction convention, with the exception of the last sentence beginning with the words: "The nationality of the father..."

Article 1, paragraph 3, of the reduction convention, as put to the vote by the Chairman, was adopted by 8 votes to none, with 3 abstentions.

19. The CHAIRMAN pointed out that in the last sentence of the paragraph the word: "legislation" should be altered to read: "law". On the other hand, inasmuch as the last sentence raised the question of dual nationality, the Drafting Committee had contemplated avoiding that aspect of the problem and omitting the last part of the paragraph beginning with the words: "unless, in the case of a child..." The final sentence of the paragraph would then be identical with the last sentence of article 1, paragraph 3, of the original (1953) draft convention.⁵ He proposed that the last sentence of the paragraph should read: "The nationality of the father shall prevail over that of the mother", and that the words "unless... to the child" should be omitted.

³ *Ibid.*

⁴ *Vide supra*, 250th meeting, paras. 65-77.

⁵ *Vide supra*, footnote 2.

The proposal that the passage "unless... to the child" should be deleted, was adopted by 9 votes to none, with 2 abstentions.

20. The CHAIRMAN put to the vote article 1, paragraph 3, as modified.

Article 1, paragraph 3, of the reduction convention, as redrafted by the Drafting Committee and further modified by the Commission, was adopted by 10 votes to none, with 2 abstentions.

Article 2

21. The CHAIRMAN pointed out that the Drafting Committee had merely altered the words: "its" and "it" to "his" and "he". He put the article to the vote in its modified form:

"For the purpose of article 1, a foundling, so long as his place of birth is unknown, shall be presumed to have been born of the territory of the Party in which he is found."

Article 2 of both conventions, as modified, was adopted unanimously.

Article 3

22. The CHAIRMAN put article 3, which was identical with article 3 of the 1951 draft, to the vote.⁶

Article 3 of both conventions was adopted unanimously.

Article 4

23. Mr. CORDOVA, Special Rapporteur, said the Drafting Committee⁷ had altered the introductory sentence of the article and inserted the phrase "if he would otherwise be stateless", as the Commission should not impose on the person the nationality of one of his parents unless he became stateless.

24. The CHAIRMAN recalled that article 1, paragraph 3, of the reduction convention also covered the question of a person who acquired the nationality of one of his parents, and in that article the Commission had included a residence qualification. He suggested that a similar qualification should be included in article 4.

⁶ Article 3 read:

"For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered."

⁷ Article 4, as drafted by the Drafting Committee, read in both conventions:

"If a child is not born in the territory of a State which is a Party to this convention, he shall, if he would otherwise be stateless, acquire the nationality of the Party of which one of his parents is a national. The nationality of the father shall prevail over that of the mother unless, in the case of a child born out of wedlock, the national legislation of the mother grants her nationality to the child."

25. Furthermore, the last part of the article, which was identical with the last phrase of article 1, paragraph 3, of the reduction convention, should be modified in accordance with the Commission's previous decision and the last part of the paragraph beginning with the words: "unless, in the case of a child..." deleted.

26. Mr. LAUTERPACHT proposed the shorter form "if otherwise stateless" for the longer phrase inserted by the Drafting Committee.

27. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the words: "if otherwise stateless", should be inserted in the first phrase of article 4 of both conventions.

The proposal was adopted by 10 votes to none, with 1 abstention.

28. The CHAIRMAN put to the vote the proposal that the following residence clause should be inserted in the draft convention on the reduction of future statelessness: "Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory."

The proposal was adopted by 11 votes to none, with 1 abstention.

29. The CHAIRMAN put to the vote the proposal that the last part of article 4 of both conventions, beginning with the words: "unless, in the case of a child..." should be deleted.

The proposal was adopted by 10 votes to none, with 2 abstentions.

30. The CHAIRMAN read out the text of article 4 of the reduction convention as amended:

"If a child is not born in the territory of a State which is a Party to this convention, he shall, if otherwise stateless, acquire the nationality of the Party of which one of his parents is a national. Such Party may make the acquisition of its nationality dependent on the person having been normally resident in its territory. The nationality of the father shall prevail over that of the mother."

This text was agreed to.

Article 5 (article 5, paragraph 1, of the 1953 draft)

31. The CHAIRMAN put to the vote article 5 of both conventions, which was identical with paragraph 1 of article 5 of the 1953 draft.⁸

Article 5 of both conventions consisting of paragraph 1 only of the original draft article 5 was adopted.

⁸ Article 5 as submitted by the Drafting Committee read in both conventions:

"If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon acquisition of another nationality."

Article 6 (article 5, paragraph 2, of the 1953 draft)

32. The CHAIRMAN said article 6 as submitted by the Drafting Committee was now identical with article 5, paragraph 2 of the original draft of both conventions.⁹ He put article 6 to the vote.

Article 6 of both conventions as submitted by the Drafting Committee was adopted.

Article 7 (article 6 of the 1953 draft)

33. The CHAIRMAN said the minor alterations of style in paragraph 2 had been made; otherwise, paragraphs 1 and 2 of the article were identical with paragraphs 1 and 2 of the original (1953) draft of article 6. Paragraph 3, on the other hand, had been revised as far as the reduction convention was concerned.

34. He put the Drafting Committee's text of article 7, paragraph 1, for both conventions to the vote.¹⁰

Article 7, paragraph 1, of both conventions was adopted.

35. The CHAIRMAN submitted the Drafting Committee's article 7, paragraph 2, for both conventions, reading as follows:

"2. A person who seeks naturalization in a foreign country or who obtains an expatriation permit for that purpose shall not lose his nationality unless he acquires the nationality of that foreign country."

Article 7, paragraph 2, of both conventions was adopted.

36. The CHAIRMAN submitted the Drafting Committee's article 7, paragraph 3:

Convention on Elimination of Future Statelessness

3. A person shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.

Convention on Reduction of Future Statelessness

3. A natural-born national shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or on any other similar ground. A naturalized person may lose his nationality on account of residence in his country of origin for the period specified by the law of the Party which granted the naturalization.

⁹ Article 6, of both conventions, as submitted by the Drafting Committee read:

"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."

¹⁰ Article 7, paragraph 1, as submitted by the Drafting Committee, read:

"1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality."

Article 7, paragraph 3, of each convention as given above was adopted.

Article 8 (article 7 of the 1953 draft)¹¹ of the draft Convention on the Elimination of Future Statelessness

37. Mr. CORDOVA, Special Rapporteur, submitted to the Commission, on behalf of the Drafting Committee, a draft article 8 which resulted from the merging into one single article of the provisions previously contained in articles 7 and 8. The proposed draft article read:

“A party may not deprive its nationals of their nationality on any ground if such deprivation renders them stateless.”

38. Clearly, it was no longer necessary to maintain article 8 of the 1953 draft, which prohibited the deprivation of nationality on racial, ethnic, religious or political grounds, once it was forbidden to deprive persons of their nationality on any grounds whatsoever. The original article 8 was useful, because the 1953 version of article 7 (corresponding to the present article 8) only referred to deprivation of nationality by way of penalty.

39. Mr. LAUTERPACHT said that the change was a major one, of which he did not approve. Even with an article 8 couched in such general terms as suggested, it was still very desirable that it should be followed by another article or paragraph on the following lines:

“In particular, a Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”

Such a provision, although logically not indispensable, would stress the sentiment of condemnation of such practices.

40. Mr. FRANÇOIS said that the Netherlands Government, in its comments,¹² had pointed out that the original article 7 stating that a country should not deprive its nationals of nationality “by way of penalty” had the presumably unintended effect of allowing deprivation so long as it was not a penalty. A Government might deprive persons of nationality by administrative measures and justify that action by stating that the measure in question was not a penalty.

41. Mr. CORDOVA, Special Rapporteur, said that the criticism in question could be adequately met by amending article 8 (previous article 7) to read: “by way of penalty or on any other ground”.

42. Mr. FRANÇOIS agreed that the Special Rapporteur’s wording would meet the objection of the Netherlands Government.

43. Mr. CORDOVA, Special Rapporteur, proposed that the Commission adopt two separate articles corresponding to articles 7 and 8 of the 1953 draft, with

¹¹ *Vide supra*, footnote 2.

¹² See annex to the Commission’s report on its sixth session, *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*. Also in *Yearbook of the International Law Commission, 1954*, vol. II.

the addition of the words “or on any other ground” which he had proposed.

44. Faris Bey el-KHOURI said that he still considered that the prohibition of deprivation of nationality for racial, ethnic, religious or political reasons should only apply to cases in which the person concerned would become stateless.

45. The CHAIRMAN put to the vote article 8 as amended to read:

“A Party may not deprive its nationals of nationality by way of penalty or on any other ground if such deprivation renders them stateless.”

Article 8 of the elimination convention was adopted as amended by 8 votes to none, with 4 abstentions.

Article 8 (article 7 of the 1953 draft)¹³ of the draft Convention on the Reduction of Future Statelessness

46. The CHAIRMAN submitted the Drafting Committee’s draft article 8, paragraph 1:

“1. A Party may not deprive any person of his nationality by way of penalty or on any other ground if such deprivation renders him stateless, except on the ground mentioned in article 7, paragraph 3, or on the ground that he voluntarily enters or continues in the service of a foreign country in disregard of an express prohibition of his State.”

Article 8, paragraph 1, of the reduction convention was adopted by 10 votes to 1, with 1 abstention.

47. The CHAIRMAN submitted article 8, paragraph 2 which had been amended by the Drafting Committee, to read:

“2. In the cases to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which will always provide for recourse to judicial authority.”

48. Mr. LAUTERPACHT proposed that the last phrase should read: “... which shall provide...”

It was so agreed.

Article 8, paragraph 2 of the reduction convention, as amended, was adopted by 8 votes to none, with 4 abstentions.

Article 9 (article 8 of the 1953 draft)¹³

49. The CHAIRMAN announced that there was no need for a vote on article 9 of the two conventions, as the text¹⁴ was simply the one voted at the fifth session, in 1953 and adopted by the Commission at the current session without change.¹⁵

¹³ *Vide supra*, footnote 2.

¹⁴ The text of article 9 (identical with article 8 of the 1953 draft) read:

“The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious or political grounds.”

¹⁵ *Vide supra*, 244th meeting, para. 10.

*Article 10 (article 9 of the 1953 draft)*¹⁶

50. Mr. CORDOVA, Special Rapporteur, said that minor drafting changes had been made by the Drafting Committee to article 10 of both conventions which now read:

Convention on the Elimination of Future Statelessness

1. Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless.

2. In the absence of such provisions, a State to which territory is transferred, or which otherwise acquires territory, or a new State formed on territory previously belonging to another State or States, shall confer its nationality upon the inhabitants of such territory unless they retain their former nationality by option or otherwise or have or acquire another nationality.

Convention on the Reduction of Future Statelessness

1. Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option the inhabitants of that territory shall not become stateless.

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Article 10 of each convention was adopted without discussion.

*Article 11 (article 10 of the 1953 draft)*¹⁶

51. The CHAIRMAN submitted the text of article 11, paragraph 1, of both conventions, as drafted by the Drafting Committee to read as follows:

"1. The Parties undertake to establish, within the framework of the United Nations, an agency to act in appropriate cases on behalf of stateless persons before Governments or before the tribunal referred to in paragraph 2."

52. Mr. LAUTERPACHT proposed that the words: "in appropriate cases" should be replaced by "when it deems appropriate".

It was so agreed.

53. The CHAIRMAN put paragraph 1, as amended, to the vote.

Article 11, paragraph 1, of both conventions, was adopted as amended.

54. Mr. CORDOVA, Special Rapporteur, said that paragraph 2 had been amended so as to allow for the fact that the Commission had decided¹⁷ to delete paragraph 4 of the original 1953 article which referred to the jurisdiction of the International Court of Justice in respect of disputes concerning the interpretation or

application of the convention and to vest jurisdiction in the special tribunal.

55. Mr. SALAMANCA proposed that paragraph 4 be restored.

56. Mr. LAUTERPACHT proposed that paragraph 4 to be restored in the article should read as follows:

"The parties agree that any disputes between them concerning the interpretation or application of the Convention shall, if not referred to the tribunal provided for in paragraph 2 above, be submitted to the International Court of Justice."

57. The wording he thus proposed would not only provide for the jurisdiction of the International Court until such time as the special tribunal was created; it would also apply after such a tribunal was set up. For the Parties to the future convention might legitimately desire to submit to the International Court, rather than to the special tribunal, a dispute which they deemed particularly important.

58. The CHAIRMAN said that the proposal to restore paragraph 4 implied the reconsideration of a decision already taken by the Commission. It was therefore necessary for the Commission to take a two-thirds majority vote on the question whether it should reconsider its decision regarding article 11 (previous article 10), paragraph 4.

By 8 votes to none, with 2 abstentions, the Commission decided to reconsider its decision on paragraph 4.

Article 11, paragraph 4, of both conventions, as proposed by Mr. Lauterpacht was adopted by 10 votes to 1, with 2 abstentions.

59. The CHAIRMAN then submitted to the Commission paragraph 2 as drafted by the Drafting Committee, reading:

"2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide any dispute between them concerning the interpretation or application of this convention and to decide complaints presented by the Agency referred to in paragraph 1 on behalf of a person claiming to have been denied nationality in violation of the provisions of the convention."

Article 11, paragraph 2, of both conventions, as thus drafted, was adopted by 9 votes to 1, with 2 abstentions.

60. The CHAIRMAN then submitted to the Commission paragraph 3, as redrafted by the Drafting Committee.

"3. If within two years after the entry in force of the Convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been established by the Parties, any of the Parties shall have the right to request the General Assembly to establish such agency or tribunal."

Article 11, paragraph 3, of both conventions, as thus drafted, was adopted.

¹⁶ *Vide supra*, footnote 2.

¹⁷ *Vide supra*, 245th meeting, para. 2.

FINAL CLAUSES OF THE DRAFT CONVENTIONS
(resumed from the 271st meeting)¹⁸

61. The CHAIRMAN said that the final clauses which the competent Sub-Committee had drafted and the Commission had considered at its 271st meeting would have to be renumbered to follow article 11, the last of the substantive articles.

Article 12 (signature, ratification, accession)

62. The CHAIRMAN put to the vote article 12, on signature, ratification and accession, reading as follows:

"1. The present Convention, having been approved by the General Assembly, shall until... (a year after the approval of the General Assembly) be open for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign is addressed by the General Assembly.

"2. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

"3. After... (the above date) the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations."

Article 12 of both conventions was adopted.

Article 14 (entry into force)

63. The CHAIRMAN submitted to the Commission article 14, as follows:

"The present Convention shall enter into force on the ninetieth day following the date of the deposit of the (e.g., third or sixth) instrument of ratification or accession.

"2. For each State ratifying or acceding to the present Convention subsequently to the latter date, the Convention shall enter into force on the ninetieth day following the deposit of the instrument of ratification or accession by that State."

Article 14 of both conventions was adopted.

Article 13 (reservations) of the draft Convention on the Elimination of Future Statelessness

64. The CHAIRMAN submitted to the Commission the Sub-Committee's draft article 13 reading as follows:

"1. At the time of signature, ratification or accession any State may make a reservation permitting it to postpone, for a period not exceeding two years, the application of the Convention pending the enactment of necessary legislation.

"2. No other reservations to the present Convention shall be admissible."

Article 13 of the draft Convention on the Elimination of Future Statelessness was adopted.

Article 13 (reservations) of the draft Convention on the Reduction of Future Statelessness

65. The CHAIRMAN submitted to the Commission the Sub-Committee's draft article 13 reading:

"1. Any State acceding to this Convention may attach reservations to any of its articles, with the exception of articles 9 and 11, to the extent to which and on the ground that any law in force in its territory is in conflict with the article or articles to which reservation is made.

"2. The Secretary-General shall notify reservations received by him to all States which have by the date of such notification deposited an instrument of accession with or without reservation.

"3. A reservation shall be deemed to be accepted if not less than two-thirds of the States notified in accordance with paragraph 2 of this article accept or do not object to it within a period of three months following the date of notification.

"4. If an instrument of accession accompanied by a reservation to articles 9 or 11 is deposited by any State, the Secretary-General shall invite such State to withdraw the reservation. Unless and until the reservation is withdrawn, the instrument of accession shall be without effect.

"5. Any State making a reservation in accordance with this article may withdraw that reservation either in whole or in part at any time after its acceptance, by a notice addressed to the Secretary-General; a copy of such notice shall be circulated by the Secretary-General to all States parties thereto."

66. Mr. LAUTERPACHT proposed the adoption of the Sub-Committee's draft. He said that that draft gave States reasonable liberty regarding the putting into force of the convention. Quite justifiably, the latitude given to States on the question of reservations was greater in the case of the convention on reduction of statelessness than was the case for the convention on elimination of statelessness.

67. It was proposed that no reservations should be permitted in respect of two provisions of the Convention: article 9, which forbade discrimination on racial, political, etc. grounds, and article 11, which provided for the establishment of the special agency and tribunal. In connexion with the other articles of the convention, however, it was proposed to allow reservations, provided no objections were raised to a reservation by more than one-third of the States acceding to the Convention.

68. Mr. CORDOVA, Special Rapporteur, said that he had doubts concerning paragraph 3. He proposed a draft along the lines of article 42 of the 1951 Convention relating to the Status of Refugees:

¹⁸ *Vide supra*, 271st meeting, paras. 28-44.

"1. Any State acceding to this Convention may make reservations to its articles, other than articles 9 and 11.

"2. Any State making a reservation under paragraph 1 may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations."

69. Mr. LAUTERPACHT said that the Commission was faced with a choice between two courses. It could either adopt a provision such as that suggested by the Sub-Committee, or else it could give States a much wider latitude of making reservations. If the latter course were adopted, it would encourage States to accede to the convention, deriving moral prestige by that action, while not undertaking any real obligations. The convention could thus be reserved out of existence.

70. Mr. CORDOVA, Special Rapporteur, said that the General Assembly could decide on the system of reservations which it would adopt.

71. Mr. ZOUREK said that there was no reason to exclude article 11 from the scope of reservations by States acceding to the convention. The right to attach reservations to any of the articles of the convention when acceding to it was an inherent right derived from the principle of the sovereignty of States. The sovereign right of States to make reservations was all the more important when dealing with a convention, the draft of which was to be adopted by the General Assembly by a majority vote. He would refer to the advisory opinion of the International Court of Justice on the subject of reservations to the Genocide Convention.¹⁹ The procedure by majority vote facilitated the conclusion of conventions but it made reservations all the more justifiable on the part of States. The Advisory Opinion of the International Court concerning reservations to the Genocide Convention, as well as the flexible system of reservations in practice within the Organization of American States, both militated against the draft presented by the sub-committee which Mr. Lauterpacht was advocating.

72. He requested that, in accordance with the established practice, there should be a footnote to the effect that he had voted against the two draft conventions on the elimination or reduction of future statelessness, as also against the commentary on the drafts, for reasons of principle which he had explained during the discussions at the fifth session and had briefly reiterated when the vote was taken at the present session.

The meeting rose at 1 p.m.

¹⁹ *I.C.J. Reports 1951*, p. 15.

275th MEETING

Friday, 23 July 1954, at 4 p.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. R. CORDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. J. ZOUREK.

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

Nationality, including statelessness (item 5 of the agenda) (A/2456) (*continued*)

FINAL CLAUSES OF THE DRAFT CONVENTIONS (*continued*)

Article 13 (reservations) of the draft Convention on the Reduction of Future Statelessness (continued)

1. Mr. FRANÇOIS said he did not approve of either the Sub-Committee's or Mr. Córdova's drafts for article 13, proposed during the 274th meeting.¹ If States were permitted to formulate reservations to any article which was incompatible with the law in force in their territories, no State would be prepared to amend its municipal legislation. Moreover, acceptances accompanied by weighty reservations might entail serious consequences, both with regard to the right of contracting States to pass judgement on the reservations of other States and from the point of view of the entry into force of the convention and hence of the establishment of the agency and the tribunal. It would appear, therefore, that the Commission would be unable to deal with the reservations clause to be inserted in the draft convention so long as it had not considered the whole question of reservations to treaties, in connexion with its study of the law of treaties.

¹ *Vide supra*, 274th meeting, paras. 65 and 68.

2. Mr. HSU did not think that the article proposed by the Sub-Committee was suitable to the convention under discussion. The two-thirds majority rule referred to in paragraph 3 of that proposal did not give sufficient freedom to States. The proposed convention was primarily a recommendation to States. The Commission should try to guide States, without entering too much into the question of how many States were likely to accept its recommendation.

3. The CHAIRMAN agreed with Mr. François. The reservations clause might be referred to in the general report on the current session but should not be the subject of a separate article. The report might mention that the Commission did not wish to decide the question in view of the fact that it was a political problem which was not within its competence.

4. Faris Bey el-KHOURI said that reservations to article 1 were also not admissible. That article, which laid down the *jus soli* rule, was the cornerstone of the whole draft convention.

5. Mr. PAL said that reservation to article 8 should not be admitted for that article was intended to limit the number of cases of deprivation of nationality, one of the chief causes of statelessness.

6. Mr. CORDOVA, Special Rapporteur, said he was now convinced that none of the articles of the draft could be the subject of reservations; he therefore proposed that article 13 of the convention on the reduction of future statelessness should be identical with the corresponding article of the draft convention on the elimination of future statelessness.²

7. The CHAIRMAN proposed that the question of reservations should not be dealt with in any article of the draft convention, but should simply be mentioned in the report.

The Chairman's proposal was rejected by 5 votes to 4, with 1 abstention.

8. The CHAIRMAN put to the vote Mr. Córdova's proposal that article 13 should be identical with the corresponding provision of the convention on the elimination of future statelessness.

The proposal was adopted by 7 votes to 3.

VOTING ON EACH DRAFT CONVENTION AS A WHOLE

9. The CHAIRMAN put the draft convention on the Elimination of Future Statelessness to the vote.

The draft convention on the Elimination of Future Statelessness, composed of the various articles adopted at the previous meeting, was adopted as a whole by 7 votes to 1, with 2 abstentions.

10. The CHAIRMAN put the draft Convention on the Reduction of Future Statelessness to the vote.

The draft Convention on the Reduction of Future Statelessness, composed of the various articles adopted

during the previous meeting and at the current meeting, was adopted as a whole by 6 votes to 1, with 3 abstentions.

11. Faris Bey el-KHOURI said he had abstained from both votes, because States which applied the *jus sanguinis* rule would not accept either of the two draft conventions.

12. Mr. ZOUREK said he had voted against both draft conventions for the following reasons. Firstly, they served no useful purpose, because all States considered nationality questions as matters essentially within their domestic jurisdiction. Secondly, the scope of the drafts was very much wider than the question of conflicts of laws and jurisdiction on nationality. Some of their provisions implied that States would waive powers which were inseparable from sovereignty. Thirdly, the two drafts were based on a one-sided view of the nationality link; their exclusive object was to protect the interests of individuals, and they completely neglected the interests of the national community. The whole emphasis was on the rights of the nationals concerned, while no reference was made to those duties which were the counterpart of their rights. Finally, he could not accept the proposition that *jus sanguinis* States were under a duty to grant their nationality to aliens who did not have sufficient ties with the State in whose territory they had been born. Such a proposal was in direct conflict with the concept which *jus sanguinis* countries had of the ties binding the individual to the State.

13. Mr. EDMONDS said he had abstained because he had not attended the meetings at which the drafts in question had been discussed.

Consideration of the draft report of the Commission covering the work of its sixth session

CHAPTER II: NATIONALITY, INCLUDING STATELESSNESS

PART II: PRESENT STATELESSNESS (A/CN.4/L.48/Add.3)

14. The CHAIRMAN invited the Commission to consider chapter II, part two, of the Commission's draft report, which contained the articles on present statelessness and comments (A/CN.4/L.48/Add.3).³

15. Mr. ZOUREK said he could not take part in the discussion, as he had not been present when the Commission had prepared the draft articles.

³ Mimeographed document only. It was incorporated, with modifications, in the Commission's report on its sixth session as chapter II, part two. See volume II of *Yearbook of the International Law Commission, 1954*. The report on the session was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*. The modifications made in the draft of chapter II, part two, are given in the present summary record and in the summary records of the 276th and 280th meetings.

² *Ibid.*, para. 64.

*Paragraphs 1, 2 and 3 [26, 27, 28] **

16. The CHAIRMAN submitted paragraphs 1, 2 and 3 of chapter II, part two, of the draft report.

Paragraphs 1, 2 and 3 were approved.

Paragraph 4 [29]

17. Mr. LAUTERPACHT proposed that the first sentence of paragraph 4 should be replaced by the following: "The Commission considered that it was not feasible to suggest means for the total and immediate elimination of present statelessness."

The proposal was adopted.

18. The CHAIRMAN put paragraph 4, as amended, to the vote.

Paragraph 5 as amended was adopted.

Paragraph 5 [30]

19. The CHAIRMAN put paragraph 5 to the vote.

Paragraph 5 was approved.

Paragraphs 6 and 7 [32 and 33]

20. Mr. CORDOVA, Special Rapporteur, proposed that paragraphs 6 and 7 should be replaced by the two texts given by him in document A/CN.4/L.49.⁴

21. He stressed that paragraph 6 as he now proposed it began with the words: "The Commission welcomed"

* The numbers within brackets refer to the paragraph numbers in the Commission's report on its sixth session.

⁴ The proposed texts read as follows:

"The Commission welcomed the resolution of the Economic and Social Council endorsing the principles underlying the work of the Commission for the elimination or reduction of statelessness (resolution 526 (XVII) B) and noted the decision of the Council to convene a conference of plenipotentiaries to review and adopt a protocol relating to the status of stateless persons by which certain provisions of the Convention relating to the Status of Refugees of 28 July 1951 would become applicable to stateless persons (resolution 526 (XVII) A)."

"The Commission considered the question of the relation of its work on present statelessness to the subject of the forthcoming conference of plenipotentiaries. It welcomed the decision of the Council to convene a conference in order to improve the legal status of stateless persons by international agreement. It considered, on the other hand, that the task of the Commission was to make suggestions for the reduction of present statelessness, which object could only be achieved if stateless persons acquired a nationality, normally that of the country of residence. When the Commission considered its suggestions relating to the reduction of present statelessness, it was aware of the fact that stateless persons who are refugees as defined in the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) receive international protection by the United Nations through the High Commissioner. The suggestions contained in the report should not be interpreted in the sense that the Commission was opposed to the granting of international protection to stateless persons pending their acquisition of a nationality."

instead of: "The Commission was informed". The purpose was to show the satisfaction felt by the Commission at resolution 526 B (XVII) of the Economic and Social Council.

22. The CHAIRMAN pointed out that the second sentence of paragraph 7, as revised by the Special Rapporteur, referred to the Council's decision to convene a conference of plenipotentiaries; that sentence could be deleted in view of the fact that paragraph 6 as revised by the Special Rapporteur would contain a reference to that decision.

23. Mr. LAUTERPACHT proposed that the last sentence of paragraph 7, as revised by the Special Rapporteur, should be replaced by:

"The suggestions contained in the present report are without prejudice to the question of granting international protection to stateless persons."

24. Mr. CORDOVA, Special Rapporteur, suggested that the sentence proposed by Mr. Lauterpacht should specify: "international protection as distinct from diplomatic protection". The international protection which would be ensured by the United Nations would have a wider scope than the diplomatic protection granted by a State.

25. Mr. LIANG, Secretary to the Commission, pointed out that the diplomatic protection to be extended to stateless persons was mentioned for the first time in paragraph 8 of the draft report; preferably, therefore, the last two sentences of Mr. Córdova's revised paragraph 7 should be transferred to the end of paragraph 8.

26. The CHAIRMAN decided that a drafting committee composed of the Rapporteur, the Special Rapporteur and the Secretary to the Commission would redraft paragraphs 6 and 7.⁵

Paragraph 8 [31]

27. Mr. LAUTERPACHT proposed that the words: "for the purpose of reducing statelessness" should be replaced by: "for the purpose of alleviating the condition of statelessness".

The proposal was adopted.

28. Mr. FRANÇOIS, Rapporteur, proposed that the last two sentences of the paragraph should be replaced by the text of article II.⁶

The proposal was adopted.

29. The CHAIRMAN put the paragraph, as amended, to the vote.

*Paragraph 8 as amended was approved.*⁵

⁵ *Vide infra*, 280th meeting, para. 30.

⁶ *Vide infra*, paras. 41 and 42.

Paragraph 9 [35]

30. Mr. LAUTERPACHT proposed that the words "by the majority of" before "the Commission" should be deleted.

It was so agreed.

31. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 9 was approved as amended.

Paragraph 10 [36]

32. Mr. LAUTERPACHT proposed that the words "this problem" at the end of the paragraph should be altered to read: "this urgent problem".

33. The CHAIRMAN put the paragraph, as amended, to the vote.

It was so agreed.

Paragraph 10 was approved as amended.

Paragraph 11 [37]

34. Mr. LAUTERPACHT proposed that the introductory phrase of this paragraph which contained the Commission's suggestions in the form of articles should be redrafted to read:

"The suggestions adopted by the Commission are reproduced below, with some comments."

The proposal was agreed to.

*Article I**Paragraph 1*

35. Mr. LAUTERPACHT proposed the deletion of the words "Party hereto" after "State" in the paragraph in question and in all the corresponding clauses of the draft.

It was so agreed.

Paragraph 2

36. Mr. LAUTERPACHT proposed that in the English version the words "the established order" should be replaced by the words "the public order".

It was so agreed.

37. Faris Bey el-KHOURI proposed that the words "is likely to constitute", which were too vague and might give rise to abuse, should be replaced by the word "constitutes".

It was so agreed.

38. The CHAIRMAN put article I, as amended, to the vote.

Article I was approved as amended.

Comment to article I

39. Mr. LAUTERPACHT proposed that the second paragraph⁷ of the comment should be replaced by the following text:

"However, it considered, subject only to the proviso contained in paragraph 2, that a stateless person should, pending the acquisition of a nationality, be granted certain rights which, for most practical purposes, give him the status of a national."

The proposal was agreed to.

40. The CHAIRMAN put the comment to article I, as amended, to the vote.

The comment to article I was approved as amended.

Article II

41. Mr. LAUTERPACHT proposed that the article should by a small drafting change be amended to read:

"1. A person possessing the status of 'protected person' under article I, paragraph 1, shall be entitled to the rights to which nationals of the protecting States are entitled, with the exception of political rights. He shall be entitled to the diplomatic protection of the protecting State.

"2. The protecting State may impose upon him the same obligations as it imposes upon its nationals."

The proposal was agreed to.

42. The CHAIRMAN, put article II, as amended, to the vote.

Article II was approved as amended.

Comment to article II

43. Mr. LAUTERPACHT and Mr. SALAMANCA suggested that the comment⁸ could be dispensed with.

44. Mr. CORDOVA, Special Rapporteur, thought it was necessary to state that if the protecting State was entitled to impose military service on the protected person, it was, however, in no way compelled to do so.

⁷ The second paragraph read as follows:

"It [the Commission] decided that, subject only to the proviso contained in paragraph 2, a stateless person should, pending the acquisition of a nationality, be treated as a protected person in the country of residence."

⁸ The comment read:

"The members of the Commission were not agreed whether protected persons should be liable to compulsory military service. The Commission felt that the military service obligations of protected persons should be the same as those of the nationals of the country, though the protecting State remained, naturally, free to determine whether, or to what extent, to treat protected persons in the same way as its nationals for the purpose of such obligations."

45. Mr. FRANÇOIS proposed the following draft :

“The obligations envisaged in paragraph 2 include military service”.

The proposal was agreed to.

Article III

46. Mr. LAUTERPACHT proposed that the words “if she makes a declaration to that effect” should be replaced by the words “on her application”, before “his wife”.

The proposal was agreed to.

47. The CHAIRMAN put article III, as amended, to the vote.

Article III was approved as amended.

Comment to article III

48. The CHAIRMAN submitted the comment to article III.

The comment to article III was approved.

Article IV

49. The CHAIRMAN proposed that the word “(stateless)” before “child” should be deleted.

It was so agreed and article IV was approved as amended.

Comment to article IV⁹

50. Mr. PAL pointed out that the only object of the comment to article IV should be to explain why the Commission had decided to treat a protected child more favourably than the child's parents with regard to the acquisition of nationality. The second sentence failed to mention that the draft convention dealt only with present statelessness.

51. Mr. LAUTERPACHT proposed that the second and third sentences should be replaced by the following text :

“The effect of this provision is not only to reduce statelessness but to prevent it from becoming hereditary. Furthermore, through residence and as a consequence of their status as protected persons, the children would, by the time they attain the age of majority, have formed an attachment to the protecting State.”

The proposal was agreed to.

52. The CHAIRMAN put the comment, as amended, to the vote.

⁹ The comment read :

“As the position of a protected person is largely comparable to that of a national, such a person's children should, on attaining the age of majority, acquire the nationality of the country of residence. In this way statelessness will be reduced and would not be hereditary. Furthermore, through residence and as a consequence of their status as protected persons, the children would by then have formed an attachment to the country concerned.”

*The comment to article IV was approved as amended.*¹⁰

Article V

53. The CHAIRMAN proposed that the introductory words: “Every State Party hereto agrees to grant” should be replaced by the words: “The States shall grant”.

The proposal was agreed to.

54. The CHAIRMAN put article V, as amended, to the vote.

Article V was approved as amended.

The meeting rose at 6.40 p.m.

¹⁰ See, however, below, 276th meeting, paras. 1-2.

276th MEETING

Saturday, 24 July 1954, at 9.45 a.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members : Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER II: NATIONALITY, INCLUDING STATELESSNESS

PART II: PRESENT STATELESSNESS (A/CN.4/L.48/Add.3) (*continued*)

Comment to article IV (resumed from the 275th meeting)¹

1. Mr. PAL thought it necessary to state in the comment to the article the reason for treating stateless

¹ *Vide supra*, 275th meeting, paras. 50-52.

children more favourably than their parents. The stateless children of stateless parents would in all probability fulfil the conditions required for naturalization and would have a sufficiently long association with the State in question to justify such favourable treatment. He proposed that the comment should be replaced by the following draft:

“This article covers the case of present stateless children enjoying the status of ‘protected person’. By reason of their association with the State from an early age the Commission is of the view that the States should consider their cases more favourably, and shall enable them to acquire the nationality of the protecting State on their attaining the age of 18, without anything more.”

2. Mr. CORDOVA, Special Rapporteur, criticized Mr. Pal’s proposed draft comment as it implied the long association of the stateless child with the State in question, whereas, in fact, a stateless child arriving in the country at the age of 17 would be entitled to the nationality of the country within only one year of its arrival. He proposed that all comment to the article should be deleted.

It was so agreed.

Comment to article V²

3. Mr. CORDOVA, Special Rapporteur, pointed out that the comment³ to the article was intended to emphasize that a stateless person should be placed on an equal footing with an ordinary alien, with the exception that if he fulfilled all the conditions required for naturalization the State was under a duty to grant naturalization, because the person in question would otherwise remain stateless.

4. The CHAIRMAN pointed out that the last phrase of the comment made no distinction between nationality and protection. Refugees from dictatorial States would not be likely to enjoy the protection of those States. He proposed that the words “have no international protection” should be deleted.

5. Mr. LAUTERPACHT said the Commission should explain the reason for granting stateless persons more favourable treatment than other aliens and proposed that the last sentence of the comment should be modified to read:

² The article was adopted at the previous meeting; *vide supra*, 275th meeting, paras. 53-54.

³ The comment to article V read as follows:

“While the grant of nationality is, as a rule, in the discretion of the authorities, it is suggested that stateless persons who fulfil the statutory conditions governing naturalization, including application and a prescribed period of residence, should be granted nationality as of right. The Commission felt that stateless persons should receive more favourable treatment than ordinary aliens in the matter of naturalization, because the latter, before being naturalized have nevertheless a nationality whereas stateless persons have no international protection.”

“The Commission felt that stateless persons should in this respect receive more favourable treatment than ordinary aliens in the matter of naturalization, seeing that the latter, before being naturalized, have a nationality, whereas stateless persons possess none.”

6. He also proposed that the words “it is suggested” in the second phrase of the comment should be replaced by the phrase: “the purpose of this article is to lay down...”

7. Mr. CORDOVA, Special Rapporteur, recalled that in document A/CN.4/L.49 he had submitted a further draft sentence to be added to the comment to article V. However, since it merely repeated the first sentence of the comment, he agreed to withdraw it.

8. The CHAIRMAN proposed that the Commission should adopt the text of the comment as modified in the course of discussion by Mr. Lauterpacht and himself.

It was so agreed.

Article VI

9. The CHAIRMAN said that the words “Party hereto” after “State” in the opening paragraph and in (b) should be deleted in conformity with a decision taken at the previous meeting.⁴

10. With this modification, he put the article to the vote.

Article VI was approved, as modified.

Comment to article VI

11. Mr. LAUTERPACHT thought the comment to the article somewhat colourless as it merely repeated the substance of the article. He proposed that the comment should be deleted.

It was so agreed.

Article VII

12. Mr. LAUTERPACHT said that although he had no objection in principle to the substance contained in it he thought the article⁵ as submitted was somewhat

⁴ See *supra*, 275th meeting, para. 35.

⁵ Article VII read as follows:

“1. The States parties hereto undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

“2. The parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide any dispute between them concerning the interpretation or application of this [convention] and 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. If, within two years after the entry into force of the [convention], the agency or the tribunal referred to in paragraphs 1 and 2 has not been established by the Parties, any of the Parties shall have the right to request the General Assembly to establish the agency or the tribunal, or both.”

too formal. He accordingly submitted to the Commission the following revised draft of the article :

“There shall apply, to any convention concluded on this subject, the provisions of the conventions on the elimination and reduction of future statelessness concerning the interpretation and application of their terms, including the provisions for the creation of an agency to act on behalf of persons claiming to have been wrongfully denied nationality or the status of a protected person.”

13. The CHAIRMAN pointed out that the article having already been adopted,⁶ could not be reconsidered unless a two-thirds majority of the members so decided.

By 8 votes to none, with 1 abstention, it was decided to reconsider article VII.

14. The CHAIRMAN put to the vote the new draft text of article VII submitted by Mr. Lauterpacht.

Article VII as redrafted by Mr. Lauterpacht was adopted by 8 votes to 1.

Comment to article VII

15. The CHAIRMAN proposed that no comment should be attached to the article.

It was so agreed.

Voting on articles I - VII as a whole

16. The CHAIRMAN put to the vote articles I-VII as a whole, subject to the amendments agreed to in the course of the debate.

Articles I - VII, as amended, were adopted by 5 votes to 1, with 3 abstentions.

17. The CHAIRMAN said he had abstained from the vote because in his opinion the proper way in which to deal with stateless persons in law was to treat them broadly speaking in the same manner as other aliens ; they should not, as envisaged in the draft, receive privileged treatment for that meant in many cases that a premium was placed on the status of statelessness.

1. Mr. EDMONDS said he had abstained from voting because he had not attended the meetings of the Commission at which the articles in question had been discussed.

19. Mr. ZOUREK said he had voted against the adoption of the articles because, apart from the general reservations he had previously made to the draft conventions on the elimination and reduction of future statelessness, the draft under consideration gave States the possibility of granting only restricted civil rights to stateless persons while imposing on them the widest obligations, including that of military service.

20. Mr. FRANÇOIS said he had voted in favour of the articles, subject to a reservation concerning article V.

The application of the provisions of that article appeared to be impossible in States where the grant of naturalization was left, within the framework of some general directives, to the discretion of the administrative or legislative authorities, as was the case in the Netherlands.

21. Faris Bey el-KHOURI said he had abstained because he was unable to accept the text of article II. In his opinion the rights to be enjoyed by the person to whom the status of a protected person had been granted should be determined by the protecting State.

22. Mr. ZOUREK requested that his vote against the adoption of the articles should be recorded in a footnote in the Commission's report covering the work of its sixth session, in accordance with the procedure adopted at previous sessions.

23. The CHAIRMAN and Mr. FRANÇOIS made similar requests with regard to their votes.

CHAPTER III : DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/CN.4/L.48/Add.1)

24. Mr. PAL wished, before the Commission proceeded to vote on the entire draft Code, to say that he would be unable to support the proposed measures. He had not participated in the discussion of the detailed articles and had abstained from voting when the provisions of the draft Code were being dealt with. The draft articles had been adopted by the Commission under article 20 of its statute in 1951 before he had become a member of the Commission. They had since been considered under article 21 of the statute and had also been studied by States. They were before the Commission once again only for the limited purposes of article 22 of its statute. Discussion at the present stage did not admit of raising any question which might require the abandonment of the entire effort, yet his objections to the present draft Code were of such a fundamental character as might necessitate taking such a step.

25. Before stating the exact nature of his objections he expressed the hope that his opposition would not be misunderstood by the Commission. He had not the least doubt as to the lofty ideals behind the Commission's effort which had been inspired by an ardent desire for justice. If in spite of that ideal he opposed the adoption of the draft Code, it was because he felt strongly that it was impossible to realize such an ideal in the present formative stage in the development of the international community.

26. He would oppose the adoption of the draft Code not because the various acts defined in it were not wrongful or reprehensible, but because in the present phase of international development, it would be impossible to punish them in a spirit of justice. Despite the very detailed provisions of several of the articles of the Code, it would in fact only be possible to establish guilt, and punish the guilty after armed conflict.

⁶ *Vide supra*, 249th meeting, para. 43.

27. In the present world crisis it was necessary to act with caution, whereas the majority of the provisions of the draft would, he feared in the present circumstances, jeopardize the very purpose of the Code. The present stage of world development made it imperative to extend the principles of order and justice from the national to the international community. It would, however, be impossible to achieve that object by adopting a single over-all solution for all the problems involved. In building for justice it was necessary to exercise particular caution so as not to erect a monstrous edifice of injustice. Where there was no possibility of justice and, in the matter under consideration there would be none for some time to come, it was dangerous to forge ahead. Waiting might not altogether be futile as history showed that problems could sometimes be settled without the intervention of any coercive force from above.

28. Mr. EDMONDS said that since his recent arrival he had not had sufficient time to consider all the aspects of the questions discussed by the Commission and the conclusions reached by it. He considered that the draft Code of offences dealt with a subject of paramount importance, but felt that the terms adopted by the Commission were in many cases too vague and indefinite to stand the test of any statutory political validity. As an example, where article 11, paragraph 2, relating to inhuman acts condemned "the toleration" of such acts he would be at a loss to know what interpretation should be placed on the word "toleration". Furthermore, article 2, paragraph 9, appeared to condemn as unjustified intervention practically all the normal manifestations of international life.

29. The examples he had quoted were perhaps of no great practical importance since the draft Code was hardly likely to be approved by States. However, the professional competence of the Commission was at stake, and since he did not wish it to produce a document which might be criticized as unpractical or not valid from a legal point of view, he would vote against its adoption.

30. The CHAIRMAN said that any further declarations on the draft Code as a whole should be deferred until later. He invited the Commission to consider the draft articles of the Code of Offences against the Peace and Security of Mankind, as submitted in document A/CN.4/L.48/Add.1.⁷

⁷ Mimeographed document only. It was incorporated, with modifications, in the Commission's report on its sixth session as chapter III. The modifications are given in the present summary record and in the summary record of the 280th meeting. The Commission's report on its sixth session is reproduced in *Yearbook of the International Law Commission, 1954*, vol. II, and was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*.

THE DRAFT ARTICLES OF THE CODE⁸

Article 1

31. Mr. LAUTERPACHT expressed surprise at the use of the words "referred to" instead of "defined". The definitions contained in the draft Code were perhaps not perfect, but they were nevertheless definitions and not merely references. The Commission was formulating a code of crimes; the least it could do was to define them and not describe them by means of vague references.

32. Mr. LIANG, Secretary to the Commission, agreed with Mr. Lauterpacht; the article appeared to imply that there were other offences which constituted crimes under international law and which were not mentioned in the Code.

33. The CHAIRMAN proposed that the Commission should restore the original text of article 1 adopted by it which read:

"Offences against the peace and security of mankind as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished."

The proposal was agreed to and article 1 was adopted in that form.

Article 2 (1)

34. The CHAIRMAN pointed out that for grammatical reasons in the third line of the paragraph the word "in pursuance" had been replaced by "the execution".

35. Mr. LAUTERPACHT proposed that the original expression "in pursuance" should be restored.

It was so agreed, and article 2 (1), was adopted as modified.

Article 2 (2)

36. The CHAIRMAN put paragraph 2 of article 2 to the vote.

Article 2 (2) was adopted without modification.

Article 2 (3)

37. The CHAIRMAN pointed out that the words "the execution" should be replaced by the words "in pursuance" as in article 2, paragraph 1.

38. Mr. LAUTERPACHT proposed that the paragraph should begin with the word "Preparation..." and that the word "for" should be replaced by the word "of" before "the employment".

It was so agreed, and article 2 (3) was adopted as modified.

⁸ Corresponds to paragraph 54 of the Commission's report on its sixth session.

Article 2(4)

39. The CHAIRMAN proposed that to avoid misunderstanding the comma between the words "other territory" and "for incursions into" should be deleted.

It was so agreed and article 2(4) was adopted, as modified.

Article 2(5)

40. Mr. LAUTERPACHT said there was a regrettable discrepancy between the English and French texts. The French text used the term "guerre civile" whereas the English used "civil strife". He proposed that the term "civil war" should be used instead. Civil strife was a term which could cover any form of political dissension on an acute scale. It would be exorbitant to make it a criminal offence for the authorities of a State to encourage any form of political dissension in other States, for example by means of subsidies to the press.

41. Mr. HSU said that the term "civil strife" was taken from General Assembly resolution 30(V) of 17 November 1950, in which it was stated that the fomenting of civil strife constituted aggression.

42. Mr. LIANG, Secretary to the Commission, said that in the comment contained in the report on the Commission's third session reference was made to that resolution and also to article 4 of the draft declaration on rights and duties of States, prepared by the Commission, which also mentioned the fomenting of civil strife.

43. Mr. CORDOVA said that he had voted against proposals for separate provisions to cover such acts as "fifth column" activities and sabotage because those activities were included in the term "civil strife". If the term were to be amended to "civil war", it would no longer cover those activities. It would then be necessary for the Commission to reconsider its attitude concerning "fifth column" activities and sabotage.

44. Mr. LAUTERPACHT said that the General Assembly was a political body, whereas the Commission was a technical body which should employ more precise terms. The two expressions "guerre civile" and "civil strife" were different in substance.

45. Mr. EDMONDS said the discussion illustrated his remarks on the vagueness of the terminology used in the draft Code. Many of the definitions would prove extremely difficult to interpret in practice.

46. Mr. CORDOVA said that the article had been discussed and adopted in its English version. To alter the English wording would therefore constitute a reversal of an earlier decision of the Commission. A decision to reconsider the provision would require a two-thirds majority.

47. Mr. HSU said that the term "civil strife" had been coined by the Commission for its draft declaration on rights and duties of States; it had been accepted by the General Assembly and its connotation was clear.

He urged the Commission to adhere to the terms it had adopted earlier.

48. Mr. LIANG, Secretary to the Commission, said that, as the Drafting Committee had not modified the paragraph, no vote was necessary upon it. Mr. Lauterpacht proposed a change that appeared too important for the matter to be raised at that late stage.

49. The CHAIRMAN said that if the paragraph were left as it stood, any discrepancy between the French and English texts would, if raised before a court, operate in favour of the accused. A criminal court, when in doubt regarding the interpretation of a provision, had to place upon it the most lenient construction.

50. Mr. PAL said the alteration of the words "civil strife" to "civil war" would require a preliminary decision by a two-thirds majority to reconsider the paragraph.

51. Mr. ZOUREK, while agreeing that the English and French texts should be brought into line, said that a special decision to reconsider the paragraph would be necessary.

The meeting was suspended at 12 noon, owing to the absence of a quorum, and resumed at 12.15 p.m.

52. The CHAIRMAN announced that paragraph 5, not having been amended by the Commission or by the Drafting Committee, would not have to be voted upon.

53. Mr. LAUTERPACHT said that as an attempt had been made, by making a quorum impossible, to prevent a critical revision of the draft, he would abstain from taking part in the discussion.

Article 2(6) and (7)

54. The CHAIRMAN announced that paragraphs 6 and 7 had not been amended so that no vote upon them was necessary.

Article 2(8)

55. Mr. FRANÇOIS, Rapporteur, said that the final draft of paragraph 8⁹ did not contain the words "or of territory under an international régime" which had appeared in the 1951 draft.¹⁰ The Commission considered that the term "State" should be interpreted as applying also to a territory under the international régime; paragraph 14 of the draft report for the current session (A/CN.4/L.48/Add.1) contained a specific stipulation to that effect, which could be deleted.¹¹

⁹ Article 2(8), as submitted in the draft report on the sixth session (A/CN.4/L.48/Add.1) read:

"(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law."

¹⁰ Article 2(8), as adopted in 1951, read:

"(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory belonging to another State or of territory under an international régime."

¹¹ *Vide infra*, paras. 78-84.

56. The CHAIRMAN submitted to the Commission the text of paragraph 8, as contained in A/CN.4/L.48/Add. 1.⁹

Article 2(8) was adopted.

57. The CHAIRMAN, in reply to a remark by the Secretary, proposed that the word "thereby" should be inserted before the word "obtain" so that the final phrase of paragraph 9 should read: "in order to force its will and thereby obtain from it advantages of any kind".

Article 2(9) as amended was adopted.

Article 2(10)

58. The CHAIRMAN announced that paragraph 10 being unchanged, would not be put to the vote.

Article 2(11), (12) and (13)

59. The CHAIRMAN announced that no vote was needed on paragraphs 11, 12 and 13. He would only point out two minor corrections. The words "against any civilian population" at the end of paragraph 11 should instead be inserted in the second line after the word "committed" so as to make the paragraph read:

"11. Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, etc."

60. The text of paragraph 13 was identical with the corresponding text of the 1951 draft except that the order of the last two clauses was reversed.

Article 3

61. The CHAIRMAN said that in article 2 the word "defined" should be substituted for the word "referred", as was done in article 1.¹²

Article 3 as amended was adopted without discussion.

Article 4

62. Mr. FRANÇOIS, Rapporteur, said that the French text of article 4 had been altered to read, in its last phrase, "de ne pas se conformer à cet ordre." That alteration had been made in order to conform with the English text: "not to comply". There was a difference between the French text thus adopted and the original French wording which was stronger.

The change in the French text of article 4 was agreed to.

Paragraphs 1 - 9 of chapter III¹³

63. The CHAIRMAN invited the Commission to consider the introductory paragraphs 1 - 9 of chapter III of the draft report on the present session.

Paragraphs 1 - 6 were adopted without discussion.

64. The CHAIRMAN, following a suggestion by the Secretary, submitted paragraph 7 amended to read: "The Commission again took up..." (instead of "discussed").

Paragraph 7 as amended was adopted.

65. Mr. FRANÇOIS, Rapporteur, said that the last phrase of the French text of paragraph 8 was amended to read *mais la Commission les a prises en considération dans ces travaux* instead of the terms formerly used *en a tenu compte* which were not strictly consistent with the English "taken into consideration".

Paragraph 8 was adopted with the amendment of the French text.

66. The CHAIRMAN submitted paragraph 9 with the words "some brief comments" substituted for "annotations" in the third line of the paragraph.

Paragraph 9 as amended was adopted.

COMMENTS TO SOME OF THE ARTICLES

67. The CHAIRMAN invited the Commission to consider the comments to certain of the articles, included in paragraph 10 of chapter III of the draft report.¹⁴

Comment to article 1

68. Mr. FRANÇOIS, Rapporteur, suggested the deletion of the last sentence of the comment reading "The question of the criminal responsibility in international law of the State is left open".

The proposal was adopted by 6 votes to none with 1 abstention.

Comment to article 2, paragraph 4

69. The CHAIRMAN submitted the comment to the vote.

The comment to article 2, paragraph 4 was adopted.

Comment to article 2, paragraph 9

70. Mr. FRANÇOIS, Rapporteur, proposed the deletion of the second sentence of the comment: "The

¹³ Those paragraphs correspond to paragraphs 41-49 of the Commission's final report on its sixth session; *vide supra*, footnote 7.

¹⁴ Paragraph 10 of chapter III corresponds to paragraph 50 of the Commission's final report on its sixth session; *vide supra*, footnote 7.

¹² *Vide supra*, paras. 31-33.

majority of the Commission was in favour of inserting it in the draft". Those words were not necessary.

The comment to article 2, paragraph 9 was adopted as amended.

Comment to article 2, paragraph 1¹

71. The CHAIRMAN submitted the comment to article 2, paragraph 11, to the Commission with two amendments, both to the effect that the term "defined" should be substituted for the term "referred to" at the end of the second paragraph, and also at the end of the first sentence of the third paragraph.¹⁵

72. Mr. ZOUREK said that several members of the Commission had favoured the drafting of article 2, paragraph 11, in such a manner as to restrict its application to those inhuman acts which were committed in execution or in connexion with aggression and other international offences. It was desirable that the comment should contain a reference to the dissenting opinion of the members concerned.

73. Mr. FRANÇOIS, Rapporteur, said that it was not always possible to insert minority opinions in the comment, a process which would be too cumbersome. He hoped Mr. Zourek would not press the matter.

74. Mr. ZOUREK said he would not insist on the point.

75. The CHAIRMAN submitted the comment to the vote.

The comment to article 2, paragraph 1, was adopted.

Comment to article 4

76. The CHAIRMAN invited the Commission to consider the comment to article 4.

The comment to article 4 was adopted.

Paragraphs 11 - 14 of chapter III

77. The CHAIRMAN invited the Commission to consider paragraphs 11 - 14 of chapter III of the draft report on the current session.

Paragraphs 11 - 13 were adopted.¹⁶

78. Mr. LIANG, Secretary to the Commission, said that in paragraph 14 the term "State" was stated to include a territory under an international régime.¹⁷ There were two types of territories under such a régime. Firstly, there were Trust Territories, secondly, there had existed at times "free cities" which were under an inter-

national régime but were not administered by any particular State. Paragraph 14 would seem to require amplification.

79. Faris Bel el-KHOURI said he did not recollect that the Commission had decided that the term "State" should be interpreted in the manner indicated in paragraph 14.

80. The CHAIRMAN said that the Drafting Committee had been asked by the Commission to draft the paragraph in question.¹⁸

81. Mr. CORDOVA said that whatever the régime of a territory under international control, its rulers could be guilty of an offence under the code.

82. Mr. HSU suggested that paragraph 14 should be placed as a comment to article 2, paragraph 8.

83. Mr. FRANÇOIS, Rapporteur, said that paragraph 14 might be redrafted to read: "The Commission took the view that for the purposes of the draft code a territory under an international régime should be assimilated to a State."

84. The CHAIRMAN requested the Rapporteur to redraft paragraph 14 of chapter III of the draft report for submission at the next meeting.¹⁹

The meeting rose at 1.20 p.m.

¹⁸ *Vide supra*, 267th meeting, paras. 34-38.

¹⁹ *Vide infra*, 280th meeting, para. 20.

277th MEETING

Monday, 26 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

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

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

¹⁵ Cf. *supra*, paras. 31-33 and 61.

¹⁶ These paragraphs correspond to paragraphs 51-53 of the Commission's final report on its sixth session; *vide supra*, footnote 7.

¹⁷ Cf. *supra*, para. 55.

Consideration of the draft report of the Commission covering the work of its sixth session (continued)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA
(A/CN.4/L.48/Add.4)

1. The CHAIRMAN invited the members of the Commission to consider chapter IV of its draft report on the current session commencing with the draft articles on the régime of the territorial sea included in paragraph 17 of the chapter (A/CN.4/L.48/Add.4).¹

DRAFT REGULATIONS RELATING TO THE RÉGIME OF THE TERRITORIAL SEA

Article 1

2. Mr. FRANÇOIS, Rapporteur, pointed out that the Drafting Committee had combined, in the two paragraphs of article 1, the provisions which had been embodied in the former articles 1 and 2.

3. Mr. ZOUREK said he preferred, for paragraph 1, the text originally submitted by the Special Rapporteur, reading: "The territory of a State includes a belt of sea described as the territorial sea." That was in fact the text which the Commission had adopted.

4. The CHAIRMAN read the relevant passages of the Commission's records² showing that the Commission had adopted, for the clause in question, the text quoted by Mr. Zourek, but had later asked the Special Rapporteur to redraft articles 1, 2 and 3 as a whole.

The Commission adopted article 1 as contained in the draft report by 4 votes to 2, with 6 abstentions.

Article 2 (previously article 3)

5. The CHAIRMAN submitted article 2 to the Commission.

Article 2 was approved.

CHAPTER II: LIMITS OF THE TERRITORIAL SEA

Article 4 (previously article 5)

6. The CHAIRMAN submitted article 4 to the Commission.

Article 4 was approved.

¹ This document was mimeographed only. It was incorporated, with modifications, in the Commission's report on its sixth session as chapter IV. Paragraph 17 of chapter IV in the draft report corresponds to paragraph 72 in chapter IV of the final report. The modifications made by the Commission in draft chapter IV are set out in the present summary record and in the summary records of the 278th, 279th, 280th and 281st meetings. The Commission's final report on its sixth session is included in vol. II of *Yearbook of the International Law Commission, 1954*. It was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*.

² *Vide supra*, 252nd meeting, paras. 60 and 62, and 253rd meeting, paras. 44-49.

Article 5 (previously article 6)

7. Mr. LAUTERPACHT pointed out that he had proposed that the English text of paragraph 3 should read: "The coastal State shall give due publicity to any straight base line drawn by it."

It was agreed to redraft paragraph 3 as proposed by Mr. Lauterpacht.

Article 4 was adopted as amended.

Article 6 (previously article 7)

8. The CHAIRMAN proposed that the English text should read: "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the base line equal to the breadth of the territorial sea."

It was so agreed.

Article 6 was adopted as amended.

Article 8 (previously article 9)

9. Mr. LAUTERPACHT proposed that the word "determining" should be replaced by "delimiting".

It was so agreed.

Article 8 was adopted as amended.

Article 9 (previously article 10)

10. Mr. FRANÇOIS, Rapporteur, pointed out that the Drafting Committee had redrafted article 9 so as to specify clearly that roadsteads situated in inland waters remained subject to the régime of those waters and not to the régime of the territorial sea.

11. Mr. LAUTERPACHT proposed that the words "belt" should be replaced by "outer limit".

It was so agreed.

Article 9 was adopted as amended.

Article 10 (previously article 11)

12. Mr. LAUTERPACHT proposed that the word "normally" should be replaced by "in normal circumstances".

It was so agreed.

Article 10 was adopted as amended.

Article 12 (previously article 13)

13. The CHAIRMAN submitted article 12 to the Commission.

Article 12 was adopted.

Article 13 (previously article 14)

14. Mr. FRANÇOIS, Rapporteur, said he had amended the first sentence of paragraph 4 in the light of a proposal made by Mr. Zourek.³

³ *Vide supra*, 271st meeting, paras. 1-14.

15. Mr. ZOUREK proposed that the title of the article should be altered to "Delimitation of the territorial sea in straits".

It was so agreed.

16. At the proposal of Mr. Zourek, the CHAIRMAN put to the vote the second sentence of paragraph 4, which had not previously been formally adopted.

The sentence was adopted by 11 votes to 1.

17. Mr. ZOUREK agreed that the enclaves in question should be treated in the same way as the territorial sea. He had voted against the particular sentence, however, because he did not approve of the maximum breadth laid down for the enclaves.

18. The CHAIRMAN put the article as amended to the vote.

Article 13 was adopted as a whole as amended.

Article 15 (previously article 16)

19. The CHAIRMAN submitted article 15 to the Commission.

Article 15 was adopted.

Article 16 (previously article 17)

20. The CHAIRMAN submitted article 16 to the Commission.

Article 16 was adopted.

CHAPTER III: RIGHTS OF PASSAGE

Article 17 (previously article 18)

21. Mr. LAUTERPACHT recalled that he had voted against the whole of paragraph 2, which he regarded as completely meaningless. The Commission had adopted the paragraph, and he bowed to its decision, but he pointed out that, purely for reasons of logic, the word "other" should be inserted before "of its interests".

It was so agreed.

Article 17 was adopted as amended.

Section A. Vessels other than warships

Article 18 (previously article 19, paragraph 1)

22. Mr. GARCÍA-AMADOR recalled that the Commission had decided to place the text of article 18 at the beginning of the chapter relating to the right of passage.⁴

23. Mr. LAUTERPACHT agreed with Mr. García-Amador and pointed out that articles 19, 21 and 22,

which could perfectly well apply to warships, should also be placed in the general provision of the chapter, before the sub-heading "Section A. Vessels other than warships".

24. Mr. FRANÇOIS, Rapporteur, said that the chapter had been taken from the draft prepared by the 1930 Codification Conference at The Hague.⁵

25. Mr. ZOUREK said that if the Commission were to change the position of article 18 and extend its provisions to warships, it would amount to an important change, not of form, but of substance. In agreement with other members of the Commission, he had always objected to warships being assimilated to merchant vessels so far as the right of passage was concerned.

26. Mr. LIANG, Secretary to the Commission, suggested that the text of article 18 be placed immediately after the title of chapter III, while said article should specify that warships were covered by the provisions of articles 26 and 27.

27. Mr. CÓRDOVA said it was essential that separate articles should deal with warships and merchant ships.

28. Mr. FRANÇOIS, Rapporteur, agreed with Mr. Córdova. In order to satisfy Mr. Lauterpacht and Mr. García-Amador, he suggested that the Commission might perhaps transfer the text of article 18 to the general part of the chapter, before section A.

29. Mr. PAL felt it would be preferable to delete the two sub-headings: "Section A. Vessels other than warships" and "Section B. Warships", which the Commission had never formally adopted.

30. The CHAIRMAN pointed out that during the discussions no objections had been raised to those words.

31. After a brief discussion, the CHAIRMAN proposed that article 18 should be maintained as it stood and in its position.

It was so agreed.

Article 19 (previously article 19, paragraphs 2 and 3)

32. The CHAIRMAN submitted article 19 to the Commission.

Article 19 was adopted.

Article 20

33. Mr. LAUTERPACHT pointed out that the word "other" should be inserted in paragraph 1 before "of its interests", and that, in paragraph 2, the word "it" should be replaced by "that".

It was so agreed.

Article 20 was adopted as amended.

⁴ Cf. *supra*, 262nd meeting, paras. 33-37 and 263rd meeting, para. 68.

⁵ *Acts of the Conference for the Codification of International Law*, vol. III: Minutes of the Second Committee (League of Nations publication, V. Legal, 1930.V.16), pp. 213-217.

Articles 21, 22, 23 and 24

34. The CHAIRMAN put these articles to the vote.

Articles 21, 22, 23 and 24 were adopted.

Article 25

35. Mr. CORDOVA was surprised to find that article 25 merely repeated the rules contained in articles 23 and 24. State-owned vessels operated for commercial purposes should be treated in every respect in the same way as merchant ships.

36. Mr. HSU agreed with Mr. Córdova.

37. Mr. FRANÇOIS, Rapporteur, proposed that the opening phrase of article 25 should read: "The rules contained in the foregoing articles of this chapter..."

It was so agreed.

38. The CHAIRMAN put to the vote article 25 as amended.

The article was adopted as amended by 10 votes to 1.

39. Mr. ZOUREK said he had voted against article 25 because he considered its provisions at variance with the international law in force.

Section B. Warships

40. Mr. LAUTERPACHT inquired if the report specified that the provisions relating to the territorial sea only applied in time of peace.

41. Mr. FRANÇOIS, Rapporteur, replied that the point was made clear in the comment to article 17.

42. Mr. LAUTERPACHT said it was surprising that such an important stipulation should only appear in a comment.

43. The CHAIRMAN said that for greater emphasis the point should be mentioned in the introduction.

44. Mr. LIANG, Secretary to the Commission, pointed out that, in principle, the Commission only dealt with the international law of peace.

45. The CHAIRMAN decided that the question would be discussed when the Commission considered the various paragraphs of chapter IV of the general report.

Article 26

46. Mr. LAUTERPACHT proposed that in paragraph 2 the term "described" should be replaced by "envisaged". He further proposed that, in paragraph 4, the term "may" should be replaced by "must".

It was so agreed.

Article 26 was adopted as amended.

Article 27

47. The CHAIRMAN submitted article 27 to the Commission.

Article 27 was adopted.⁶

48. Mr. ZOUREK proposed that the articles which had just been adopted should be reproduced in the report under the title "Draft articles relating to the régime of the territorial sea", which was similar to that used by the Commission in 1953 in connexion with the continental shelf.

49. Mr. LIANG, Secretary to the Commission, said that at the next session the Commission would be preparing a final draft regulation on the régime of the territorial sea; consequently it should be stressed that the decisions taken at the current session with respect to the territorial sea were purely provisional.

50. Mr. FRANÇOIS, Rapporteur, proposed that a suitable heading would be "Provisional articles relating to the régime of the territorial sea".

The Rapporteur's proposed heading was agreed to.

51. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the chapter of the report containing the various articles which had been adopted, together with the comments to them.

INTRODUCTION

*Paragraphs 1, 2, 3 and 4 (55, 56, 57, 58, 59) **

52. The CHAIRMAN proposed that the last sentence of paragraph 1 ("At the fourth session...") should be transferred to the beginning of paragraph 3. The work accomplished at the sixth session would in that way be set out more clearly.

53. Mr. ZOUREK was surprised that paragraph 4 should contain a reference to the bed and subsoil of the territorial sea and the air space above it. The Commission had not studied those questions during the current session.

54. Mr. FRANÇOIS, Rapporteur, explained that those questions had been discussed at the third session. To avoid any misunderstanding he would rearrange paragraphs 1 to 4 in the light of the remarks which had been made.

Paragraph 5 (60)

55. The CHAIRMAN submitted paragraph 5.

Paragraph 5 was adopted.

⁶ For the voting on the articles as a whole, *vide infra*, 281st meeting, para. 29.

* The numbers within parentheses refer to the paragraph numbers in the Commission's final report on its sixth session. *Vide supra*, footnote 1.

Paragraph 6 (61)

56. The CHAIRMAN submitted paragraph 6.

Paragraph 6 was adopted.

Paragraph 7 (62)

57. The CHAIRMAN submitted paragraph 7.

Paragraph 7 was adopted.

Paragraph 8 (63)

58. Mr. ZOUREK requested that the words "mentioned in paragraph 5" should be inserted after the words "The committee of experts".

59. Mr. LIANG, Secretary to the Commission, said that "group of experts" was probably a better description than "committee of experts".

60. Mr. HSU thought the best solution would be to give the names of the experts who had met at The Hague.

It was so agreed.

Paragraph 8 was adopted subject to that modification.

Paragraph 9 (64)

61. The CHAIRMAN submitted paragraph 9.

Paragraph 9 was adopted.

Paragraph 10 (65)

62. The CHAIRMAN submitted paragraph 10.

Paragraph 10 was adopted.

Paragraph 11 (66)

63. Mr. ZOUREK requested that the words "which follows broadly the 1952 draft" after "draft regulation" should be deleted.

It was so agreed.

Paragraph 11 was adopted as amended.

Paragraph 12 (67)

64. Mr. LAUTERPACHT requested that in the last line of the paragraph the words "article 16 (h)" should be replaced by "the provisions".

It was so agreed.

Paragraph 12 was adopted as amended.

Paragraph 13 (68)

65. Mr. FRANÇOIS, Rapporteur, said that, in accordance with the decision of the Commission, he had in that paragraph summarized the various proposals made by the members of the Commission with respect to the breadth of the territorial sea. The proposals had not

all been submitted at the sixth session as the Commission had only dealt with that problem indirectly; most of them had been submitted during the third session. In addition he had received a proposal from Mr. Hsu which would be added to the list in paragraph 13.

66. Mr. HSU pointed out that the opinions expressed by the members of the Commission during debate were not necessarily all formal proposals. Accordingly, several of the sub-paragraphs of paragraph 13 might well be deleted.

67. Mr. LIANG, Secretary to the Commission, said it was not clear that the proposals enumerated in paragraph 13 had been submitted by members of the Commission. Furthermore, the sequence in which those proposals were enumerated was not very logical.

68. Mr. LAUTERPACHT said that the enumeration was merely intended to give Governments an indication of the great variety of possible solutions and to induce them to give their views. There was, therefore, no point in giving the name of the author of the proposal in each case or in enumerating them in the most logical order.

69. Mr. FRANÇOIS, Rapporteur, said that all the points of view expressed in paragraph 13 had actually been formulated by members of the Commission, at any rate, as constituting possible bases for discussion.

70. Mr. ZOUREK requested the Special Rapporteur to insert in paragraph 13 a passage drafted on the following lines: "That it should be admitted that the breadth of the territorial sea depends on different factors which vary from State to State and that it should be agreed that each coastal State is entitled to fix the breadth of its territorial sea in the light of these factors."⁷

The meeting rose at 1.10 p.m.

⁷ *Vide infra*, 281st meeting, paras. 1-3.

278th MEETING

Monday, 26 July 1954, at 4 p.m.

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Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS

Present :

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (continued)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA
(A/CN.4/L.48/Add.4) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter IV of the draft report on its current session.

*Paragraph 14 (69) **

2. Mr. LAUTERPACHT proposed that the word "inevitably" before "meet" should be deleted and the word "objection" replaced by the word "opposition".

It was so agreed.

3. Mr. FRANÇOIS, Rapporteur, explained that the last sentence had been inserted so as to enlist the co-operation of States which had hitherto, in the majority of cases, merely noted that their legislation did not conform to the proposals of the Commission.

4. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 14 was adopted as amended.

Paragraph 15 (70)

5. Mr. LAUTERPACHT proposed that the phrase: "the Commission would be grateful to Governments ..." should be replaced by: "the Commission would be greatly assisted in its task if governments would state..." The words "very debatable" before "question" should also be deleted.

It was so agreed.

6. Mr. LIANG, Secretary to the Commission, proposed that the word "help" in the last line of the paragraph should be replaced by the word "enable".

It was so agreed.

7. Faris Bey el-KHOURI said that no useful purpose would be served by requesting the opinion of Governments. The Commission should define its attitude with regard to the problems before it and present its opinion to the Governments.

8. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 15 was adopted as amended by 6 votes to none, with 4 abstentions.

Paragraph 16 (71)

9. Mr. LIANG, Secretary to the Commission, proposed that the words "for those seem to be connected" should be replaced by the words "for these questions are connected".

It was so agreed.

10. Mr. LAUTERPACHT requested that "governments' replies" should be altered to read "the replies of the Governments".

It was so agreed.

11. The CHAIRMAN put the paragraph, as amended, to the vote.

Paragraph 16 was adopted as amended.

Paragraph 17 (72)

12. Mr. ZOUREK proposed that the words "draft rules relating to the régime" should be replaced by the words "the provisional articles concerning the régime...".

It was so agreed.

Paragraph 17 was adopted as amended.

13. The CHAIRMAN proposed that the heading of the articles should be altered from "Draft regulations relating to..." to "Provisional articles concerning..." and invited the Commission to take up the comments to the provisional articles one by one.

It was so agreed.

Comment to article 1¹¹

14. Mr. LAUTERPACHT pointed out that the Special Rapporteur appeared to have based the substance of the comment on what he considered to have been the attitude of The Hague Codification Conference of 1930. In fact, however, it was somewhat inexact to speak of an attitude since no decisions had been taken and no convention drafted. It was only possible to refer to the replies of Governments and to the Sub-Committee's report to the Conference. In his opinion, the principle of the sovereignty of the coastal State over the territorial sea was no longer seriously disputed and it was therefore unnecessary to elaborate on the subject. He also queried the need to refer to dissenting views.

15. Mr. FRANÇOIS, Rapporteur, said he would not oppose the deletion in the third sentence of the words "which adopted the same attitude" after the words "the Codification Conference of 1930"; nor would he object to the deletion of the last sentence beginning

* The number within parentheses refers to the paragraph number in the Commission's final report on its sixth session. *Vide supra*, 277th meeting, footnote 1.

¹ See also below, 281st meeting, paras. 4-6.

with the words "The opinions of the few dissentients..." He would, however, point out that the principle of the sovereignty of the coastal State over the territorial waters was still disputed, for example, by La Pradelle.

16. The CHAIRMAN proposed that further consideration of the first paragraph of the comment should be deferred until the Special Rapporteur and Mr. Lauterpacht had devised an agreed draft.

It was so agreed.

17. Mr. ZOUREK recalled that he had preferred the term "territorial waters" to the term "territorial sea" and added that he was unable to agree with the reasons for the change given in the second paragraph of the comment.

18. Mr. LAUTERPACHT said that the difference was not sufficiently clear between "internal waters" and "inland waters".

19. The CHAIRMAN agreed that the English translation of the term *eaux intérieures* was deficient and proposed that further consideration of the paragraph should be deferred until Mr. Lauterpacht had been able to suggest a more suitable term.

It was so agreed.

20. Mr. ZOUREK said that since the article dealt only with the territorial sea, it was illogical to mention the air space over or the sea bed and sub-soil of the territorial sea. He proposed that in the third paragraph the phrase "the air space above it and the bed and sub-soil of the territorial sea", which followed upon the words "sovereignty over the territorial sea" should be deleted.

It was so agreed.

21. Mr. ZOUREK further proposed that the entire sentence beginning with the words "The reason why this is expressly mentioned..." should be deleted.

22. The CHAIRMAN put Mr. Zourek's proposal to the vote.

The proposal was rejected by 7 votes to 2, with 1 abstention.

23. Mr. LAUTERPACHT proposed that the word "general" before the word "sovereignty" at the end of the third paragraph should be deleted and that the words "of the State over other parts of its territory" should be added at the end of the paragraph.

It was so agreed.

24. The CHAIRMAN put the third paragraph, as amended, to the vote.

Paragraph 3 was adopted as amended.

25. Mr. LAUTERPACHT said the words "This draft regulation" at the beginning of the fourth paragraph should be modified to read "These provisional articles", and that the word "immediate" should be

replaced by "specific". Furthermore, it would be better to say that international law limited "the rights of the sovereign State" instead of "the sovereign power of the State".

26. Mr. LIANG, Secretary to the Commission, said he preferred the English text of the comment in question to the French text. The latter was somewhat pretentious and too mandatory. He had doubts concerning such words in the French text as "impose" and "doivent être recherchées". The English text of the first sentence of the paragraph reflected more exactly the views of the Commission.

27. Mr. CORDOVA agreed that the word "specific" should be used in the English text rather than "immediate". The words "the sovereign power" in the comment should be replaced by the words "the exercise of the sovereign rights".

28. Mr. ZOUREK said the entire comment should be reconsidered.

29. Mr. FRANÇOIS, Rapporteur, pointed out that it was impossible to cover all the provisions of public and private international law relating to the territorial and high seas. That is why he had in the French text included the words "en premier lieu".

30. Mr. LIANG, Secretary to the Commission, proposed that the words "doivent être recherchées" should be replaced in the French text by "sont énoncées". He also proposed that in the third sentence the words "be described in this draft codification as applying to" should be replaced by: "be codified in this draft as applying to".

31. Mr. ZOUREK thought that many of the limitations imposed by the draft articles on the exercise of sovereignty were not a part of existing law, and therefore called for a vote.

32. The CHAIRMAN put to the vote the passage in question, as amended in the course of the discussion:

"These provisional articles set forth the specific limitations imposed by international law on the exercise of sovereignty in the territorial sea. These provisions should not, however, be regarded as exhaustive. Events which occur in the territorial sea and which have a legal import are also governed by the general rules of international law which cannot be codified in this draft as applying to the territorial sea in particular. For this reason, the 'other rules of international law' are mentioned in addition to the provisions of this draft."

The above text was adopted by 6 votes to 1, with 5 abstentions.

33. Mr. SALAMANCA proposed that in the fifth paragraph a comma should be inserted between the words "special" and "geographical" so as to cover any existing conventions.

34. Mr. CORDOVA agreed that conventional relationships were even more important than geographical

relationships between two States and should therefore be mentioned.

35. Mr. LIANG, Secretary to the Commission, thought it was inappropriate to place conventions and geographical relationships on the same level.

36. Mr. FRANÇOIS, Rapporteur, proposed that the words "by convention or otherwise" should be added at the end of the paragraph.

37. The CHAIRMAN put the Rapporteur's proposal to the vote.

The proposal was adopted by 7 votes to 1, with 1 abstention.

38. Mr. CORDOVA thought that reference should not be restricted to rights of passage since there were a number of other rights, such as, for example, fishing rights and those pertaining to the use of ports.

39. Mr. ZOUREK thought that reference to the rights of passage should be made not in the present comment but in the comment to the article referring specifically to those rights.

40. The CHAIRMAN said the last sentence of the paragraph might be modified to read: "It is, for instance, not the Commission's intention to limit, in any way, the rights of States which, on account of a convention or otherwise, enjoy more extensive rights of passage through the territorial sea."

41. Mr. LIANG, Secretary to the Commission, thought that if the paragraph did not refer exclusively to rights of passage, any reference to such rights should be omitted.

42. Mr. SALAMANCA agreed with the modification proposed by the Chairman.

43. Mr. LAUTERPACHT proposed that the last sentence of the paragraph should be redrafted to read:

"It is not the intention of the Commission to limit any more extensive rights of passage or other rights enjoyed by States by virtue of custom or treaty."

44. The CHAIRMAN said the words "by virtue of custom or treaty" in Mr. Lauterpacht's draft were in conformity with the Commission's prior vote to insert some such phrase as "by convention or otherwise".

The draft of the last sentence of the paragraph as submitted by Mr. Lauterpacht was adopted.

Comment to article 2

45. Mr. LAUTERPACHT proposed that the terms "the manner in which sovereignty over the air space, sea bed and sub-soil in question is exercised" should be replaced by "the question of the exercise of sovereignty".

46. Mr. FRANÇOIS, Rapporteur, said the French text was satisfactory.² He proposed that the Commission should adopt the French text on the understanding that the English version would be brought into line with it.

It was so agreed.

Comment to article 4³

47. Mr. LAUTERPACHT proposed the deletion of the last sentence of paragraph 1 reading: "This is the Commission's interpretation..."

48. Mr. FRANÇOIS, Rapporteur, said that it had been suggested by Mr. Zourek in the course of the discussion that the ruling of the International Court of Justice was to the effect that States were completely free to choose between the low-water line and straight base-lines. The majority of the Commission, however, had agreed with him (Mr. François) in interpreting the judgement as stating that straight base-lines concerned the very special case of a deeply indented coastline.

49. Mr. CORDOVA said that perhaps all reference to the judgement in the Fisheries case could be omitted.

50. The CHAIRMAN said he personally shared the Rapporteur's view but that a vote should perhaps be taken.

51. Mr. ZOUREK said the matter was not one that could be decided by a vote. An adverse vote would not change what he regarded as the correct interpretation of the judgement in question. He would therefore not ask for a vote on the matter.

52. Mr. LAUTERPACHT withdrew his proposal for the deletion of the last sentence.

53. The CHAIRMAN suggested that a more precise reference to the Fisheries case (date, etc.) should be inserted.

It was so agreed.

54. The CHAIRMAN put the comment to the vote.

The comment to article 4 was adopted by 10 votes to 1, subject to the insertion of a fuller reference to the judgement of the International Court of Justice in the Fisheries case.

Comment to article 5⁴

55. Mr. LAUTERPACHT said that the comment in question suggested that the right of States to draw

² The French text read:

"Cet article a été emprunté, sauf modifications de pure forme, au règlement de 1930. Il peut être considéré comme faisant partie du droit positif. Eu égard au fait que le présent projet s'occupe exclusivement de la mer territoriale, la Commission n'a pas étudié les conditions dans lesquelles la souveraineté sur l'espace aérien, le sol et le sous-sol, est exercée."

³ See also below, 281st meeting, para. 7.

⁴ *Ibid.*, paras. 8-17.

straight base-lines was part of existing law both before and after the judgement in the Fisheries case. The comment went on to say that the two limitations concerning the maximum distance of five miles from the coast and the maximum length of ten miles for the straight base-lines were *lex ferenda* rules which would only become valid after the States had approved of them. The judgement in the Fisheries case, in his opinion, expressed an acceptable rule of future international law provided that limits were laid down both for the maximum length of the straight base-lines and for their maximum distance from the coast.

56. Mr. FRANÇOIS, Rapporteur, said that the five-mile maximum for the distance between the straight base-lines and the coast, and the ten-mile maximum length of those lines, as suggested by the experts, could not possibly be regarded as part of existing international law. Having been proposed by experts, those limits deserved careful consideration, but the only rule of positive international law was that acknowledged by the International Court of Justice—namely, that States with a deeply indented coast were entitled to draw straight base-lines.

57. Mr. LAUTERPACHT said he had gathered that Mr. François as Special Rapporteur had agreed with his view that the law laid down limitations to the right of drawing straight base-lines. Such limitation was implied in the judgement of the Court. All that the Commission had done, on the advice of experts, was to express those limitations in concrete terms. The proposed paragraph, however, implied that any limitation as such of that right was a *lex ferenda* rule. That was putting the ruling of the Court much too high. He proposed that the last sentence of the comments should be deleted altogether.

58. Mr. ZOUREK said that the International Court of Justice had accepted straight base-lines 38 and 45 miles long in places.

59. Mr. FRANÇOIS, Rapporteur, said that the sentence in question was necessary because the Commission had often been accused of not specifying clearly enough which of its conclusions were *de lege ferenda* and which *de lege lata*.

60. The CHAIRMAN put to the vote Mr. Lauterpacht's proposal that the last sentence of the comment to article 5 should be deleted.

The proposal was rejected by 2 votes to 1, with 8 abstentions.

61. The Chairman put the comment to article 5 to the vote.

The comment to article 5 was adopted by 5 votes to 2, with 5 abstentions.

62. Mr. LAUTERPACHT said that, as a result of the adoption of the comment to article 5, he would be unable to vote for the whole of the draft relating to the territorial sea.

63. Mr. ZOUREK said that he had voted against the comment because article 5 itself did not reflect existing international law.

Comment to article 6

64. Mr. ZOUREK proposed that the expression "committee of experts" in the first paragraph should be amended to "group of experts" as had been done in certain other references to that unofficial body.

It was so agreed.

65. The CHAIRMAN put the comment, as amended, to the vote.

The comment to article 6 was adopted as amended by 7 votes to 1 with 2 abstentions.

Comment to article 8

66. The CHAIRMAN said that in the last sentence the words "are assimilated to" should be substituted for "are deemed to be", to bring the text into line with the French version.

The comment to article 8 was adopted as amended.

Comment to article 9

67. Mr. ZOUREK proposed that the last sentence should be deleted. He did not consider that the article reflected the international law in force. Even in 1930, the opinion had been expressed that roadsteads should be regarded as internal waters.

68. Mr. FRANÇOIS, Rapporteur, said that the view to which Mr. Zourek had referred had received only a minority of votes in 1930. In the discussions during the current session of the Commission, it had received no support whatever. The sentence in question was therefore not at all unjustified.

69. The CHAIRMAN put Mr. Zourek's proposal to the vote.

Mr. Zourek's proposal for the deletion of the last sentence was not adopted, 2 votes being cast in favour, 2 against, with 6 abstentions.

The comment to article 9 was adopted by 10 votes to 1, with 1 abstention.

Comment to article 10

70. Mr. LAUTERPACHT said that the terms "the Commission challenges this right" (the right to create artificial islands in the high seas) were not adequate. In the same comment, it was stated that, in the Commission's view, existing artificial islands had a territorial sea of their own. He did not recall the Commission discussing that question in any detail.

71. Mr. ZOUREK said that artificial islands which might be erected should not have any territorial waters. They should be treated in the same manner as light-

houses, for which no State had ever claimed a special territorial sea.

72. The CHAIRMAN proposed that the entire passage dealing with artificial islands should be deleted.

The proposal was adopted by 5 votes to 2, with 5 abstentions.

The comment to article 10 as a whole was adopted as amended by 10 votes to 1, with 1 abstention.

The meeting rose at 6.10 p.m.

279th MEETING

Tuesday, 27 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. R. CORDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA (A/CN.4/L.48/Add.4) (*continued*)

1. The CHAIRMAN invited the Commission to continue the discussion of the comments to the provisional articles concerning the régime of the territorial sea included in chapter IV of the Commission's report (A/CN.4/L.48/Add.4).¹

¹ *Vide supra*, 277th meeting, para. 1 and footnote.

Comment to article 12

2. Mr. LAUTERPACHT recalled that at the 261st meeting² he had made a proposal intended to prevent a State from extending its territorial sea unduly by using a succession of drying rocks off its coast. By a vote of 4 against 4 that proposal had not been adopted. The third paragraph of the comment to article 12 showed that the Rapporteur interpreted that vote as indicating that the majority of the Commission intended to grant a territorial sea of their own to drying rocks and shoals situated within the bulges in the outer limit of the territorial sea caused by the existence of another drying rock. He feared that such an interpretation went beyond the intentions of the Commission; he therefore proposed that the third paragraph of the comment to article 12 should be deleted.

The proposal was adopted by 4 votes to 1, with 4 abstentions.

The comment to article 12 was adopted as amended.

Comment to article 13

3. The CHAIRMAN proposed that the word "open" in the second line of the second paragraph of the English text should be replaced by "high".

It was so agreed.

The comment to article 13 was adopted as amended by 8 votes to 1, with 1 abstention.

Comment to article 15

4. Mr. LAUTERPACHT proposed that the words "that an arbitration" in the first line of the fifth paragraph of the English text of the comment should be replaced by "that some provision for arbitration".

It was so agreed.

The comment to article 15 was adopted as amended by 9 votes to 1.

*Comment to article 16*³

5. Mr. ZOUREK recalled that, among the various possible solutions to the problem dealt with in article 16, he had indicated the system of following the line of a parallel of latitude drawn through the intersection of the land frontier and the coastline. That was the solution adopted by Bulgaria, for example.

6. Mr. FRANÇOIS, Rapporteur, pointed out that the method mentioned by Mr. Zourek was only possible in the case of a coast following a north to south direction. It would be necessary to specify that it did not apply to all cases. Subject to that reservation, he saw no objection to indicating that solution after the three others referred to in the comment.

It was so agreed.

² *Vide supra*, 261st meeting, paras. 3-23.

³ See also below, 281st meeting, para. 18.

The comment to article 16 was adopted by 9 votes to 1, subject to the insertion of a new paragraph proposed by Mr. Zourek.

Comment to article 17⁴

7. Mr. PAL pointed out that the term "other" (of its interests) had been omitted in the quotation from article 17 which was given in the first paragraph of the comment to the said article.

8. Mr. LAUTERPACHT said that the comment was incomplete, particularly its first paragraph. The Commission had voted in favour of inserting, in paragraph 2 of article 17, the terms "or to such of its other interests as the territorial sea is intended to protect";⁵ without wishing to reopen the discussion on that point, he hoped that the comment would specify the exact scope of those terms, which were very vague. If broadly construed they might be taken to mean that the Commission regarded the régime of the territorial sea as identical with that of the actual territory of a coastal State; that would be completely at variance with the principles adopted by the 1930 Codification Conference. The comment should specify that the interests in question were those which the coastal State protected by means of its legislation on fiscal, public health, sanitation, immigration and customs matters. To that list might be added a reference to the very general provisions of article 21 (on the duties of foreign vessels during their passage). He could not see what other restrictions could be imposed on the right of passage without completely abolishing the freedom of the seas.

9. Mr. CORDOVA agreed that the terms "such of its other interests as the territorial sea is intended to protect" were very general. It was, however, precisely because it might apply to unforeseeable cases that the Commission had adopted it.

10. The CHAIRMAN proposed that the comment should indicate that the interests in question included, *inter alia*, those of the State in matters of taxation, public health, sanitation, immigration and customs, as well as those which the provisions of article 21 safeguarded. He would submit a written proposal on those lines and the Commission could then vote on the comment to article 17.

11. Mr. LAUTERPACHT said that, as the draft articles concerning the régime of the territorial sea were purely provisional, he would not press for a special reference to the revised language of the second paragraph.

12. With regard to the third paragraph, he proposed that, in the English text, the words "limit the duties" should be replaced by "affect the rights or obligations". The French text of the paragraph would then read: "Aucune disposition du présent chapitre n'a

pour but d'affecter les droits et obligations des Etats Membres des Nations Unies en vertu de la Charte."

The proposal was agreed to.

Comment to article 18

13. Mr. FRANÇOIS, Rapporteur, said he would redraft the English text of the first sentence of the second paragraph, which was not sufficiently clear.

Comment to article 19⁶

14. Mr. LAUTERPACHT proposed that the comment should specify that the provisions of article 19 also applied to warships even though the article appeared in section A of chapter III. The judgement of the International Court of Justice in the Corfu Channel case had actually concerned warships.

15. The CHAIRMAN said that if warships were mentioned only in one of the articles, the impression might be conveyed that none of the other articles concerned warships, which would be a wrong inference.

16. Mr. CORDOVA recalled that the Commission had admitted that, for security reasons States could, subject to certain conditions, restrict the right of free passage through their territorial sea. The decision of the International Court appeared not to recognize that right in the particularly important case of warships, and the comment to article 19 seemed to generalize that view.

17. Mr. ZOUREK regretted that the Commission had agreed to divide chapter III into two sections. It was not true to say that the rules recognized by the International Court in the particular case were a part of the law in force. According to the Charter, which was one of the principal statements of the law, warships could be used only for defensive purposes, and they therefore did not require freedom of movement in the territorial sea of other States. The decision of the Court in the Corfu Channel case dealt with the very special case of a naval demonstration which had occurred very soon after the war. The Commission had been wrong in adopting in article 19 the rules laid down by the Court and had been even less justified in extending in the comment those rules to merchant vessels.

18. Mr. FRANÇOIS, Rapporteur, recalled that he had previously proposed that article 19 should be placed in the general part of chapter III.

19. Mr. LAUTERPACHT proposed that the second phrase of the comment should be altered to read: "and which, in the Commission's view, should be applicable to all ships."

⁶ The comment read as follows:

"This article confirms the principles which were upheld by the International Court of Justice in its judgement in the Corfu Channel case and which, in the Commission's view, should be regarded as forming an integral part of international law."

⁴ *Ibid.*, paras. 19 and 20.

⁵ *Vide supra*, 262nd meeting, paras. 64-70.

20. Mr. EDMONDS proposed that the comment should be drafted as follows:

“This article confirms the principles which were upheld by the International Court of Justice in its judgement in the Corfu Channel case and which should be regarded as forming an integral part of international law.”

21. Mr. CORDOVA proposed that the second phrase of the comment (“and which, in the Commission’s view...”) should be deleted.

22. Mr. PAL agreed with Mr. Córdova. It was not necessary to extend the scope of the International Court’s judgement any further.

23. Mr. HSU pointed out that the interpretation of the Court’s judgement as given in the comment was not shared by all jurists; the comment reflected only one point of view and, consequently, did nothing to improve the article.

24. Mr. LAUTERPACHT said that, since the draft before the Commission was provisional, he would withdraw the amendments he had proposed.

25. Mr. CORDOVA and Mr. EDMONDS also withdrew their respective proposals.

26. Mr. ZOUREK proposed that the second phrase of the comment to article 19 (“and which, in the Commission’s view...”) should be deleted.

The proposal was adopted by 5 votes to 4, with 2 abstentions.

The comment to article 19 was adopted, as amended, by 8 votes to none, with 3 abstentions.

Comment to article 20

27. Mr. LAUTERPACHT proposed that the word “possible” in the second sentence of the comment should be replaced by the word “permissible”. The French text should accordingly be modified to read: “Dans les cas exceptionnels, une suspension temporaire du droit de passage pourrait même être permise.”

It was so agreed.

28. Mr. LAUTERPACHT proposed that in the third sentence of the comment the words “might have argued” should be replaced by the words “is arguable”. The French text would remain unchanged.

It was so agreed.

29. Mr. ZOUREK doubted if the third sentence of the comment truly represented the view of the Commission. The Commission had, in his opinion, envisaged in certain cases the permanent suspension of the right of passage. The Chairman had requested Mr. Córdova to prepare a draft providing for the safeguarding of installations used for the exploitation of the sub-soil of the territorial sea.

30. Mr. FRANÇOIS, Rapporteur, did not think the Commission had ever envisaged a permanent suspension of the right of passage.

31. Mr. CORDOVA agreed that the very special cases referred to by Mr. Zourek were covered by the right of the Stae to regulate maritime traffic within its own territorial sea.

32. Mr. ZOUREK proposed that the third sentence of the comment should be deleted, at least until the Commission had obtained the views of the Governments on article 20.

The proposal was rejected by 6 votes to 1, with 3 abstentions.

The comment to article 20, as amended in the light of Mr. Lauterpacht’s proposals, was adopted by 10 votes to 1.

Comment to article 21

33. Mr. LAUTERPACHT proposed that in the second sentence of the third paragraph of the comment, the words “in the absence of treaty provisions to the contrary” should be inserted after the words “cannot be invoked”. It was necessary to provide for the case of a State concluding treaties which included a “most favoured nation” clause.

It was so agreed.

The comment to article 21 was adopted as amended by 8 votes to 1, with 1 abstention.

Comment to article 22

34. Mr. ZOUREK said the comment gave an inadmissible interpretation of article 22. Contrary to the implication of the second paragraph, the principle of non-discrimination in the matter of charges should be recognized as a general principle.

35. Mr. LAUTERPACHT proposed that in the second paragraph the words “subject to” should be replaced by the words “on a footing of”.

It was so agreed.

The comment to article 22 was adopted as amended by 7 votes to 1, with 1 abstention.

Comment to article 23⁷

36. Mr. LAUTERPACHT proposed that the exact title and date of the 1952 convention should be given in the fourth paragraph, and the phrase “has not yet entered into force and is still under consideration by the contracting parties” should be replaced by: “has not yet been ratified by a large number of States”.

It was so agreed.

⁷ See also below, 281st meeting, para. 21.

37. Mr. LAUTERPACHT doubted whether the last (fifth) paragraph⁸ reflected exactly the true position; he suggested that it should be deleted.

38. Mr. ZOUREK supported Mr. Lauterpacht.

39. Mr. FRANÇOIS, Rapporteur, agreed to the deletion of the paragraph.

40. Mr. LIANG, Secretary to the Commission, pointed out that the words "international criminal law" in the fourth paragraph were open to misconstruction. It might be better merely to say "law", and to alter the French text to read: *la codification du droit en cette matière*.

It was so agreed.

41. Mr. LAUTERPACHT proposed that in the fourth paragraph the words "The Commission did not fail to realize how desirable it would be" should be replaced by the words "The Commission realizes that it would be desirable".

It was so agreed.

42. The CHAIRMAN put the comment, as amended, to the vote.

The comment to article 23 was adopted as amended by 8 votes to none, with 2 abstentions.

Comment to article 24⁹

43. Mr. LAUTERPACHT proposed that the word "comparable" should be replaced by the word "analogous", and that the last sentence of the comment should be deleted.¹⁰

It was so agreed.

44. Mr. LAUTERPACHT said the comment should refer to the Brussels convention of 10 May 1952, relating to the arrest of sea-going ships, and state that the Commission proposed to continue the study of that topic in the light of that convention.

45. The CHAIRMAN said the Rapporteur would make the relevant additions to the comment on the lines suggested by Mr. Lauterpacht, and the Commission would vote on the comment to article 24 when the redrafted text was submitted to it.

Comment to article 25

46. The CHAIRMAN pointed out that the third sentence of the comment should be deleted so as to take

⁸ The paragraph read:

"Though it realizes that some authorities hold that the coastal State has a broader power to arrest, the Commission, nevertheless, considers the article as drafted as the expression of the international law in force."

⁹ See also below, 281st meeting, para. 22.

¹⁰ The sentence read:

"In the Commission's opinion, the article states the international law in force."

into account the amendments made by the Commission to the text of article 25.

It was so agreed.

47. Mr. LAUTERPACHT thought it somewhat excessive to say that the rules laid down by the Brussels Convention of 1926 could be regarded as already forming part of general international law; the principles underlying those rules were being increasingly recognized, but it should not be forgotten that the Brussels Convention had as yet only been ratified by a small number of States. It might therefore be preferable to replace the second sentence by the following text: "It considers that these rules follow the preponderant practice of States, and has consequently formulated this article accordingly."

It was so agreed.

48. The CHAIRMAN submitted the comment, as amended, to the vote.

The comment to article 25 was adopted as amended by 10 votes to 1.

Comment to article 26¹¹

49. Mr. CÓRDOVA proposed the deletion of the final phrase of the last paragraph: "which it considers to be in conformity with the international law in force".

It was so agreed.

50. Mr. ZOUREK pointed out that the first sentence of the comment did not represent the unanimous opinion of the Commission. It would be preferable to indicate that some members of the Commission considered that the passage of warships through the territorial sea was subject to the prior consent of the coastal State.

51. Mr. FRANÇOIS, Rapporteur, pointed out that nowhere else in the report was a minority opinion recorded.

52. Mr. ZOUREK said he would draft a suitable comment. He proposed that the vote on the comment to article 26 should be deferred.

It was so agreed.

Comment to article 27

53. Mr. LIANG, Secretary to the Commission, pointed out that the term "exterritoriality" raised a number of theoretical difficulties; it was perhaps preferable to say "immunity from jurisdiction".

54. Mr. LAUTERPACHT agreed.

55. Mr. CÓRDOVA said that the terms proposed by the Secretary and Mr. Lauterpacht did not convey a very precise meaning.

¹¹ See also below, 281st meeting, paras. 23-28.

56. Mr. LAUTERPACHT said there was a body of law relating to immunity from jurisdiction. To avoid any confusion, the passage might state, for example, that the provisions of paragraph 1 were without prejudice to the generally recognized principle of immunity from jurisdiction enjoyed by warships in the territorial sea.

57. Mr. FRANÇOIS, Rapporteur, pointed out that, in the French text, the words *immunité de juridiction* might prove confusing, and they could be construed as meaning merely that the courts of the coastal State had no jurisdiction over foreign warships, whereas what the Commission wanted to stress was that the law of the coastal State did not apply on board a warship. For that reason, he preferred to retain the term "exterritoriality".

58. The CHAIRMAN put the comment to the vote.

The comment to article 27 was adopted by 10 votes to 1, with 1 abstention.

**Election of a special rapporteur for the topic
"Diplomatic intercourse and immunities"**

59. The CHAIRMAN recalled that at its 270th meeting¹² the Commission had asked Mr. Zourek whether he would be prepared to act as special rapporteur on the topic. Owing to lack of time, Mr. Zourek was unable to act and the Commission had to appoint another rapporteur.

60. Mr. LAUTERPACHT proposed that Mr. Sandström should be appointed special rapporteur on the topic "diplomatic intercourse and immunities".

61. Mr. PAL seconded Mr. Lauterpacht's proposal.

Mr. Lauterpacht's proposal was adopted unanimously.

62. Mr. LAUTERPACHT pointed out that Mr. Hsu had proposed that the Commission should request the Special Rapporteur on the law of treaties and the Special Rapporteur on the régime of the high seas to continue their work on those topics.¹³

63. Mr. LIANG, Secretary to the Commission, pointed out that it was not customary for the Commission to adopt a formal resolution in such cases. It went without saying that special rapporteurs appointed by the Commission continued their work until they submitted their reports.

64. Mr. LAUTERPACHT recalled that the Commission had made similar decisions at its fifth session.¹⁴

65. Mr. HSU said he was satisfied with the explanations given by the Secretary to the Commission and therefore withdrew his proposal.

Control and limitation of documentation

66. Mr. LIANG, Secretary to the Commission, drew attention to General Assembly resolution 789 (VIII) concerning the control and limitation of documentation.

67. The CHAIRMAN proposed that the Commission should indicate in its report that it had duly noted that resolution.

It was so agreed.

Draft resolution proposed by Mr. García-Amador regarding closer co-operation with Inter-American institutions

68. Mr. GARCÍA-AMADOR proposed the following draft resolution:

"The International Law Commission,

"*Considering* that according to article 26 of its statute, adopted by resolution 147 (II) of the General Assembly,

"The advisability of consultation by the International Law Commission with intergovernmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized,

"*Considering* that the Inter-American Council of Jurists and the Tenth Inter-American Conference have taken steps towards the implementation of the foregoing provision,

"*Resolves* to ask the Secretary-General to take such steps as he may deem appropriate in order to establish a closer co-operation between the International Law Commission and the Inter-American bodies whose task is the development and codification of international law."

69. He pointed out that the Inter-American Council of Jurists at its session in Rio de Janeiro in 1950 had adopted a resolution providing for a certain degree of co-operation between the Secretariat of the Council and the Secretariat of the International Law Commission, particularly so far as the exchange of documentation was concerned. The Tenth Inter-American Conference had, moreover, adopted, in connexion with the subject of the responsibility of States, a resolution along the same lines.

70. It would be desirable for the Commission to be kept informed of the work done by American inter-governmental institutions on problems studied by the Commission. It would be sufficient for that purpose, at the present stage, for the Secretariat of the Commission and that of the Inter-American Council of Jurists to communicate to one another all the documents relating

¹² *Vide supra*, 270th meeting, para. 12.

¹³ *Vide ibid.*, para. 7.

¹⁴ See the Commission's report on its fifth session, in *Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, p. 30, paras. 164 and 165. Also in *Yearbook of the International Law Commission, 1953*, vol. II.

to the questions studied by both bodies, and further, to take all appropriate measures with a view to closer co-operation between them. Such action would not involve any additional expenditure as enough copies of the documents of the Commission were reproduced in any case.

71. Mr. LIANG, Secretary to the Commission, pointed out that there was already in practice a certain degree of co-operation between the Secretariat of the United Nations and that of the Pan American Union. It was no doubt desirable that the co-operation should become closer, provided that it had no major financial implications.

72. Mr. HSU supported Mr. García-Amador's proposal. Inter-American bodies were doing splendid work, at the regional level, in the matter of the codification of international law, and the Commission's co-operation with them should be closer.

13. The CHAIRMAN put the draft resolution to the vote.

Mr. García-Amador's draft resolution was adopted unanimously.

Representation of the Commission at the ninth session of the General Assembly of the United Nations

74. Mr. HSU submitted the following proposal: "The Commission decides that it shall be represented at the ninth session of the General Assembly by its Chairman, Mr. A. E. F. Sandström, for purposes of consultation."

Mr. Hsu's proposal was adopted unanimously.

The meeting rose at 1 p.m.

280th MEETING

Tuesday, 27 July 1954, at 4 p.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA (A/CN.4/L.48/Add.4) (*continued*)

1. The CHAIRMAN invited the Commission to vote on the provisional articles concerning the régime of the territorial sea, as a whole.

2. He explained that he would vote in favour of the articles, subject to a reservation with regard to article 5 for it laid down a system for determining the breadth of the territorial sea which was more rigid than that recognized by existing law as interpreted by the International Court of Justice, and which did not sufficiently take into consideration the geographical characteristic of certain archipelagoes such as those in the Scandinavian countries (the *skjaergaard*).

3. Mr. LAUTERPACHT proposed that the vote on the provisional articles should be postponed until after the Commission had considered the comments to the articles.

4. Mr. HSU thought that the vote could be taken at the following meeting. Since, however, he would be unable to attend, he wished the Commission to note that he had intended to abstain from such a vote.

5. The provisional articles on the régime of the territorial sea had been drawn up before the pivotal question of the breadth of the territorial sea had been decided upon. The procedure was illogical and could not but have had consequences. The first was the need to assume, for the sake of drafting, the out-of-date three-mile rule. That, in turn, would produce the second; namely, a prejudicial effect on the minds of the Governments in their consideration of the problem of the breadth of the territorial sea, now referred to them for their opinions. Those two consequences would make the revision of the articles at the following session necessarily more drastic and time-consuming.

6. The CHAIRMAN said that the vote on the provisional articles concerning the régime of the territorial sea would be postponed until the next meeting.

CHAPTER III: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/CN.4/L.48/Add.1) (*resumed from the 276th meeting*)

7. The CHAIRMAN invited the Commission to continue its consideration of the draft Code of Offences against the Peace and Security of Mankind as contained in chapter III of the draft report covering the work of the Commission's sixth session (A/CN.4/L.48/Add.1).¹

8. Mr. ZOUREK said he did not wish to withdraw his earlier objections to article 2, paragraphs 2 and 10. The draft Code was still a very imperfect document. For example, the Nürnberg principles were only very imperfectly reflected in it, particularly in articles 3 and 4. The draft Code did not condemn the use of poison gas, it did not outlaw bacterial warfare, nor did it ban the use of weapons of mass destruction, despite the fact that the latter were condemned by existing law. It also failed to condemn racial and national hatred. He hoped it would be possible to improve its provisions once a definition of aggression had been devised. However, despite his criticism he would vote in favour of the draft Code, because its purpose was honourable and humanitarian.

9. The CHAIRMAN said that he would vote in favour of the adoption of the draft Code but would make a reservation with regard to article 2, paragraph 9, as the latter condemned certain manifestations of international life which, in his opinion, were in no way illicit.

10. Mr. CORDOVA said he would vote in favour of the draft Code in the hope that it would, in the future, be possible to improve its provisions, particularly by including in it a condemnation of the use of weapons of mass destruction.

11. Mr. LAUTERPACHT said that a code which laid down individual responsibility in international law for crimes committed was in itself an important and beneficent document. However, he could not associate himself with the draft Code as adopted by the Commission. Certain articles, such as those relating to superior orders, impaired or even destroyed the purpose of the draft. Others, for example, those dealing with intervention and civil strife, were loosely drafted to the point of being extravagant. He would therefore abstain from the vote. He requested that the report covering the work of the Commission's sixth session should note his dissent with regard to article 2, paragraphs 5 and 9, and article 4, for the reasons he had stated at a previous meeting.

12. Mr. PAL recalled that he had already stated his reasons for abstaining from the vote; he requested that a suitable note should be included in the report of the Commission.

13. Mr. EDMONDS recalled that on an earlier occasion he had explained why he would abstain. He would not

repeat his reasons but would merely say that they were very similar to those given by Mr. Lauterpacht.

14. Faris Bey el-KHOURI said he had in principle intended to vote in favour of the draft Code. He had decided, however, to abstain from the vote because of the provisions of article 2, paragraph 7, which obliged a State to comply with the conditions of a treaty which was forced on it and which might be unjust. He was also opposed to the new paragraph 9 of article 2 dealing with the intervention which, in his opinion, was too general.

15. Mr. GARCIA-AMADOR said he was not entirely satisfied with the draft code as a whole and was opposed to certain of its more detailed provisions. He had been personally responsible for the text of one of the clauses adopted and was surprised that it had been so adversely criticized. He pointed out that the provision in question had been accepted by twenty-one of the members of the United Nations. He approved of the fundamental purpose of the code and would, therefore, despite his reservations, vote in favour of it. He regretted that certain other members of the Commission were unable to do the same.

16. Mr. SALAMANCA said the task of the Commission was not an easy one. The intention of the draft Code was praiseworthy, but it did not specify who would be responsible for giving it effect. He agreed with Mr. Zourek in regretting that it had not been possible to define aggression; he thought that the draft Code would, for that reason precisely, serve no useful purpose. He would therefore abstain from the vote.

Voting on the draft Code as a whole

17. The CHAIRMAN requested the members of the Commission to submit their reservations to the Secretariat in writing for inclusion in the general report.

18. He put to the vote the draft Code of Offences against the Peace and Security of Mankind as contained in chapter III of the Commission's draft report on the work of its sixth session and modified by the Commission.

The draft Code was adopted as a whole by 6 votes to none, with 5 abstentions.

19. Mr. LAUTERPACHT said that, time permitting, he would at the next meeting formally propose that the Commission should not, in future, be bound by the rigid rules of procedure which applied in the General Assembly. Experience showed that the application of such rigid rules stifled discussion. In particular, at the present session, through the operation of the two-thirds majority rule governing reconsideration, four members of the Commission had been able to prevent the reconsideration of a question despite the fact that seven other members had been in favour of such reconsideration. Rules of procedure allowing for such situations to develop were suited to a political rather than to a scientific body.

¹ *Vide supra*, 276th meeting, para. 30 and footnote.

Paragraph 14 of chapter III (resumed)

20. The CHAIRMAN said that the Rapporteur had proposed² that paragraph 14 of the draft report on the draft Code should be replaced by the following text:

“The duties which these provisions impose on States apply also to territories under an international régime, and the rights which relate to the territories of States may also be invoked in favour of territories under an international régime.”

21. Mr. FRANÇOIS, Rapporteur, explained that the Commission had discussed the drafting of paragraph 14 at some length. His new draft was intended to cover both territories under an international régime administered by a State, and territories, such as Trieste, not administered by any one State.

22. Mr. CORDOVA agreed that the text of paragraph 14 should be revised. The Commission had been dealing only with crimes committed by individuals and by the authorities of a State, but crimes committed by members of the administration of territories under an international régime should also be covered.

23. The CHAIRMAN felt that it was difficult to speak of territories as having rights and duties.

24. Mr. SALAMANCA said the draft left in doubt whether aggression against a colonial territory, as distinct from a Trust Territory, was an international offence.

25. Faris Bey el-KHOURI said the expression “under an international régime” was too vague.

26. Mr. LAUTERPACHT proposed that paragraph 14 should be replaced by the following draft:

“The provisions of this draft can apply also to acts of State authorities and the individuals in and in relation to territories under international régime.”

27. Mr. GARCÍA-AMADOR and Faris Bey el-KHOURI proposed that in order to avoid any misunderstanding paragraph 14 should be entirely omitted and the remaining paragraph renumbered accordingly.

28. The CHAIRMAN put to the vote the proposal made by Mr. García-Amador and Faris Bey el-Khourri that paragraph 14 should be deleted.

The proposal was adopted by 7 votes to 1, with 3 abstentions.

Voting on chapter III

29. The CHAIRMAN put to the vote chapter III of the draft report covering the work of the Commission's Sixth Session (A/CN.4/L.48/Add.1) as modified by the Commission.

² *Vide supra*, 276th meeting, paras. 78-84.

Chapter III of the draft report covering the work of the Commission's sixth session was adopted, as amended, by 5 votes to none, with 6 abstentions.

CHAPTER II: NATIONALITY INCLUDING STATELESSNESS (A/CN.4/L.48/Add. 2, 3 and 5) (*resumed from the 276th meeting*)

PART II: PRESENT STATELESSNESS (A/CN.4/L.48/Add.3) (*resumed from the 276th meeting*)

30. Mr. CORDOVA, Special Rapporteur, said that he and the Rapporteur had redrafted paragraphs 6, 7 and 8 of part II (Present statelessness) of chapter II on the draft report.³

*Paragraph 8 (31) **

31. The CHAIRMAN, after allowing for some drafting changes suggested by Mr. Lauterpacht which had been agreed to, put to the vote paragraph 8 drafted in the following terms:

“In formulating its proposals relating to present statelessness, the Commission considered that present statelessness could only be reduced if stateless persons acquired a nationality which would normally be that of the country of residence. Since, however, the acquisition of nationality is in all countries governed by certain statutory conditions including residence qualifications, the Commission considered that for the purpose of improving the condition of statelessness, it would be desirable that stateless persons should be given the special status of ‘protected person’ in their country of residence prior to the acquisition of a nationality. Stateless persons possessing this status would have all civil rights accorded to nationals with the exception of political rights, and would also be entitled to the diplomatic protection of the Government of the country of residence; the protecting State may impose on them the same obligations as it imposes on nationals.”

Paragraph 8 was adopted as above by 7 votes to 1, with 2 abstentions.

Paragraphs 6 and 7 (32, 33 and 34)

32. Mr. CORDOVA, Special Rapporteur, said that the two paragraphs numbered 6 and 7 in the draft of chapter II, which he now proposed to replace by three paragraphs, raised a somewhat delicate issue. He feared that the Conference of Plenipotentiaries which was to meet later in 1954 might note that the Commission's drafts were more generous to stateless persons than the proposals likely to come before that Conference. That might lead the Conference to reject the Commission's drafts. He would suggest that a sentence should be added to say that the Commission was not putting

³ *Vide supra*, 275th meeting, paras. 20-29.

* The number within parentheses refers to the corresponding paragraph number in the Commission's report on its sixth session.

forward its draft conventions for approval by the Conference of Plenipotentiaries.

33. The CHAIRMAN said that the Commission could not make such a statement. It was not for the Commission to speak of any possible overlapping of the work of two independent bodies such as the Conference and itself.

34. He put to the vote the three paragraphs drafted to replace paragraphs 6 and 7 in the following terms:

“The Commission welcomed the resolution of the Economic and Social Council endorsing the principles underlying the work of the Commission for the elimination or reduction of statelessness (resolution 526 B (XVII)) and also the decision of the Council to convene a conference of plenipotentiaries to review and adopt a protocol relating to the status of stateless persons by which certain provisions of the Convention relating to the Status of Refugees of 28 July 1951 would become applicable to stateless persons (resolution 526 A (XVII)).

“The Commission considered the question of the relation of its work on present statelessness to the subject of the forthcoming conference of plenipotentiaries. It was of the opinion that while the object of that conference was the regulation of the status of stateless persons by international agreement, the Commission was primarily concerned with the reduction of present statelessness.

“In considering the problem of present statelessness the Commission was aware of the fact that stateless persons who are refugees as defined in the statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) receive international protection by the United Nations through the High Commissioner. The suggestions contained in the present report are without prejudice to the question of granting international protection by an international agency, as distinguished from diplomatic protection by States, to stateless persons pending their acquisition of a nationality.”

The three paragraphs were adopted as above.

Paragraphs 10, 11 and 12 (previously paragraphs 9, 10 and 11)

35. The CHAIRMAN said that paragraphs 9, 10 and 11 of A/CN.4/L.48/Add.3 would as a result of the foregoing vote be renumbered 10, 11 and 12.

35. He put them to the vote.

Paragraphs 10, 11 and 12 were adopted.

37. The CHAIRMAN put part II of chapter III to the vote.

Part II (Present statelessness) of chapter II of the draft report, as amended, was adopted by 6 votes to 2 with 2 abstentions.

PART I: FUTURE STATELESSNESS (A/CN.4/L.48/Add.2)

38. The CHAIRMAN invited the Commission to consider part I, on future statelessness, of chapter II of the draft report (A/CN.4/L.48/Add.2)⁴

*Paragraph 1 (10)**

39. The CHAIRMAN submitted paragraph 1 to the vote.

Paragraph 1 was adopted subject to the correction in the fifth line to replace “sixteen countries” by “fifteen countries”.

Paragraph 2 (11)

40. The CHAIRMAN put paragraph 2 to the vote.

Paragraph 2 was adopted.

Paragraph 3 (12)

41. Mr. LAUTERPACHT proposed that the word “precisely” be inserted after the word “attributable” in the third line. He further proposed that the fifth and sixth lines should be slightly re-drafted to read: “... decisive objection for if Governments adopted the principle of the elimination or at least the reduction of statelessness in the future...”

It was so agreed.

Paragraph 3 was adopted as amended.

Paragraphs 4, 5, 6 and 7 (13, 14, 15 and 16)

42. The CHAIRMAN put these paragraphs to the vote.

Paragraph 4 was adopted.

Paragraph 5 was adopted subject to the replacing of the word “to” after “preference” in the third line by the word “for”.

Paragraph 6 was adopted.

Paragraph 7 was adopted.

43. Mr. ZOUREK said he had not been present at the discussion of the articles during the current session. He therefore explicitly referred to the remarks made by him during the discussion of statelessness at the fifth session of the Commission.

⁴ This document was mimeographed only. It was incorporated, with modifications, in the Commission's report on its sixth session as chapter II, part one. This report is included in volume II of *Yearbook of the International Law Commission, 1954*. It was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*. The modifications made in chapter II, part one, of the draft report are given in the present summary record.

* The number within parentheses refers to the corresponding paragraph number in the Commission's report on its sixth session.

PART III : OTHER ASPECTS OF THE SUBJECT
OF NATIONALITY (A/CN.4/L.48/Add.5)

Paragraph 8 (17)

44. Mr. LAUTERPACHT proposed that the word "because" in the seventh line of the paragraph should be replaced by "seeing that".

It was so agreed.

Paragraph 8 was adopted as amended.

Paragraph 9 (18)

45. Mr. LAUTERPACHT proposed that in the sixth line the words "interest in his country..." should be replaced by "attachment to his country of adoption". In the same line, he proposed that the words "after mature consideration and" should be deleted so that the sentence would read: "The Commission, keeping in mind..."

It was so agreed.

Paragraph 9 was adopted as amended.

Paragraphs 10, 11, 12, 13 and 14 (19, 20, 21, 22 and 23)

46. The CHAIRMAN submitted these paragraphs to the vote.

Paragraph 10 was adopted.

Paragraph 11 was adopted.

Paragraph 12 was adopted.

Paragraph 13 was adopted.

Paragraph 14 was adopted.

Paragraphs 15 and 16 (24 and 25)

47. Mr. LAUTERPACHT proposed that the word "if" after "International Court of Justice" in the penultimate line of the paragraph should be replaced by "in case".

It was so agreed.

Paragraph 15 was adopted as amended.

Paragraph 16 was adopted, subject to the insertion of a comma after the word "session".

48. The CHAIRMAN put part I, as a whole, to the vote.

Part I of chapter II of the draft report was adopted as a whole as amended by 9 votes to 1, with one abstention.

49. Mr. ZOUREK said he had voted against part I of chapter II for the reasons he had given during the discussion.

50. The CHAIRMAN invited the Commission to consider part III, on other aspects of the subject of nationality, of chapter II of the draft report (A/CN.4/L.48/Add.5)⁵

Paragraph 1 (38)*

51. Mr. CORDOVA, Special Rapporteur, proposed that the words "now" at the end of the second sentence and "for the time being" before the word "content" should be deleted. The Commission had decided to set aside the subject of multiple nationality, some members having said that dual nationality was no evil. He did not wish the report to give the impression that the Commission had only postponed the subject of multiple nationality to the following session.

52. Mr. LAUTERPACHT said that any decision taken by the Commission not to deal with a subject could only be valid for the session at which it was taken. It did not and could not bind the Commission not to take up the subject at the following session.

53. Mr. ZOUREK said the intention of the majority who had voted for the adjournment of the subject of multiple nationality had clearly been to set it aside altogether. That intention should appear from the report so that Governments could adopt a considered attitude.

54. Mr. LIANG, Secretary to the Commission, suggested that the last sentence of the paragraph be deleted as it might be construed as suggesting that the Commission was expressing satisfaction with its own work on nationality.

55. Mr. PAL made a formal proposal that the last sentence of paragraph 1 should be deleted.

56. The CHAIRMAN said that according to the summary records of the meeting in question⁶ the decision taken had been "for the time being" and he could not see how any other decision could have been taken. All that the Commission had decided was that multiple nationality was not so urgent a problem as some other items on the agenda; it had therefore given priority to other topics. It had accordingly adjourned discussion on multiple nationality, and that decision was naturally not valid for any future sessions.

⁵ This document was mimeographed only. It was incorporated, with modifications, in the Commission's report on its sixth session as chapter II, part three. This report is included in volume II of *Yearbook of the International Law Commission, 1954*. It was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*. The modifications made in chapter II, part three of the draft report are given in the present summary record.

⁶ *Vide supra*, 252nd meeting, para. 53.

* The number within parentheses refers to the corresponding paragraph number in the Commission's report on its sixth session.

57. He put the various proposals to the vote.

Mr. Córdova's proposal for the deletion of the word "now" was adopted by 6 votes to 1, with 3 abstentions.

Mr. Pal's proposal for the deletion of the last sentence of paragraph 1 was rejected by 6 votes to 4, with 1 abstention.

Mr. Córdova's proposal for the deletion of the words "for the time being" was adopted by 5 votes to 2, with 3 abstentions.

Paragraph 1 as amended was adopted by 10 votes to 1, with 1 abstention.

Paragraph 2 (39)

58. Mr. CORDOVA, Special Rapporteur, proposed that paragraph 2⁷ should read: "The Commission decided not to deal with the problem of multiple nationality."

59. Mr. LAUTERPACHT said that the Commission could not possibly decide never to deal with a subject. At most it could adjourn discussion.

60. Mr. CORDOVA, Special Rapporteur, withdrew his proposal and proposed instead that the paragraph should read:

"The Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality."

This proposal was adopted by 5 votes to 3, with 2 abstentions.

61. The CHAIRMAN put part III, as a whole and as amended, to the vote.

Part III of chapter II of the draft report was adopted as a whole as amended by 9 votes to none, with one abstention.

62. Faris Bey el-KHOURI said that his vote in favour of a chapter of the draft report did not imply approval of the articles contained therein.

63. Mr. CORDOVA, Special Rapporteur, wished the report to mention the valuable assistance he had received from Mr. Weis of the Office of the High Commissioner for Refugees in connexion with the work of the Commission on statelessness.

64. Faris Bey el-KHOURI proposed that the Special Rapporteur should draft a suitable paragraph to be inserted in the report.

It was so agreed.

⁷ In the draft report (A/CN.4/L.48/Add.5), paragraph 2 read:

"2. The Commission decided to defer for the time being, any further consideration of multiple nationality and of all other questions relating to nationality with the exception of those concerning the elimination or reduction of statelessness."

CHAPTER I: INTRODUCTION (A/CN.4/L.48)

65. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.48).⁸

Paragraphs 1, 2 and 3

66. The CHAIRMAN put paragraphs 1, 2 and 3 to the vote.

Paragraph 1 was adopted.

Paragraph 2 was adopted.

Paragraph 3 was adopted.

Paragraph 4

67. Mr. LIANG, Secretary to the Commission, said reference should be made to the fact that Mr. Zourek attended the meetings from 21 June to the end of the session. Furthermore, the reference to Mr. Scelle having "ceased to attend" would have to be replaced by a more suitable expression.

Paragraph 4 was adopted, subject to drafting changes by the Secretariat.

Paragraphs 5 and 6

68. The CHAIRMAN put paragraphs 5 and 6 to the vote.

Paragraph 5 was adopted.

Paragraph 6 was adopted.

Paragraph 7

69. Mr. LAUTERPACHT said that item 8 of the agenda was given as "Request of the General Assembly" for the codification of state responsibility. He recollected a communication rather than a request on the subject from the General Assembly.

70. Mr. LIANG, Secretary to the Commission, said that the General Assembly gave instructions to the Commission, which was its subordinate body. It was therefore proper to talk of a request and not of a communication.

71. The CHAIRMAN put the paragraph to the vote.

Paragraph 7 was adopted.

Paragraphs 8 and 9

72. The CHAIRMAN put the paragraphs to the vote.

Paragraph 8 was adopted.

Paragraph 9 was adopted.

The meeting rose at 6.20 p.m.

⁸ This document was mimeographed only. It was incorporated, with the modifications given here in the Commission's report on its sixth session as chapter I. Cf. *supra*, footnote 5.

281st MEETING

Wednesday, 28 July 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. J. ZOUREK.

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

Consideration of the draft report of the Commission covering the work of its sixth session (*continued*)

CHAPTER IV: RÉGIME OF THE TERRITORIAL SEA
A/CN.4/L.48/Add.4
(*resumed from the 280th meeting*)

1. The CHAIRMAN invited the Commission to consider the revisions made by the Rapporteur in the introduction and the various articles of chapter IV of the draft report (A/CN.4/L.48/Add.4)¹ in the light of comments by members of the Commission.

INTRODUCTION

Paragraphs 4, 7, 8 and 13 (59, 62, 63 and 68) *

2. Mr. FRANÇOIS, Rapporteur, proposed the following text for paragraphs 4, 7, 8 and 13 of chapter IV:²

"During its fourth session (1952), the Commission considered the question of the juridical status of the territorial sea; the breadth of the territorial sea; the question of base lines; and bays. To guide the

¹ *Vide supra*, 277th meeting, para. 1 and footnote 1.

² *Ibid.*, paras. 52-54, 57, 58-60 and 65-70.

* The numbers within parentheses refer to the corresponding paragraph numbers in the final report of the Commission on its sixth session.

Rapporteur, it expressed certain preliminary opinions on some of these questions.

"7. In compliance with this request, the Rapporteur, on 19 February 1953, submitted a second report on the regime of the territorial sea (A/CN.4/61).

"8. The group of experts mentioned above met at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur. Its members were: Professor L. E. G. ASPLUND (Geographic Survey Department, Stockholm);

Mr. S. Whittemore BOGGS (Special Adviser on Geography, Department of State, Washington, D.C.);

Mr. P. R. V. COUILLAULT (Ingénieur en Chef du Service central hydrographique, Paris);

Commander R. H. Kennedy, O.B.E., R.N. (Retd.) (Hydrographic Department, Admiralty, London) accompanied by Mr. R. C. SHAWYER (Administrative Officer, Admiralty, London);

Vice-Admiral A. S. PINKE (Retd.) (Royal Netherlands Navy, The Hague).

"The group of experts submitted a report on technical questions. In the light of their comments, the Rapporteur amended and supplemented some of his own draft articles; these changes appear in an addendum to the second report on the régime of the territorial sea (A/CN.4/61/Add.1) in which the report of the experts appears as an annex.

"13. On the question of the breadth of the territorial sea, divergent opinions were expressed during the debates at the various sessions of the Commission. The following suggestions were made:

"(1) That a uniform limit (3, 4, 6 or 12 miles) should be adopted;

"(2) That the breadth of the territorial sea should be fixed at three miles subject to the right of the coastal State to exercise, up to a distance of twelve miles, the rights which the Commission has recognized as existing in the contiguous zones;

"(3) That the breadth of the territorial sea should be three miles, subject to the right of the coastal State to extend this limit to twelve miles, provided that it observes the following conditions:

(i) Freedom of passage through the entire area must be safeguarded;

(ii) The coastal State may not claim exclusive fishing rights for its nationals beyond the distance of three nautical miles from the base line of the territorial sea. Beyond this three-mile limit the coastal State may prescribe regulations governing fisheries in the territorial sea, though the sole object of such regulations must be the protection of the resources of the sea;

"(4) That it should be admitted that the breadth of the territorial sea may be fixed by each State at a distance between three to twelve miles;

“(5) That a uniform limit should be adopted for all States whose coasts abut on the same sea or for all States in a particular region ;

“(6) That the limit should vary from State to State in keeping with the special circumstances and historic rights peculiar to each ;

“(7) That the basis of the breadth of the territorial sea should be the area of sea situated over its continental shelf ;

“(8) That it should be admitted that the breadth of the territorial sea depends on different factors which vary from case to case, and it should be agreed that each coastal State is entitled to fix the breadth of its own territorial sea in accordance with its needs ;

“(9) That the breadth of the territorial sea, in so far as not laid down in special conventions, would be fixed by a diplomatic conference convened for this purpose.”¹

3. The CHAIRMAN put the paragraphs, as redrafted, to the vote.

Paragraphs 4, 7, 8 and 13, as redrafted by the Special Rapporteur, were adopted.

Comment to article 1³

4. Mr. LAUTERPACHT proposed that the first paragraph of the comment to article 1 should be replaced by the following text :

“Paragraph 1 emphasizes the fact that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which it exercises over other parts of its territory. There is an essential difference between the régime of the territorial sea and that of the high seas since the latter is based on the principle of free use by all nations. The replies of the Governments in connexion with The Hague Conference of 1930 and the report of its Committee on the subject confirmed that this view, which is almost unanimously held, is in accordance with existing law. This is also the view underlying some multilateral conventions—such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944—which treat territorial waters in the same way as other parts of State territory.”

5. Mr. FRANÇOIS, Rapporteur, accepted the text.

The text proposed by Mr. Lauterpacht was adopted.

6. Mr. FRANÇOIS, Rapporteur, proposed that the second sentence of the second paragraph of the English text should read as follows :

“It is of the opinion that the term ‘territorial waters’ lends itself to confusion for the reason that it may be used to describe both internal waters only and internal and territorial waters taken together.”

The proposed text was adopted.

³ *Vide supra*, 278th meeting, paras. 14-44.

The comment to article 1 was adopted as a whole as amended.

Comment to article 4⁴

7. Mr. FRANÇOIS, Rapporteur, proposed that the last sentence of the first paragraph of the comment to article 4 should read as follows :

“This is the Commission’s interpretation of the judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries case between the United Kingdom and Norway.”

The proposed text and the comment to article 4 as amended were adopted.

Comment to article 5⁵

8. Mr. FRANÇOIS, Rapporteur, proposed that the last paragraph of the comment should be replaced by the following text :

“The Commission considers that these additions express in concrete terms the general guidance given by the Court and are in conformity with the intention behind the Court’s decision. While of the opinion that the provisions in question are part of the international law in force, the Commission does not wish to claim, however, that the figures adopted (five and ten miles) are recognized in positive international law.”

9. The last paragraph of the comment to article 5 as drafted in document A/CN.4/L.48/Add.4 had in fact only been adopted by 2 votes to 1, with 1 abstention, and he feared that it did not reflect the view of the majority.

10. The CHAIRMAN wondered if the words “and are in conformity with the intention behind the Court’s decision” really reflected the view of the Commission.

11. Mr. FRANÇOIS, Rapporteur, replied that the phrase in question embodied an idea proposed by Mr. Lauterpacht. Mr. Lauterpacht had wished to go even further and to say: “these additions express in concrete terms the decisions of the Court”.

12. Mr. LAUTERPACHT agreed with the compromise solution proposed by the Rapporteur. It would be difficult, in his opinion, to deny that certain passages of the judgement of the International Court of Justice did in fact restrict the right to draw straight base lines.

13. Mr. ZOUREK was unable to accept the text proposed by the Rapporteur which he thought gave too narrow an interpretation of the Court’s decision. The latter had not intended to restrict the right of drawing straight base lines to exceptional cases ; on the contrary, it had found that in the case of certain coastlines it was the only possible method.

⁴ *Ibid.*, paras. 47-54.

⁵ *Ibid.*, paras. 55-63.

14. He therefore proposed that the Commission should reconsider its decision with regard to the comments to article 5.

There were 6 votes in favour of the proposal, none against, with 5 abstentions. The required two-thirds majority having been obtained it was decided to reconsider the decision.

15. Mr. FRANÇOIS, Rapporteur, withdrew the words "and are in conformity with the intention behind the Court's decision" at the end of the first sentence of the revised text submitted by him at the present meeting.

16. The CHAIRMAN put to the vote the Rapporteur's revised text of the comment as amended.

The revised text was not adopted, 4 votes being cast in favour, 4 against, with 3 abstentions.

17. The CHAIRMAN ruled that, as a result of the vote the last paragraph of the comment to article 5 should be retained as drafted at the 278th meeting.

Comment to article 16⁶

18. Mr. FRANÇOIS, Rapporteur, proposed that the following text should be inserted after the third paragraph :

"A third solution would be to adopt as a demarcation line the geographical parallel of the point at which the land boundary meets the coast. However, that solution is not applicable in all cases.

"A fourth solution might be provided by a line drawn at right angles to the general direction of the coast line. The adoption of this line... etc."

This text and the comment to article 16 as amended were adopted.

Comment to article 17⁷

19. The CHAIRMAN proposed that the first paragraph of the comment to article 17 should be replaced by the following :

"This article follows the lines of the regulation proposed by Sub-Committee II of the 1930 Conference, but the Commission considered that 'fiscal interests'—a term which according to the 1930 comments should be interpreted very broadly as including all matters relating to customs and to export, import and transit prohibitions—could be included in the more general expression 'such other of its interests as the territorial sea is intended to protect'. This expression comprises *inter alia* questions relating to immigration, customs and health as well as the interests enumerated in article 21."

20. Mr. FRANÇOIS, Rapporteur, accepted the text.

⁶ *Vide supra*, 279th meeting, paras. 5 and 6.

⁷ *Ibid.*, paras. 7-12.

The text submitted by the Chairman and the comment to article 17 as a whole as amended were adopted.

Comment to article 23⁸

21. Mr. FRANÇOIS, Rapporteur, proposed that the penultimate sentence of the fourth paragraph of the comment should be replaced by the following text :

"Again, the Commission did not deal with the matter of collisions because, since 1952, a convention relating to the subject has been in existence and this convention has not yet been ratified by a considerable number of States ; the convention in question is entitled 'International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collisions or other Incidents of Navigation', and was signed at Brussels on 10 May 1952. The Commission proposes, however, to study this topic later."

The proposed text and the comment to article 23 as amended were adopted.

Comment to article 24⁹

22. Mr. FRANÇOIS, Rapporteur, proposed that the following text should be inserted before the last sentence of the second paragraph of the comment :

"Two conventions materially affecting questions of civil jurisdiction were drawn up at the Brussels Conference referred to in the comment to the previous article, namely, the International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision and the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, both dated 10 May 1952."

The text submitted by the Rapporteur was adopted.

The comment to article 24 was adopted as amended.

Comment to article 26¹⁰

23. Mr. CORDOVA and Mr. ZOUREK proposed that the following text should be inserted after the first paragraph of the comment to article 26.

"Some members of the Commission pointed out that under the international law in force the passage of foreign warships through the territorial sea was a mere concession and was subject to the consent of the coastal State. They also expressed the view that the right of passage does not imply the right of warships to stop or anchor in the territorial sea unless specially authorized to do so."

24. Mr. FRANÇOIS, Rapporteur, thought the last sentence of the proposed text unnecessary as the provisions of paragraph 3 of article 17 applied also to warships.

⁸ *Ibid.*, paras. 36-42.

⁹ *Ibid.*, paras. 43-45.

¹⁰ *Ibid.*, paras. 49-52.

25. Mr. ZOUREK thought that article 17, paragraph 3, was intended to apply primarily to merchant vessels.

26. Mr. FRANÇOIS, Rapporteur, proposed that the following new paragraph should be inserted after the first paragraph of the comment:

“The right of passage does not imply the right for warships to stop or anchor in the territorial sea unless specially authorized to do so. The Commission decided that it was unnecessary to include a special provision to that effect since the provisions of paragraph 3 of article 17 apply also to warships.

“The Commission was of the opinion that the right of passage should be granted to warships without prior authorization or notification.

“Some members of the Commission pointed out, however, that, under the international law in force, the passage of foreign warships through the territorial sea was a mere concession and hence subject to the consent of the coastal State.”

It was so agreed.

27. Mr. CORDOVA proposed that the last paragraph of the comment to article 26 should end with the word “judgement”, and that the remainder of the sentence should be deleted.

It was so agreed.

28. The CHAIRMAN put the comment, as amended, to the vote.

The comment to article 26 was adopted as amended.

Voting on the articles relating to the territorial sea

29. The CHAIRMAN put to the vote as a whole the articles relating to the régime of the territorial sea as adopted at previous meetings.

The articles as a whole were adopted by 9 votes to 1 with 1 abstention.

30. Mr. LAUTERPACHT said that, while voting for the draft, he was unable to approve of the comment to article 5, article 17, article 20 and the system of Chapter III, inasmuch as it created the impression that some of the provisions of the draft, i.e., in the matter of the obligation of the coastal State to give notice of the dangers to navigation, did not apply to warships for reasons which he had given in the course of the debate.

31. Mr. EDMONDS said he had abstained only because he had not attended the meetings of the Commission at which most of the articles had been discussed.

32. Faris Bey el-KHOURI said he had voted in favour of the draft articles in the hope that the circulation of the draft to Governments, together with a questionnaire concerning the breadth of the territorial sea, would provide the Commission with fresh information. The decision taken by the Commission should not be considered as final.

33. Mr. CORDOVA also expressed the hope that the replies of Governments would make it possible to improve the draft. In particular, he hoped that the Commission would in the future attach as much importance to the rights of the coastal States as to the interests of the freedom of navigation.

34. Mr. ZOUREK said he had voted against the draft because, in his opinion, it departed in several respects from the international law in force, for example, the provisions concerning the maximum lengths of five and ten miles for the straight base lines, the exceptional character attributed to the system of straight base lines, the adoption of a uniform system for determining the territorial sea of two adjacent States, and, above all, the clauses relating to the regulation of the right of passage.

35. The CHAIRMAN expressed certain reservations with regard to article 5. The Commission, by the text it had adopted, had provided for a much more restricted application of the method of straight base lines than the International Court of Justice; under the provisions as adopted it was impossible to take into account the special needs of the Scandinavian States, for example, whose coast lines were very irregular and bordered by archipelagoes.

Voting on chapter IV as a whole

36. The CHAIRMAN put to the vote chapter IV of the Commission's report as a whole, as amended.

Chapter IV was adopted by 9 votes to one.

CHAPTER V: OTHER DECISIONS (A/CN.4/L.48/Add.6)¹¹

*Paragraphs 1, 2, 3, 4 and 5 (73, 74, 75, 76 and 77) **

37. The CHAIRMAN put these paragraphs to the vote.

Paragraphs 1, 2, 3, 4 and 5 were adopted.

Paragraph 6 (78)

38. Mr. LAUTERPACHT said that the Commission should expressly authorize the Chairman to consider and if necessary accept any proposals made by the competent bodies of the General Assembly concerning the date and place of the Commission's next session.

39. Mr. LIANG, Secretary to the Commission, said the Chairman clearly had the required authority, but for practical reasons it was not desirable to include a specific reference to that effect in the report.

¹¹ This document was mimeographed only. It was incorporated in the report of the Commission on its sixth session as chapter V. The report is included in *Yearbook of the International Law Commission, 1954*, vol. II. It was also published separately in *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*.

* The numbers within parentheses refer to the paragraph numbers in the Commission's report on its sixth session.

40. Mr. LAUTERPACHT noted that the Chairman had wide authority in the matter.

41. The CHAIRMAN put the paragraph to the vote.

Paragraph 6 was adopted.

Paragraph 7 (79)

42. The CHAIRMAN put the paragraph to the vote.

Paragraph 7 was adopted.

43. The CHAIRMAN put chapter V as a whole to the vote.

Chapter V as a whole was adopted.

Other business

Question of stating dissenting opinions in the report

44. Mr. ZOUREK submitted a proposal to the effect that any member of the Commission who did not concur in a decision taken by the latter with regard to draft rules of international law should be allowed to insert in the Commission's report a short statement giving his view on the decision in question.

45. The CHAIRMAN thought it would be preferable to consider that question at the beginning of the next session.

By 5 votes to 2, with 2 abstentions, it was so decided.

46. The CHAIRMAN agreed to place the question raised by Mr. Zourek on the agenda of the next session.

Question of rules of procedure for the Commission

47. Mr. LAUTERPACHT gave notice that he intended to communicate to the Chairman a proposal to the effect that the Commission should consider, at the commencement of its next session, the question whether, in the light of experience, the rules of procedure applicable to the General Assembly and its Committee are best calculated to further the task of the Commission and, if not, what other rules, if any, should be adopted.

Closure of the session

48. The CHAIRMAN thanked the Director-General of UNESCO for the facilities he had so generously placed at the disposal of the Commission. He also thanked all the members of the Secretariat for their valuable assistance in the Commission's work. He was equally grateful to the Rapporteur and the Special Rapporteurs.

49. Mr. LAUTERPACHT paid a tribute to the Chairman for the skill and courtesy with which he had conducted the proceedings.

50. Mr. CORDOVA, Mr. AMADO, Mr. PAL, Faris Bey el-KHOURI, Mr. ZOUREK and Mr. EDMONDS associated themselves with the tribute paid to the Chairman.

51. The CHAIRMAN thanked his colleagues and declared the sixth session of the International Law Commission closed.

The meeting rose at 12.05 p.m.

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