YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1955

Volume I

Summary records of the seventh session

2 May — 8 July 1955

UNITED NATIONS

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1955

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NOTE

The present volume contains the summary records of the seventh session of the Commission (282nd to 330th meetings); in accordance with General Assembly resolution 987 (X) of 3 December 1955, they are printed in English only; they include the corrections to the provisional summary records which were requested by members of the Commission and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session have been incorporated in the summary records.

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

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE SEVENTH SESSION

282nd MEETING

Monday, 2 May 1955, at 4.30 p.m.

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

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Opening of the session

1. The CHAIRMAN declared open the seventh session of the International Law Commission and he welcomed the members—and in particular Mr. Krylov, who was attending for the first time.

Statement by Mr. Krylov

2. Mr. KRYLOV thanked the Chairman for his kind words of welcome. He then went on to say that in protesting against the presence at the Commission's table of a person who in no sense could be said to represent China, he was expressing the feeling both of the people and of the Government of the Soviet Union.

3. Mr. ZOUREK, referring to what he had said on the subject at previous sessions, associated himself with Mr. Krylov's statement.

4. Mr. HSU regretted that such a question should have been raised in the Commission, which was a non-political body.

5. The CHAIRMAN explained that, as on previous occasions, the Commission was unable to take note of such a statement. Its members did not represent their countries, but served as individuals in their personal capacity.

Election of officers

6. The CHAIRMAN suggested that, since some members had not yet arrived, the Commission should defer the election of officers until Monday, 9 May.[1]

It was so agreed.

Adoption of the provisional agenda for the seventh session (A/CN.4/89) [2]

7. Mr. GARCÍA AMADOR, supported by Mr. ZOUREK, suggested that the reason for which the election of officers had been deferred applied with equal force to item 1 of the agenda: filling of casual vacancies in the Commission. He therefore suggested that consideration of that item too be deferred.

It was so agreed.

8. Mr. GARCÍA AMADOR proposed the inclusion in the agenda of the topic "the responsibility of States", that had been only briefly discussed at the sixth session. The omission of so important a topic might create the impression that the Commission had postponed consideration of it indefinitely.

9. Mr. LIANG (Secretary to the Commission), said that the original intention had been to include that topic under item 6: planning of future work of the Commission. If the Commission so wished, it could either adopt that course, or consider the topic as a new item between items 5 and 6. He would point out, however, that the Commission might not even have time to take up item 5.

10. Mr. GARCÍA AMADOR proposed that the topic be included under item 6.

It was so agreed.

11. Mr. SCELLE suggested that when the Commission came to consider item 2, régime of the high seas, it should again take up the question of the continental shelf, which was its natural corollary.

12. Mr. FRANÇOIS pointed out that the question of the continental shelf had already been extensively dealt with under the subject of the territorial sea. However close the relationship between the continental shelf and

[1] See *infra*, 287th meeting, paras. 1–15.

[2] Document A/CN.4/89 read as follows:
1. Filling of casual vacancies in the Commission.
2. Régime of the high seas.
3. Régime of the territorial sea.
4. Law of treaties.
5. Diplomatic intercourse and immunities.
6. Planning of future work of the Commission.
7. Question of stating dissenting opinions.
8. Date and place of the eighth session.
9. Other business.

the régime of the high seas, the Commission had always regarded it as a special subject, and the Commission's report to the General Assembly on it had been presented as such.

13. During the present session the Commission would be considering other aspects of the régime of the high seas and the territorial sea. To revert to a subject already disposed of would be both illogical and, from the practical point of view, undesirable, since a final report had been submitted to the General Assembly. Moreover, the Commission would have its time fully occupied with the other aspects of the régime of the high seas.

14. The CHAIRMAN said Mr. Scelle had not meant to suggest that the whole question of the continental shelf should be reopened, but only that its place in the special rapporteur's sixth report on the régime of the high seas (A/CN.4/79) should be considered.

15. Mr. SCELLE said that he had given the matter a great deal of thought, for he was convinced that the Commission should not regard any question as closed merely on the grounds that it had been the subject of a report to the General Assembly. Any question could be re-opened, and there was always the possibility of the Commission having to revise or review an opinion. It had consistently affirmed that the term "continental shelf" referred to areas outside the territorial sea, so that if the subject of the high seas was to be dealt with at the present session he saw no reason why the continental shelf should not also be discussed, as he suggested. Reconsideration was, in his view, indispensable, because the Commission's decisions concerning the continental shelf conflicted with the decision on fisheries.

16. The CHAIRMAN observed that Mr. Scelle could submit his proposal under item 2 or item 3 of the agenda. In the meantime, he saw no necessity for adding an additional item to the provisional agenda, which appeared to be acceptable.

17. Mr. ZOUREK assumed that it would always be possible to modify the order in which items were taken up. He had in mind particularly item 7, which should be discussed well before the end of the session, since debates could be considerably shortened if it were agreed that dissenting opinions should be included in the report. Otherwise, certain members had to expound their views at length in order to ensure their incorporation in the summary records.

18. The CHAIRMAN considered that the adoption of the provisional agenda in no way bound the Commission to a rigid order of discussion; some measure of flexibility was desirable. However, he did not think that item 7 should be taken up first.

The provisional agenda (A/CN.4/89) was adopted on the understanding that consideration of item 1 would be deferred until 9 May.

19. Mr. GARCÍA AMADOR observed that, in accordance with General Assembly resolution 900 (XI), an International Technical Conference on the Conservation of the Living Resources of the Sea was being held at Rome. It would be remembered that the Conference had been requested to present a report and recommendations for consideration by the Commission in connexion with draft articles concerning the international regulation of fisheries. The Conference was to end on 6 May, and he had been informed that the Chairman of the Conference would be prepared to come to Geneva for two days during the following week. It would be useful and appropriate to invite him to make an oral statement before the Commission on the results of the Conference, especially on any aspect of particular interest.

It was so agreed.

The meeting rose at 5.5 p.m.

283rd MEETING

Tuesday, 3 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

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

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79)

1. The CHAIRMAN invited discussion of the Special Rapporteur's sixth report on the régime of the high seas (A/CN.4/79).

2. Mr. FRANÇOIS (Special Rapporteur) introducing his sixth report, said that the question had been before the Commission from the latter's inception, as it had been

included among the topics for consideration at the first session, at which time he had been appointed Special Rapporteur. At its second session, the Commission had discussed certain general aspects of his first report (A/CN.4/17), and had decided that, as it was not in a position to undertake a comprehensive codification of maritime law, it should select for study the following questions: nationality of ships, collision, safety of life at sea, the right of approach, slave trade, submarine telegraph cables, resources of the sea, right of pursuit, contiguous zones, sedentary fisheries and the continental shelf.[1] It had further been agreed that subjects under examination by other United Nations organs or specialized agencies, as well as those which, because of their technical nature, were not suitable for study by the Commission, should be left aside.

3. His second report (A/CN.4/42) had been considered at the third session, and the Commission had subsequently reported to the General Assembly on the chapters concerning the continental shelf, conservation of the resources of the sea, sedentary fisheries and contiguous zones, giving him certain general directives about the other topics dealt with in the report.[2] Consideration of his third report (A/CN.4/51), submitted at the fourth session, had been postponed until the following year, when the Commission had, to some extent, reversed the decision taken at its second session by requesting him to prepare a new report, for consideration at the sixth session, on subjects not touched upon in his third and fifth reports.[3] The Commission had thus reverted to the idea of codifying the law of the high seas without, however, including any detailed provisions on technical matters or trespassing on ground already covered by special studies undertaken by other United Nations organs or specialized agencies.

4. His sixth report (A/CN.4/79) submitted the previous year, but not then discussed for lack of time, was now before the Commission. As the subject had already been debated at length, he believed that the Commission could proceed at once with its detailed consideration, article by article.

5. The CHAIRMAN agreed that little purpose would be served by a general discussion, particularly on such a heterogeneous subject, and suggested that the procedure suggested by the Special Rapporteur be followed.

It was so agreed.

DRAFT ARTICLES (A/CN.4/79, SECTION II)

Article 1 [1]: Definition of the high seas[4]

6. Mr. FRANÇOIS (Special Rapporteur) pointed out that the adoption of article 1 would, to some extent, prejudge the Commission's decision concerning the territorial sea, but such action could be taken without prejudice to the limit fixed for the latter.

7. In his opinion, article 1 contained the most satisfactory definition of the term "high seas".

8. Mr. SCELLE was prepared to accept the definition as it stood.

9. Mr. HSU strongly opposed the article, which was, moreover, incomplete if the principle were accepted that coastal States possessed sovereignty over the continental shelf. In that event, the continental shelf should be listed in article 1 as not being subsumed under the term "high seas". On the other hand, if the Commission adopted article 1 as it stood, it would have to reconsider its decisions about the continental shelf.

10. Mr. SPIROPOULOS asked whether it was necessary to mention inland waters in the definition, since they were always separated from the high seas by the territorial sea.

11. Mr. FRANÇOIS (Special Rapporteur) admitted that, strictly speaking, Mr. Spiropoulos was correct; but the reference to inland waters did serve to clarify the text.

12. Mr. SCELLE favoured the original wording because it indicated clearly that there existed special régimes for the high seas on the one hand and for the territorial sea on the other.

13. Mr. SPIROPOULOS accepted Mr. Scelle's argument, but asked how inland waters were to be defined. Article 1 did not provide a genuine definition, but a definition by exclusion. If the reference to inland waters were removed, it would be possible to lay down that the term "high seas" meant all parts of the sea outside the territorial sea.

14. Mr. GARCÍA AMADOR endorsed Mr. Spiropoulos's arguments in favour of the deletion of the words "or inland waters", which could be interpreted as including lakes, rivers and inland seas—at least, so far as the Spanish language was concerned. If such a reference were kept, it must be made clear that it related to inland *seas*.

15. Mr. KRYLOV said that as he was opposed to overloading the text with unnecessary detail, he would be prepared to vote for article 1 as it stood.

16. The CHAIRMAN observed that the terminological difficulty did not arise in the case of the English text. In his view, the reference to "inland waters" did serve a purpose, because it could include bays where there was no territorial sea.

17. Mr. FRANÇOIS (Special Rapporteur) suggested that Mr. García Amador's concern should be allayed by the presence of the words "all parts of the sea", which made it clear that "inland waters" did not refer to rivers and lakes.

[1] A/1316, Ch. III, in *Yearbook of the International Law Commission, 1950*, vol. II, pp. 383–385.

[2] A/1858, Annex in *Yearbook of the International Law Commission, 1951*, vol. II, pp. 141–144.

[3] A/2456, Ch. V, in *Yearbook of the International Law Commission, 1953*, vol. II.

[4] Article 1 read as follows:
"For the purposes of the articles hereunder, the term 'high seas' means all parts of the sea which are not included in the territorial sea or inland waters of a State."

18. Mr. SPIROPOULOS, referring to the Chairman's last intervention, asked whether there were any known instances where there was no territorial sea.

19. The CHAIRMAN replied that he had in mind those cases where "bays" formed part of the inland waters.

Article 1 was approved with 1 abstention.

Article 2 [2]: Freedom of the high seas[5]

20. Mr. FRANÇOIS (Special Rapporteur) said that the proposition which formed the subject of article 2 was generally accepted in international law, and required no further elucidation. He could not accept the point raised by Mr. Scelle at the previous meeting as to the incompatibility of the present draft with the provisions on the continental shelf,[6] because the latter did not imply that coastal States exercised sovereignty over the superjacent waters.

21. Mr. SCELLE said that he was prepared to support article 2, which, as drafted, was a perfectly correct statement of principle. But, unlike the Special Rapporteur, he considered it to be completely at variance with the provisions on the continental shelf adopted by the Commission at its fifth session. On that occasion the Commission had expressed the view that coastal States exercised sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources: [7] Its attempts to establish one régime for the seabed and another for the subsoil had soon shown that the two could not be separated. Similarly, it was impossible to deal separately wtih the seabed and the high seas, as was demonstrated by the action of certain States, notably in the South American continent, which claimed sovereign rights over the high seas above the continental shelf. It would be remembered that President Truman, in his declaration of 28 September 1945 on the subject of the continental shelf, had eschewed all mention of sovereignty—a concept which had first been applied to the high seas in 1953.

22. Whatever the disadvantages, it would be pointless for the Commission to close its eyes to the fact that once coastal States were allowed to construct installations on the continental shelf, and to protect them, they would thereby be endowed *de facto* with sovereign rights over the high seas. The possibility was, perhaps, not very apparent at the present time, but as science progressed States would undoubtedly lay claim to the superjacent waters, and it was idle to expect that the pious enunciation that formed article 2 would be capable of withstanding the pressure of events. In other words, the provisions relating to the continental shelf would make it possible for States to exercise sovereignty—or at least territorial dominion—over installations on the continental shelf which could only be reached by traversing the territorial sea. He was not at the moment concerned with theory, but with practice, and must point out that the Commission, by adopting the provisions on the continental shelf which had no foundation either in customary or in statutory international law, had deprived article 2 of all meaning.

23. Mr. LIANG (Secretary to the Commission) said that he had not yet studied with all the attention it deserved Mr. Scelle's recent article on the continental shelf,[8] and was therefore not in a position to discuss his arguments in detail. He would accordingly confine himself for the time being to expressing the view that though there appeared no flagrant contradiction between article 2 and the provisions adopted in 1953 by the Commission concerning the continental shelf, if could be argued that the two drafts, read together, implied the existence of four maritime zones: inland waters, the territorial sea, superjacent waters above the continental shelf, and the high seas.

24. At its fifth session the Commission had stated unequivocally that the superjacent waters were part of the high seas, and had stipulated in its commentary that the "rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters".[9] However, the provisions concerning measures for the exploration of the continental shelf and the exploitation of its natural resources might create the impression that the principle of the freedom of the high seas, as stated in article 2 of the present draft, had to some extent been affected.

25. Mr. HSU said that, were it not for the Commission's previous decisions concerning the continental shelf and the possibility of their being reconsidered, he would have been prepared to accept article 2. The Commission should not deceive itself. If the continental shelf were not to be regarded as part of the high seas, and accordingly became subject to acts of sovereignty and territorial dominion, States would proceed to lay claim to parts of the high seas since the continental shelf and its superjacent waters formed an indivisible entity.

26. Mr. SPIROPOULOS was unable to grasp fully the nature of Mr. Scelle's difficulty, because to him it was clear that the concept of the high seas had no connexion with the continental shelf. However, he did not propose to dwell on that issue, and would simply point out that, at least so far as the French text was concerned, article 2 seemed to require some modification, since the meaning of the words *l'objet d'actes de souveraineté* was not clear.

27. Mr. FRANÇOIS (Special Rapporteur) reminded the Commission that the articles on the continental shelf had been adopted at the fifth session with only two

[5] Article 2 read as follows:
"The high seas shall be immune from all acts of sovereignty or territorial dominion on the part of any State."

[6] 282nd meeting, para. 15.

[7] A/2456, para. 62, in *Yearbook of the International Law Commission, 1953*, vol. II.

[8] G. Scelle, "Plateau continental en droit international", *Revue générale de droit international public*, 1955, pp. 5–62.

[9] A/2456, para. 75, in *Yearbook of the International Law Commission, 1953*, vol. II.

votes, those of Mr. Hsu and Mr. Scelle, cast against them,[10] although Mr. Kozhevnikov and Mr. Zourek had entered a reservation on articles 7 and 8.[11] Since that time Mr. Scelle had further developed his argument in a recent paper, but after reading it carefully he (Mr. François) was still not convinced that the Commission had been mistaken in deciding to treat the seabed and subsoil as something separate from the superjacent waters. Mr. Scelle, supported by Mr. Hsu, now wished to overturn the whole complex of articles already agreed upon. To his great regret, he could not persuade himself that such a procedure was consistent with the Commission's task as laid down in General Assembly resolution 899 (IX).

28. Mr. LIANG (Secretary to the Commission), referring to the drafting point raised by Mr. Spiropoulos, said that the meaning of the words "all acts of sovereignty" in the English text was not open to doubt; but perhaps the text would be improved by the substitution of the word "any" for the word "all". The phrase referred of course to measures for the acquisition of territory, such as discovery, occupation, prescription, conquest, etc.

29. Mr. HSU was unable to let pass in silence the procedural issue raised by the Special Rapporteur, particularly as the final vote on the draft articles on the continental shelf had been misleading. It was essential to bear in mind that the vote on the provision concerning sovereignty over the continental shelf, which had been the crucial issue at stake, had been very close; indeed, the article in question had been carried by only a single vote.

30. He would not dispute the thesis that the Commission should endeavour to avoid going back on its decisions, but when such a course was indispensable it should not allow procedural considerations to deflect it from its purpose. Two years had passed since the adoption of the articles on the continental shelf, and perhaps the Commission, which had since gained some new members, had grown in wisdom in the meantime. It was not a sign of weakness to admit one's mistakes, and the Commission would accordingly be well advised to review the earlier text to enable it to stand up to future examination, and to serve the interests of humanity instead of introducing confusion.

31. Mr. ZOUREK said that article 2 proclaimed a generally accepted rule. However, the text should be amplified by a provision clearly stating that States must refrain from any acts which might be prejudicial to the use of the high seas by the nationals of other States.

32. As to the question whether article 2 was compatible with the provisions adopted on the continental shelf, he saw no problem, since the latter contained an express reservation concerning the régime of the superjacent waters. If the Commission were to re-open its lengthy debates on the continental shelf, it would certainly not be able to finish its task within the term fixed by the General Assembly in resolution 899 (IX).

33. Mr. GARCÍA AMADOR said that, as he had not been a member of the Commission in 1953, he wished to take the present opportunity of stating his views on the vital issue of the continental shelf.

34. Considering the superjacent waters to be part of the high seas and subject to the same régime, he fully endorsed article 3 of the rules adopted two years previously, and had consistently defended that view in the Inter-American Council of Jurists. There was, however, a tendency, dictated by practical considerations, to extend the principle of territorial sovereignty to the subsoil of the continental shelf, and the issue raised by Mr. Scelle and Mr. Hsu as to whether that would be compatible with the freedom of the seas seemed to have been satisfactorily resolved in the earlier draft by the limitations (articles 3, 5 and 6) upon the exercise of rights over the continental shelf. Navigation and fishing rights would accordingly be fully protected. Recognition that coastal States possessed certain rights for purposes of exploring and exploiting the natural resources of the continental shelf in no way weakened the principle of freedom of the seas.

35. Mr. SCELLE pointed out that none of the foregoing considerations could alter the fact that the Commission had already adopted a series of provisions which were in flagrant contradiction with articles 2 and 3 of the present draft, the second of which could not but affect the régime of the high seas in superjacent waters whatever the Commission's intentions. Coastal States had been given every facility to obstruct free navigation and the laying or maintenance of submarine cables. In the circumstances, he was unable to see how the freedom of the seas could be respected, and looked forward with the greatest apprehension to the provisions on the continental shelf becoming law, although absolutely contrary to existing rules, and to the possibility of acceptance of the concept of four maritime zones mentioned by the Secretary, for which there was no authority in customary or statutory international law.

36. If sovereign rights over the continental shelf were to be conferred on States, a whole series of international disputes would inevitably ensue, to the detriment of world peace. He was categorically opposed to allowing coastal States freedom to exploit the resources of the continental shelf, whatever the consequences for other States, and would therefore favour an amendment of the kind suggested by Mr. Zourek, which would go some way towards eliminating the contradiction inherent in article 2.

37. Mr. SALAMANCA agreed with Mr. Scelle that the Commission must be realistic. The concept of the continental shelf was a new one, but did not affect the freedom of the seas. However, if the continental shelf were to be exploited, the sovereign rights of coastal States, already claimed by certain South American countries and others, would have to be recognized.

[10] See *Yearbook of the International Law Commission, 1953*, vol. I, 234th meeting, para. 67.

[11] *Ibid.*, paras. 68 and 71.

He had the impression that the tendency to recognize four maritime zones as enumerated by the Secretary, and which, perhaps, had its origin in the Special Rapporteur's drafts, would be followed by most members of the United Nations; and the consequences of such a development must be faced. He therefore supported articles 2 and 3, but agreed that if the earlier debate on the provision contained in article 4 were to be reopened, Mr. Scelle should be given the opportunity of elucidating his views further.

38. The CHAIRMAN said that Mr. Scelle was certainly right in drawing attention to the contradiction between article 2 and the articles on the continental shelf, for the provisions of those articles clearly encroached upon the rights of States in respect of freedom of the high seas. That contradiction, however, could be resolved by adding to article 2 the phrase "without prejudice to the provisions of the articles on the continental shelf".

39. The final merging of the two sets of articles would render articles 3 and 4 of the text under consideration superfluous, and they might therefore be deleted.

40. Mr. HSU doubted the wisdom of such a course; the articles on the continental shelf had not yet been approved by the General Assembly, and it would be premature to assume that they would inevitably become law.

41. The CHAIRMAN said that it would, however, be misguided to dismiss those articles as though they were no longer of concern to the Commission.

42. Mr. FRANÇOIS (Special Rapporteur), supporting the Chairman, said that he would go even further, and reserve not only the articles on the continental shelf, but also article 5 of the present set, relating to the high seas adjacent to the territorial sea. It must not be forgotten that the articles on the continental shelf would finally be embodied in those of the régime of the high seas to form a single whole.

43. Mr. SCELLE said that such a procedure would lead to a Janus-like series of provisions, in which the inherent contradictions between the two sets of draft articles would be even more marked.

Proposal by Mr. Krylov for hearing an observer from Poland

44. Mr. KRYLOV formally proposed that the Commission allow Mr. J. Balicki, the observer for Poland at the Commission's seventh session, whose nomination as such had been notified to the Chairman, to address the Commission on some future occasion, either on the subject of article 2 or on that of article 7. The Polish Government took a particular interest in the question of freedom of the seas, and a precedent for such a procedure had been established when Mr. V. Belaunde, observer for Peru, had addressed the Commission at its first session.[12] It was also common practice in other organs of the United Nations for observers for the governments of States Members to take the floor.

45. Mr. LIANG (Secretary to the Commission) then read out the letter from the Under-Secretary of State in the Polish Ministry of Foreign Affairs to the Chairman of the Commission, notifying the latter of Mr. Balicki's nomination as an observer at the present session.

46. The CHAIRMAN regretted that he had no power to authorize an observer to address the Commission. The methods of communication between governments and the Commission had been set forth in the Commission's Statutes and it was quite clear that they contained no provision for oral communications. It would, therefore, be contrary to the Statutes to accede to Mr. Krylov's request.

47. Mr. ZOUREK drew attention to the fact that in resolution 821 (IX)—Complaint of violation of the freedom of navigation in the area of the China Seas—the General Assembly had specifically invited governments to give their views on the principle of freedom of navigation on the high seas. He therefore failed to understand why the Chairman should treat Mr. Krylov's proposal so illiberally.

48. The CHAIRMAN, after quoting the relevant paragraph of the resolution in question, said that it seemed to confirm his previous interpretation of the Commission's Statutes.

49. Mr. KRYLOV failed to see how General Assembly resolution 821 (IX) could be quoted as an argument against his proposal; the functions of observers had been fully recognized in international legal usage. The Commission was a body of experts which should study all aspects of the question under examination, and it should not therefore deprive itself of the valuable opportunity of hearing the Polish observer. It was, moreover, anomalous that the International Law Commission should be singled out as enjoying special status in that respect.

50. Mr. EDMONDS said the problem was a familiar one in cases of pleadings of *amicus curiae*. In such cases, however, the right of oral presentation was always denied on practical grounds.

51. Mr. FRANÇOIS (Special Rapporteur) said that, if Mr. Krylov thought that observers at sessions of United Nations organs had the right to take part in the discussions, he had been misinformed. Nor could he (Mr. François) agree that international custom allowed each State to send observers to all commissions with the right to intervene in the discussions. The Commission should respect its Statute with regard to methods of communicating with governments. The Polish Government had unfortunately not hitherto seen fit to comply with that procedure. If Polish observers were allowed to address the Commission there would be some risk of its judicial atmosphere being disturbed. To accede to Mr. Krylov's request would create a bad precedent.

[12] See *Yearbook of the International Law Commission, 1949*, 9th meeting, p. 69.

52. Mr. HSU, endorsing the previous speaker's viewpoint, said that the Commission had, on occasion, invited individuals to address it, but it had not hitherto acceded to any unsolicited request to do so.

53. The CHAIRMAN put to the vote Mr. Krylov's proposal that the observer for Poland be allowed to address the Commission.

Mr. Krylov's proposal was rejected by 6 votes to 3, with 1 abstention.

54. Mr. GARCÍA AMADOR, explaining his abstention, recalled the case of Mr. V. Belaunde mentioned by Mr. Krylov. The decision to hear him had infringed the Commission's Statute; it had nevertheless created a precedent. The Commission should adhere strictly to its own rules, and make no distinction between one individual and another.

55. Mr. HSU said that the previous speaker had misunderstood the point at issue. Mr. V. Belaunde had not asked to address the Commission; he had been invited to do so. No precedent therefore had been created on that occasion, whereas Mr. Krylov's proposal had raised an entirely new point.

56. Mr. SALAMANCA said that he had voted for Mr. Krylov's proposal because he saw no objection to the Commission's hearing Mr. Balicki on article 2. The Commission should welcome the views of governments on a specific point such as that at issue.

The CHAIRMAN declared the discussion on Mr. Krylov's proposal closed.

Régime of the high seas (item 2 of the agenda)

(A/CN.4/79) *(resumed from para. 43)*

DRAFT ARTICLES (A/CN.4/79, SECTION II)
(resumed from para. 43)

Article 2 [2]: Freedom of the high seas
(resumed from para. 43)

57. The CHAIRMAN put to the vote his own proposal that the phrase "without prejudice to the provisions of the articles on the continental shelf" be added to article 2.

The Chairman's proposal was adopted by 6 votes to 3, with 1 abstention.

58. Mr. SCELLE said that he had voted against the proposal because he had no very precise idea of the meaning that the term "without prejudice" was intended to convey.

59. Mr. GARCÍA AMADOR explained that, owing to a misapprehension, he had voted in favour of the proposal, which he had thereupon realized contained an inherent contradiction. The continental shelf was not the only element to be considered in the régime of the high seas: there were other related subjects such as right of pursuit, etc. If the reservation concerning the continental shelf were accepted, there would be contradiction with the other articles. As the articles had been drafted, the exceptions were implicit, but if one item were to be specified, all would have to be mentioned.

60. The CHAIRMAN said that he took the previous speaker's point, and suggested that further consideration of the article be deferred until the second reading.

It was so agreed.

61. After a short discussion, in which the CHAIRMAN, Mr. FRANÇOIS, and Mr. ZOUREK took part, *it was agreed* that Mr. Zourek's amendment[13] should also be considered on a subsequent occasion.

Further discussion of article 2 was adjourned.[14]

Article 3: Freedom of the high seas[15]

62. The CHAIRMAN, supported by Mr. FRANÇOIS (Special Rapporteur), suggested the deletion of articles 3 and 4, as being superfluous in the light of the articles on the continental shelf, the Special Rapporteur adding that article 5 might similarly be deleted.

63. Mr. SCELLE said that he had already expressed his opinion on the articles on the continental shelf and had put forward a proposal, which was being circulated as document A/CN.4/L.51.[16]

64. Mr. KRYLOV suggested that further consideration of the point be deferred until the next meeting in order to give members time to study both proposals.

It was so agreed.

The meeting rose at 1 p.m.

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[13] Mr. Zourek's amendement (A/CN.4/L.52) read as follows:
"Add the following sentence to article 2:
"Since the high seas are open to all nations they cannot be utilized, save in the exptional cases provided for in the following articles, for activities prejudicial to their use by the nationals of other States."

[14] Resumed at the 284th meeting.

[15] Article 3 read as follows:
"The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas."

[16] A/CN.4/L.51 read as follows:
"Prof. J. Scelle has never been able to associate himself with the Commission's votes on the draft relating to the continental shelf, because it is simply a question of upholding governmental claims which are mutually contradictory and are not based on any rule of customary or conventional law. On the contrary the text adopted constitutes a flagrant violation of the traditional and constitutional regime of the high seas and their subsoil laboriously established during past centuries. The introduction of the concept of sovereignty in the Commission's latest draft appears, on reflection, particularly inadmissible and should be abandoned. It is calculated to multiply the causes of friction between governments and to jeopardise peaceful relations by reverting to imperialist and mercantile occupation practices.
"It is hard to understand why the International Law Commission did not follow in this field the course it adopted with regard to fisheries on the high seas, whereby the necessary power of regulation is entrusted to an international administrative authority. This method would strengthen the efforts of the international community towards integration, which are being pursued within the framework of the San Francisco charter and the United Nations."
"A brief text based on that adopted in regard to fisheries might therefore be discussed, this text to read more or less as follows:

284th MEETING

Wednesday, 4 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

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

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/2456, A/CN.4/79, A/CN./L.51, A/CN.4/L.52) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 2 [2]: Freedom of the high seas
(resumed from the 283rd meeting)

1. The CHAIRMAN invited the Commission to continue its consideration of item 2 of the agenda—régime of the high seas—and requested Mr. Zourek to introduce his amendment to article 2 (A/CN.4/L.52).[1]

2. Mr. ZOUREK recalled that at the previous meeting he had expressed his general approval of article 2, subject to a more precise definition. He had a further drafting amendment to make to his addition: in the last line, the phrase "to their use" should be replaced by "to the use of the high seas".

3. Mr. LIANG (Secretary to the Commission) pointed out that since there was no previous mention of coastal States in the article, the word "other" in Mr. Zourek's proposal had no application.

4. Mr. FRANÇOIS (Special Rapporteur) agreed and also doubted whether the amendment improved the text. The phrase "save in the exceptional cases provided for in the following articles" might be kept; for the rest, the only fresh element was the concept of prejudicial activities. That, however, was such a vague notion that it would be unwise to introduce it into the article.

5. Mr. SCELLE said that the proposal would be acceptable if the word "even" (*même*) were substituted for the word "save" (*sauf*). It was obvious that, despite the provision "even in exceptional... cases...", any derogation from the right to freedom of the high seas could be settled by the injured government bringing an action for the infringement of that right. That would still apply even if the articles on the continental shelf were finally retained. He would suggest substituting for the phrase "the nationals of other States" (*les ressortissants d'autres Etats*) the term "the international community" (*la communauté internationale*).

6. Mr. ZOUREK suggested that his text might be further clarified by the insertion between the words "utilized" and "save" of the words "by any State" (*par aucun Etat*). In the light of Mr. François' objection, the force of which he appreciated, it might be advisable to add a new article on the concept of prejudicial activities, which might appropriately come at the end of that section.

7. The CHAIRMAN, speaking as a member of the Commission, said he failed to understand Mr. Scelle's suggestion. The contradiction with paragraph 1 of article 6 of the provisions relating to the continental shelf was a different matter entirely.

8. Mr. SCELLE urged that his proposal constituted confirmation of that article.

9. The CHAIRMAN, supported by Mr. ZOUREK, pointed out that article 6 provided for some attenuation of the right to the freedom of the seas. Any interference must not be unjustifiable; nevertheless the restriction existed.

"An international administrative authority set up within the framework of the United Nations shall be competent ot deal with any application from natural or juridical persons, supported by one or more governments, with a view to prospecting, investigating and exploiting the resources of the bed and subsoil of the high seas. This authority shall consider whether such application is justified and whether effect can be given to it. It may grant an international concession for this purpose, the utilization of which it will regulate, taking into consideration, if it thinks fit, the opinion of committees of experts and jurists appointed to report on applications for concessions. The Commission's decisions shall be subject to ratification by the Economic and Social Council. Their validity may be disputed before the International Court of Justice or before a special tribunal on the grounds of illegality or misuse of power.

"The very serious and multiple reasons justifying the abandonment of the Commission's draft, and also the above (or some similar) proposal, were developed in an article in the last number of the *Revue générale de droit international public*, an offprint of which has been circulated to all the members of the Commission."

[1] See *supra*, 283rd meeting, footnote 13.

10. Mr. FRANÇOIS (Special Rapporteur) agreed and pointed out that the phrase "following articles" referred, not only to those on the continental shelf, but also to those on other rights, such as that of hot pursuit. Approval of Mr. Scelle's proposal would upset the whole system adopted by the Commission.

11. Mr. SCELLE said that the use of the word "unjustifiable", which was essentially subjective, was itself entirely unjustifiable in any serious legal document. In the last resort, the matter was one of individual judgement in specific cases. He would, however, support any proposal for the addition of a new article establishing the principle that in the exceptional cases mentioned in Mr. Zourek's proposal any conflict should be settled by a special court.

12. The CHAIRMAN then read out paragraph 77 of the report of the Commission's fifth session (A/2456) which commented on article 6 of the provisions relating to the continental shelf.

13. Mr. HSU, supporting Mr. Scelle's proposal, said that in such borderline cases it would be safer to err on the side of strictness of interpretation.

14. Mr. EDMONDS said that approval of Mr. Scelle's proposal would undoubtedly lead to difficulties in determining whether there had been interference. He thought it unnecessary to add a further qualification to that already adequately expressed in paragraph 1 of article 6 of the provisions on the continental shelf.

15. Mr. SCELLE said that the essential issue was whether, in the case of a dispute, the last word would remain with the coastal State or with a court.

16. Mr. SALAMANCA said that there had been a shift in the direction of the discussion which had been begun by Mr. François' accepting the phrase "save in the exceptional case... following articles" in Mr. Zourek's amendment. Subsequently, the question had been raised of the compatibility of the articles on the continental shelf with the principle of the freedom of the seas, and Mr. Scelle had wished to introduce an entirely new concept. He suggested the deletion from Mr. Zourek's amendment of the words "provided for in the following articles" and he would support the proposal to add a new article.

17. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Scelle's aim seemed in fact to be to reverse the decision taken by the Commission at its previous session, in seeking which he was, of course, perfectly within his rights. His two alternatives, however, had oversimplified the issue, for since the notion of prejudicial activities was a new one, its interpretation by a court could by no means be foreseen. The safeguard was, therefore, largely illusory. He would ask Mr. Scelle whether he had included in his concept those other elements, such as hot pursuit, which were obviously prejudicial activities. There was surely no need to enunciate such a truism that trespass on the right to the freedom of the seas should be prohibited. He preferred Mr. Zourek's proposal, since Mr. Scelle's drafting would only create further ambiguity.

18. Mr. SCELLE said that, although he had no hope of the Commission's revising its attitude on the subject, his integrity as an independent jurist had impelled him to put forward his suggestion. He felt sure that Grotius, in his controversy with Selden on the issue of the freedom of the seas, would not have expected such a triumph for his ideas. He (Mr. Scelle) was waiting impatiently for the judgment of the International Court of Justice in the dispute on the continental shelf between Australia and Japan, although he had no doubt in his own mind that its ruling would be that the concept of the continental shelf had no basis in law. However long the Court took before delivering judgement, it would be very much longer before States reached agreement on the articles on the continental shelf.

19. The CHAIRMAN, speaking as a member of the Commission, suggested that Mr. Zourek's opening phrase "Since the high seas are open to all nations" was too vague; specific mention should be made, for instance, of the inclusion of freedom of navigation and fishing.

20. Mr. FRANÇOIS (Special Rapporteur) queried the usefulness of the previous speaker's suggestion, which, if the principle of articles 2 and 7 were accepted, would be unnecessary. If, however, it was considered desirable to mention specifically those two rights, care would have to be taken lest others, equally important, be excluded by omission of mention.

21. Mr. ZOUREK, agreeing with the Chairman, said that his (the Chairman's) observation reinforced his argument for a separate article. He suggested that, pending the drafting of a new article to cover that point, the Commission defer further consideration of article 2.[2]

It was so agreed.

Articles 3 (resumed from the 283rd meeting), *4 and 5: Freedom of the high seas*[3]

22. The CHAIRMAN, reverting to the decision to defer consideration of articles 3, 4 and 5 taken at the

[2] See *infra*, 293rd meeting.

[3] Article 4 read as follows:

"1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any anjustifiable interference with navigation, fishing or fish production.

"2. Subject to the provisions of paragraphs 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resouces and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

"3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no

close of the previous meeting, suggested that articles 3 and 4, as he himself had suggested, together with article 5, on the proposal of the Special Rapporteur, be deleted, subject to subsequent reconsideration.

There being no objections, *it was so decided.*

23. Mr. SCELLE, in reply to an invitation by the Chairman to introduce his proposal on the régime of the high seas (A/CN.4/L.51),[4] said that he would not wish to waste the Commission's time by putting forward a proposal that had no prospect of approval.

24. The CHAIRMAN said that a discussion on the proposal would certainly be unprofitable in the sense that the articles on the continental shelf transmitted to the General Assembly could not be the subject of further discussion. The Commission, however, would be glad to hear any observations Mr. Scelle might care to make on the subject.

25. Mr. SCELLE, withdrawing his proposal, requested that the text be inserted in the summary record of the meeting. Mr. Scelle's proposal (A/CN.4/L.51) read as follows:

> "An international administrative authority set up within the framework of the United Nations shall be competent to deal with any application from natural or juridical persons, supported by one or more governments, with a view to prospecting, investigating and exploiting the resources of the bed and subsoil of the high seas. This authority shall consider whether such application is justified and whether effect can be given to it. It may grant an international concession for this purpose, the utilization of which it will regulate, taking into consideration, if it thinks fit, the opinion of committees of experts and jurists appointed to report on applications for concessions. The Commission's decisions shall be subject to ratification by the Economic and Social Council. Their validity may be disputed before the International Court of Justice or before a special tribunal on the grounds of illegality or misuse of power."

26. Mr. HSU, while appreciating the Chairman's ruling, pointed out that the General Assembly had not yet approved the articles on the continental shelf. In view of the inevitable conflict between those articles and the articles on the régime of the high seas, he would suggest that the Commission bear that fact in mind and, in order to help the General Assembly in its decision, consider the possibility of alternative drafts, depending on whether the articles on the continental shelf received approval or not.

27. The CHAIRMAN said that Mr. Hsu's helpful suggestion could be considered at a subsequent stage.

Article 6: Merchant ships on the high seas[5]

28. Mr. FRANÇOIS (Special Rapporteur) said that he had doubts as to the necessity of the definition of a ship, which would be more appropriate in a complete work of codification. He was wedded to the inclusion of the article, although, in view of the difficulties that had arisen, some of which he had mentioned in the comment on the article, he had thought it useful to suggest a definition.

29. After a short discussion, in which Mr. KRYLOV, Mr. SCELLE, the CHAIRMAN and Mr. FRANÇOIS, Special Rapporteur, took part:

It was unanimously agreed to delete article 6.

Article 7 [4]: Merchant ships on the high seas[6]

30. Mr. FRANÇOIS (Special Rapporteur) said that in drafting article 7 he had wished to avoid any risk of controversy on the subject of the territoriality of a vessel.

31. Mr. SCELLE suggested that it would be desirable to define a merchant ship.

32. Mr. ZOUREK pointed out that the article applied to all ships, and that the word "merchant" might therefore be deleted.

33. Mr. KRYLOV said that Mr. Scelle's comment really referred to a different subject. It would be advisable to modify Mr. François' draft as little as possible. The existing text was quite satisfactory and the Commission should endeavour to press on with its work.

34. Mr. LIANG (Secretary to the Commission) said that the plan of the Special Rapporteur had contemplated dealing first with merchant ships, and then with State vessels, including warships. The point could be considered when that subject was reached. In the present context, it would be advisable to retain the concept of a merchant ship as a ship engaged in commerce.

35. In reply to a question by the CHAIRMAN, he thought it unnecessary to go into details of the scope of the jurisdiction of the flag State; it would suffice

territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.

"4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

"5. Neither the installations themselves nor the said safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation."

Article 5 read as follows:

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent and punish the infringement, within its territory or territorial sea, of its customs, immigration, fiscal or sanitary regulations. Such control may not be exercised at a distance beyond twelve miles from the base line from which the breadth of the territorial sea is measured."

[4] See *supra*, 283rd meeting, footnote 16.

[5] Article 6 read as follows:

"A ship is a device capable of traversing the sea but not the air space, with the equipment and crew appropriate to the purpose for which it is used."

[6] Article 7 read as follows:

"A merchant ship on the high seas shall be subject solely to the jurisdiction of the flag State."

merely to specify that a merchant ship on the high seas should be subject solely to that jurisdiction.

36. Mr. ZOUREK said that the Special Rapporteur, in his comment on article 12, expressed certain doubts about the validity of the distinction between warships and other vessels; there was therefore no reason to prolong the discussion on article 7.

37. With regard to jurisdiction, it might be advisable in the comment to explain the difference in the meaning of that word in French and in English. It had a much wider connotation in the latter language.

Article 7 was unanimously approved.

Article 8: Merchant ships on the high seas[7]

38. Mr. FRANÇOIS (Special Rapporteur) said that the provision in article 8 was academic rather than practical. As he had pointed out in the comment, he had borne in mind the criticism of the comparison of the ship without a nationality to the pirate.

39. In reply to Mr. SCELLE, who raised the question of the situation of a ship suspecting of piracy another ship not navigating under a regular flag, and to Mr. HSU, who asked for a definition of "public vessels", he said that both those points were dealt with in subsequent articles.

40. Mr. ZOUREK suggested that the exact meaning of the phrases *le pavillon d'un Etat* and *droit de visite et de perquisition* in the French text required clarification.

41. Mr. FRANÇOIS (Special Rapporteur) said that in the English text the words: "a State" meant "any State", that was, a ship not flying the flag of any State.

42. Mr. LIANG (Secretary to the Commission) had doubts about the implementation of the provisions of the article, which should perhaps be clarified. The article referred to boarding and searching in peacetime, an act which, of course, was severely restricted. Public vessels of another State engaged in such an act at their own risk, and the State was responsible should its suspicions prove not to have been justified.

43. Mr. FRANÇOIS (Special Rapporteur) said that if, as a result of boarding, it was ascertained that the vessel had no right to fly the flag of any State, the act would be justified. In the contrary case, compensation would have to be paid.

44. Mr. SCELLE said the article was unsatisfactory in that it propounded a generalization of the right of boarding and searching. The French Government had always been utterly opposed to that principle, on the grounds of its liability to abuse by a powerful maritime State.

45. Mr. FRANÇOIS (Special Rapporteur) said that his main purpose in article 8 had been to ensure that a ship without a flag should not be treated as a pirate unless it committed acts of piracy. It was for that reason that he had provided for such vessels being boarded or searched. He quite saw, however, that the adoption of the latter provision might in a sense prejudge article 21. He would therefore be prepared to delete that provision, and article 8 would then read "A ship not authorized to fly the flag of any State shall not be treated as a pirate unless it commits acts of piracy."

46. Mr. ZOUREK wondered whether, in view of the Special Rapporteur's suggestion, the whole of article 8 might not be eliminated, since the right of search and the question of piracy would be dealt with in other articles.

47. Mr. FRANÇOIS (Special Rapporteur) explained that the sole reason for the insertion of article 8 was that some provision was necessary to cover ships without a flag. If the Commission could agree on the principle, the problem would be mainly one of drafting.

48. Mr. LIANG (Secretary to the Commission) pointed out that there was some purpose in retaining the latter part of article 8, as suggested by the Special Rapporteur, in order to cover the special case of ships sailing without a flag.

49. The heading of articles 6 to 10 might be expanded, to indicate their subject-matter with greater precision.

50. Mr. ZOUREK said that, in view of the foregoing observations, he must state his position in greater detail. The Special Rapporteur's suggested new text would not be acceptable to him because it still contained the word "authorized", and the question remained: what authority should decide whether a ship was authorized to fly a particular flag or not? At present, the law only recognized the right to verify the flag flown by a vessel, if there were serious grounds for thinking that it was engaged in piracy or the slave trade, whereas the Special Rapporteur's text implied the possibility of questioning the legality of a vessel's flying a particular flag. It was the task of the Commission to codify existing rules and not to put forward provisions whose effect would be to put an end to the freedom of navigation. He would therefore propose a new text for article 8 if it were retained.

51. The CHAIRMAN said that article 8 should be considered in conjunction with article 21. For his part, he saw no objection to the Special Rapporteur's amended text: its position in the draft could be considered later.

52. Mr. SCELLE, fully supporting Mr. Zourek's view, said that he intended to raise a substantive objection to article 21, because he considered that the proviso "unless there is reasonable ground for suspecting" constituted a totally unacceptable interference with the freedom of navigation.

53. Mr. FRANÇOIS (Special Rapporteur) suggested

[7] Article 8 read as follows:
"The public vessels of all States may board and search on the high seas any ship not authorized to fly the flag of a State. Nevertheless, any such ship shall not be treated as a pirate unless it commits acts of piracy."

that further discussion on article 8 be deferred until article 21 was taken up.[8]

It was so agreed.

Article 9 [6]: Merchant ships on the high seas[9]

54. Mr. FRANÇOIS (Special Rapporteur) said that article 9 dealt with a controversial issue. He had accepted the view of those authors who considered that a ship sailing under two flags could not rely on either for protection, and should be treated as a ship without nationality.

55. Mr. KRYLOV expressed surprise at the Special Rapporteur's decision and asked for an explanation. Personally, he was unable to see why the nationality acquired under the first flag should not be regarded as valid.

56. Mr. ZOUREK said that he too would be interested to learn why the Special Rapporteur had favoured a proposition which would create statelessness among ships, a situation which would give rise to numerous difficulties.

56. Mr. FRANÇOIS (Special Rapporteur) pointed out that dual nationality could create even greater difficulties in the case of ships than in the case of individuals. It was for that reason that he had sought to impose the severest sanction against the acquisition of a second flag without prior withdrawal of the first. With the sanction he proposed, such vessels would be virtually unable to engage in trade because they would not be authorized to enter any port. He wished to make clear, moreover, that there was a considerable body of opinion in favour of such a sanction. The Commission must bear in mind that ships, unlike individuals, could only acquire a second nationality as the result of a deliberate act, and that should be discouraged by every possible means.

58. Mr. LIANG (Secretary to the Commission) said that the Secretariat had almost finished a compilation of the laws of States on the nationality of ships,[10] which had been found to be extremely complex. In the course of compilation he had found instances in which a nationality had been conferred on ships without any voluntary act on the part of the owner of the ships. The solution offered by the Special Rapporteur might be regarded as somewhat drastic and should perhaps be replaced by the provisions contained in certain commercial treaties and referred to in the comment on article 9.

59. Mr. HSU said that he would be prepared to make a formal proposal in that sense.

60. Mr. LIANG (Secretary to the Commission) said that he had made no specific suggestion, but had merely raised a point for consideration by the Special Rapporteur.

61. Mr. FRANÇOIS (Special Rapporteur) said that, apart from the Secretary's observation, he had heard no argument to convince him of the need for attenuating his text. After hearing the views of the Commission on the principle involved he would, however, like to study the matter further.

62. Mr. SCELLE said that he had been impressed by the Secretary's statement, which had altered his original views about the nationality of ships, and might well affect his initial support for a rigid rule of the kind proposed. Clearly, the Commission should inform itself further on an important issue, which must not be despatched without due reflection. He therefore proposed that further consideration of article 9 be deferred.[11]

It was so agreed.

Article 10 [5]: Merchant ships on the high seas[12]

63. Mr. FRANÇOIS (Special Rapporteur) explained that, apart from the drafting changes indicated in the comment, article 10 had already been approved at the third session. It would be remembered that the Commission had rejected his proposal that one of the conditions governing the right to fly the flag of a State should be that the master of the vessel was a national of that State, on the ground that such a rule would be too strict since some countries lacked sufficient qualified personnel.

64. Mr. KRYLOV said he would be interested to learn which member of the Commission had cast the only dissenting vote against the text, and for what reasons.[13]

65. Mr. LIANG (Secretary to the Commission) undertook to look up the records.

66. Mr. SCELLE said that the Commission had once again been pulled up short by the anarchy created by the exercise of sovereign rights. It was one of the tasks of the Commission to promote the progressive develop-

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[8] See *infra*, 286th meeting, paras. 62–64; 293rd meeting, paras. 69–70.

[9] Article 9 read as follows:

"A ship which sails under the flag of two or more States may not claim, with respect to another State, any of the nationalities in question and shall be treated as though it were a ship without a nationality."

[10] *Laws concerning the nationality of ships* (United Nations publication, Sales No.: 1956.V.1), *Supplement* (United Nations publication, Sales No.: 59.V.2).

[11] See *infra*, 293rd meeting, para. 71.

[12] Article 10 read as follows:

"Each State may fix the conditions on which it will permit a ship to be registered in its territory and to fly its flag. Nevertheless, for the purposes of the recognition of its national character by other States, not less than 50 per cent of the ship must be owned by:

"(*a*) Nationals of or persons permanently resident in the territory of the State concerned; or

"(*b*) A partnership or commandite company in which half the partners with personal liability are nationals or persons permanently resident in the territory of that State; or

"(*c*) A joint stock company organized under the laws and having its registered office in the territory of that State."

[13] See *infra*, 285th meeting, para. 1.

ment of international law by bringing about international agreement on rules with binding force. If it were to accept a multiplicity of different laws on the nationality of ships, far from encouraging progress it would be making a retrograde step. Every failure to draw up general rules meant that anarchy could spread without let or hindrance. The Commission was faced with a new factor that called for careful reflection, and he for his part must refresh his memory on that particular domain of international law. He would be guided, as always, by the consideration that it was the Commission's mission to contribute towards the integration of the international community, and not to ignore the disruptive effect of piecemeal national legislation.

67. Mr. FRANÇOIS (Special Rapporteur) did not think that Mr. Scelle's observations would warrant the Commission's deferring its decision on article 10.

68. Mr. SCELLE observed that he had only asked for time for further study.

69. Mr. ZOUREK, stating that he had not taken part in the discussions at the third session, expressed the view that article 10 was broad in scope since it purported to establish the conditions for registering ships. It did not, however, make any provision, and he did not think that the failure could have been intentional, to cover ships owned by the State. That omission should surely be rectified.

70. Mr. SPIROPOULOS said that he was bound to comment on Mr. Scelle's statement. Though his general thesis was, of course, unexceptionable, it must be pointed out that the Commission was engaged in codifying, not in unifying, rules governing the registration of ships. Unfortunately the time was not yet ripe for achieving the ideal in the shape of a generally accepted law for universal application, and little purpose would be served by striving to draw up a set of perfect rules which would have no chance whatsoever of adoption. In his opinion, the Special Rapporteur's text went to the limit of what States would be prepared to accept at the present time and it would be useless to go further, since certain matters pertaining to nationality must remain within domestic jurisdiction. In the various international instruments designed to eliminate anomalies arising out of dual nationality, a whole series of questions had been left for settlement by the State concerned.

71. Mr. SCELLE repeated that he only wished to have time for further thought, adding that article 10 was, in fact, more acceptable than certain others, because it did not imply that a nationality could be imposed. Moreover, it went some way towards unifying existing municipal law on the subject.

72. The CHAIRMAN pointed out that the Commission was engaged in a first reading. There would, therefore, be ample time for members to submit amendments during the second reading.

73. Mr. FRANÇOIS (Special Rapporteur), in answer to Mr. Zourek, pointed out that article 10 referred exclusively to merchant ships. The problem of government ships was much simpler, but if a provision on that point were necessary it could be inserted.

74. The CHAIRMAN observed that article 12 made no mention of merchant ships.

75. Mr. FRANÇOIS (Special Rapporteur) said that they were subsumed under "other craft".

76. Mr. ZOUREK said that he would make a proposal concerning article 12 at the appropriate time.

77. Mr. KRYLOV considered Mr. Scelle's request for time for reflection perfectly legitimate. He too did not wish to be hurried into a decision without giving the matter careful thought, and if the article were put to the vote now, he would be obliged to oppose it. The discussion had proved very valuable and no doubt if the Commission were not too hasty it might be able to move faster later.

It was agreed to defer the vote on article 10.[14]

Article 11 [7]*: State ships on the high seas*[15]

78. Mr. FRANÇOIS (Special Rapporteur) explained that article 11 dealt with the immunity of warships from the jurisdiction of any State other than the flag State. The definition of a warship contained in paragraph 2 had been borrowed from the Geneva Convention of 1949 relative to the treatment of prisoners of war and had been long accepted in international law.

70. Mr. ZOUREK asked whether a warship committing a manifest violation of the general rules of international law would continue to enjoy the same immunity.

80. Mr. FRANÇOIS (Special Rapporteur) said that there were, of course, instances when the requirements of legitimate defence would over-ride the provision contained in article 11, paragraph 1.

81. Mr. SPIROPOULOS suggested the deletion from paragraph 1 of the words "in all circumstances", which added nothing to the sense and might cause confusion.

The amendment was accepted.

Article 11 was approved as amended.

The meeting rose at 12.55 p.m.

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[14] See *infra*, 294th meeting, para. 1.

[15] Article 11 read as follows:

"1. Warships on the high seas shall in all circumstances enjoy complete immunity from the jurisdiction of any State other than the flag State.

"2. The term 'warship' means a vessel belonging to the naval forces of a State, under the command of an officer duly commissioned by the government whose name occurs on the list of officers of the military fleet and the crew of which are under regular naval discipline."

285th MEETING

Thursday, 5 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2943).

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

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. S. K. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.51) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 10 [5]: Merchant ships on the high seas
(resumed from the 284th meeting)

1. Mr. FRANÇOIS (Special Rapporteur), replying to the question raised by Mr. Krylov at the previous meeting concerning article 10, said that it had been adopted at the third session by 8 votes to 1, with 2 abstentions.[1] According to the usual practice the names of members voting had not been recorded, but the discussion suggested that the one dissenting vote had probably been cast by Mr. Alfaro. He added that the Commission had voted on the principle of article 10, not on the final text.

[1] See *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

Article 12 [8]: State ships on the high seas[2]

2. Mr. FRANÇOIS (Special Rapporteur) said that the crux of the article lay in the words "and non-commercial" which excluded merchant ships operated by the State from the privileges enjoyed by warships. As he had pointed out in the comment, the text had been taken from article 3 of the international convention for the unification of certain rules relating to the immunity of state-owned vessels, signed at Brussels on 10 April 1926.[3] Though certain States had not signed the Convention, he had included article 12 in his draft, for consideration by the Commission, as a considerable number of States had accepted the principle that it laid down.

3. Mr. KRYLOV considered that the Commission should not be over-ambitious by striving to legislate on too wide a range of specific questions. Moreover, as article 3 in the 1926 Convention, which was already somewhat out of date, had not been accepted by a considerable number of States, including some important maritime Powers—and it would be remembered that the United States of America had some vessels in commercial service—he doubted whether article 12 would serve any useful purpose. Certain States believed that vessels operated by them for commercial purposes should have a legal status differing from that of private merchantmen, and since, as Mr. Scelle was fond of pointing out, legal texts could not change facts, he would propose the deletion of the words "and non-commercial".

4. Mr. SCELLE said that, in reading the comment, he had been particularly struck by the last sentence. Apart from the question of pursuit, which was not of major importance, he could not envisage in what other circumstances a ship operated by a State would not be immune from the enforcement of policing powers. Moreover, the difference in status between state-operated and privately operated ships engaged in commerce was not very considerable, and he was therefore inclined to agree with Mr. Krylov that there was no particular advantage in retaining the words "and non-commercial".

5. Mr. FRANÇOIS (Special Rapporteur) pointed out that, in addition to the right of pursuit, there was the right of search in cases of suspected piracy. In that connexion, he wished to apologize for an error in the third sentence of the comment, which should have referred to article 21 and not to the following article. Since the question of immunity from police powers on the high seas would not often arise in the case of state-owned ships, he would be disposed to delete the whole article.

[2] Article 12 read as follows:
"Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used exclusively on governmental and non-commercial service shall be deemed to be warships for all purposes connected with the exercise of powers on the high seas by a State other than the flag State."

[3] See text in Manley O. Hudson, *International Legislation*, vol. III, pp. 1837–1845.

6. Mr. SPIROPOULOS said that the issue was a delicate one, because the number of state-owned merchant vessels was substantial. If they were not assimilated to warships, they would not be immune, for example, from attachment in a port unless there were a specific provision to the contrary, as in the case of the convention concluded between Greece and the Soviet Union.

7. Mr. HSU asked whether the United States Government did in fact own merchant vessels.

8. Mr. EDMONDS said that there were some merchant vessels which were owned, not by the government itself, but by subsidiary corporations organized on the authority of the government but as separate entities. Those corporations were normally subject to different legal sanctions from those imposed on directly owned government property.

9. Mr. HSU considered that if many States claimed that there should be no difference between the status of government and that of privately operated merchant vessels, the words "and non-commercial" should be deleted. Otherwise they should be retained, and the matter left for settlement through bilateral agreements.

10. Mr. SCELLE said that the Special Rapporteur had confirmed his belief that the only problem involved was that of hot pursuit, and obviously no State would allow a vessel to leave one of its ports if it were suspected of having infringed the law. Accordingly, the question properly belonged to the régime of the territorial sea, and there should be no serious objection to Mr. Krylov's amendment.

11. Mr. SPIROPOULOS contended that if article 12 referred solely to the régime of the high seas, the need to enforce police powers was unlikely to arise so far as the vessels of civilized States were concerned, and Mr. Krylov's amendment would be appropriate, since the words "and non-commercial" added nothing to the text.

12. Mr. ZOUREK supported Mr. Krylov's amendment. In practice it would be useless to try to draw a distinction between State ships on commercial service and other state-operated ships. On the other hand, it would be difficult to accept the Special Rapporteur's suggestion that the article be dropped altogether, because the general structure of his text called for some provision to cover state-operated vessels other than warships.

13. Mr. SCELLE also believed that article 12 should be retained.

14. Mr. FRANÇOIS (Special Rapporteur) pointed out that if article 12 were retained without the words "and non-commercial" it would be inconsistent with the Convention of 1926, which expressly stipulated that state-owned ships could be assimilated to warships only when used for non-commercial purposes. For that reason, if Mr. Krylov's amendment were adopted, he would prefer the whole of the article to be deleted. In reply to Mr. Zourek, he would only say that the Commission had already narrowed the range of the draft by dropping certain other of its provisions.

15. Mr. SPIROPOULOS said that the Special Rapporteur was right about the possibility of conflict with the 1926 Convention; but it should be remembered that at that time commercial vessels operated by the State had been, relatively speaking, an innovation, so that great prudence had had to be exercised in drafting article 3. In the many years which had elapsed since the adoption of that Convention, such vessels had given rise to no difficulties on the high seas. He therefore reiterated his view that there would be no particular advantage in retaining the words "and non-commercial". Some measure of inconsistency with earlier conventions was inevitable in the process of codification, and the Special Rapporteur should bear in mind that his text would also, in certain respects, run counter to customary law.

16. Mr. KRYLOV agreed with the preceding speaker. As Mr. H. Lauterpacht had cogently argued in an article published recently in the *American Journal of International Law*,[4] codification necessarily entailed some departure from the provisions of earlier international conventions.

17. Mr. ZOUREK observed that the Convention of 1926 had only been signed by a limited number of States, whereas the Commission was engaged in drafting a text which it hoped would be acceptable at least to all States Members of the United Nations. He did not consider that the Special Rapporteur's objection constituted adequate grounds for deleting article 12 altogether.

Mr. Krylov's proposal that the words "and non-commercial" be deleted was adopted by 5 votes to 3, with 1 abstention.

Article 12, as amended, was adopted by 6 votes to 2, with 1 abstention.

Article 13 [9]: Safety of shipping[5]

18. Mr. FRANÇOIS (Special Rapporteur) said that the provision contained in article 13 had already been discussed at length by the Commission at previous sessions. As explained in the comment, he had set forth in his second report (A/CN.4/42)[6] certain principles which in his view flowed from the International Regulations for Preventing Collisions at Sea. Though some members had feared that the Commission would be exceeding its competence if it discussed the technical questions involved, it had been admitted that it was desirable that the rules relating to the safety of life at

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[4] "Codification and Development of International Law", *American Journal of International Law*, vol. 49 (1955), pp. 16–43.

[5] Article 13 read as follows:

"A State may not issue any regulations inconsistent with those jointly agreed upon by the majority of maritime States, if such inconsistency would jeopardize the safety of life at sea."

[6] See *Yearbook of the International Law Commission, 1951*, vol. II, p. 75.

sea should be consolidated, though the matter was not within the Commission's province. On the other hand, certain members had thought it necessary to draft a provision requiring States to refrain from issuing regulations contrary to those agreed to by other maritime States, regarding such an obligation as of real value which did not vest the principal maritime Powers with any exclusive right to regulate the policing of shipping and consequently oblige other States to adopt the regulations thus laid down.

19. The CHAIRMAN asked whether there was any reason for the different wording used in article 15, which referred to "the majority of vessels engaged in international seafaring" whereas article 13 spoke of "the majority of maritime States".

20. Mr. FRANÇOIS (Special Rapporteur) said that he would have no objection to using the same expression in both articles.

21. Mr. SCELLE expressed his full approval of the principle expressed in articles 13 and 15, which was perfectly consistent with the current trend of international law and the practice of international organizations, especially the International Labour Organisation. It would be remembered that States of chief industrial importance had to be represented in the Governing Body of the latter, which was thus, in recognition of plain facts, based on the principle of a qualified as distinct from a simple majority. In that respect, the wording of article 13 was not entirely satisfactory, since it gave equal weight to all maritime powers, which was unrealistic. The wording of article 15, on the other hand, was acceptable.

22. Mr. SPIROPOULOS pointed out that the sole purpose of article 13 was to stipulate that a State might not issue any regulations which might jeopardize the safety of life at sea. He therefore considered that the words "inconsistent with those jointly agreed upon by the majority of maritime States, if such inconsistency" could be deleted.

23. Mr. KRYLOV said that with that omission the article would be unobjectionable.

24. Mr. SCELLE disagreed with Mr. Krylov, considering it necessary to stipulate that regulations should not be inconsistent with those jointly agreed upon by the majority. Articles 13 and 15 had the great advantage of substituting for the stultifying rule of unanimity the effective rule of a genuine majority. Though some members of the Commission might not think so, he was first and foremost a realist, and therefore considered the rule of unanimity to be utterly inimical to the interests of the international community.

25. Later, he would have serious objections to raise to the words "jointly agreed", which were to him totally unacceptable because they suggested that a special agreement was necessary between States to establish regulations, whereas in fact they were built up out of a series of individual decisions in the same way as customary law.

26. Mr. ZOUREK said that it should be possible to reach agreement on a text of the kind proposed by Mr. Spiropoulos, but if any additional provision which was not implicit in the present text were added, difficulties would arise. The Commission was in fact dealing with a situation where maritime States appeared to claim a monopoly, although the high seas were open to all, including States without a seaboard, many of which possessed a growing merchant navy. He therefore favoured a text on the lines suggested by Mr. Spiropoulos, but drafted in a form appropriate to a draft convention.

27. Mr. SPIROPOULOS considered Mr. Scelle to be wrong in thinking that article 13 prohibited States from issuing regulations inconsistent with those agreed on by the majority; but it did preclude them from taking any steps which might jeopardize the safety of life at sea.

28. Mr. KRYLOV said that he would vote in favour of Mr. Spiropoulos' amendment. He also found article 15 acceptable.

29. Mr. FRANÇOIS (Special Rapporteur) did not think that the words which Mr. Spiropoulos wished to delete were useless, since they would serve to prevent a State that wished, for example, to reverse existing regulations on signals from claiming that it was justified in doing so, and that States which declined to accept the change would thereby be endangering the safety of life at sea.

30. Mr. SCELLE believed that Mr. Spiropoulos, whose amendment, if adopted, would deprive article 13 of all meaning, leaving nothing but a hollow though pious wish, has misunderstood him. The aim should be to achieve uniformity of regulations. That was why he supported the original text, which clearly stipulated that it lay with the majority to decide whether any regulations were capable of endangering the safety of life at sea. The acceptance of such a provision would bring the integration of the international community one step nearer.

31. Mr. SPIROPOULOS argued that the decision must lie not with the majority, but with an international tribunal.

32. Mr. SCELLE pointed out that laws were made by the majority.

33. The CHAIRMAN supported article 13. As in the case of national traffic regulations, there was some degree of uniformity in regulations for the safety of shipping, though there was no central international organ responsible for drawing them up.

34. Mr. LIANG (Secretary to the Commission) observed that the use of the abstract word "inconsistency" might give rise to misunderstandings. It was the regulations themselves which might jeopardize the safety at sea, and the text should be so amended.

35. He believed that the object which Mr. Scelle had in mind could only be achieved if the article were

re-cast to form two paragraphs, the first stipulating that regulations issued by any State should be consistent with those jointly agreed upon by the majority, and the second stating that those regulations should not be such as to jeopardize the safety of life at sea.

36. Mr. SPIROPOULOS said that Mr. Scelle's purpose would be fulfilled if the article were re-drafted to read: "A State may not issue any regulations inconsistent with those jointly agreed upon by the majority of maritime States, in respect of safety of life at sea." He could support such a text, though, of course, the notion it embodied had not been present in the original draft.

37. Mr. SCELLE said that Mr. Spiropoulos' text would be acceptable and seemed to him perfectly consistent with the purpose of the original draft.

38. Mr. FRANÇOIS (Special Rapporteur) said he was quite agreeable to articles 13 and 15 being brought into line by replacing the idea of the majority of maritime States expressed in article 13 by that of the majority of vessels. It was simply a matter of drafting.

39. The CHAIRMAN suggested that the secretariat be instructed to re-draft the article in that sense.

It was so agreed.

40. The CHAIRMAN put to the vote, subject to the above drafting amendment, Mr. Spiropoulos' proposal to substitute for the phrase following the words "maritime States" the phrase "in respect of safety of life at sea".

Mr. Spiropoulos' proposal was rejected, 4 votes being cast in favour and 4 against, with 1 abstention.

41. Mr. KRYLOV, explaining his abstention, said that he accepted the amendment in principle, but, in the absence of a precise text embodying the idea contained in article 15, he had been unable to cast his vote.

42. Mr. SALAMANCA queried the point of a vote, since any changes would be drafting amendments only.

43. Mr. ZOUREK, agreeing with the previous speaker, suggested that the vote on the article be deferred until a definitive text had been prepared.[7]

It was so agreed.

Article 14 [11]: Safety of shipping[8]

44. Mr. FRANÇOIS (Special Rapporteur) explained that he had embodied in his draft the provisions of article 11 of the Brussels Convention of 23 September 1910 for the unification of certain rules of law with respect to assistance and salvage at sea,[9] and of article 8 of the same convention for the unification of certain rules relating to collision.

45. Mr. SPIROPOULOS asked why the first sentence referred only to assistance to "any *person* found at sea in danger of being lost", whereas the second sentence provided for assistance "to the other *vessel*, her crew and her passengers". It might be advisable, in the interests of uniformity, to include in the first sentence also assistance to the vessel.

46. Mr. FRANÇOIS (Special Rapporteur) said that article 11 of the Brussels Convention made no mention of a vessel. He would point out that acceptance of Mr. Spiropoulos' proposal would amount to an extension of the concept underlying article 14.

47. The CHAIRMAN assumed that assistance to the other vessel had been specifically mentioned in view of the special responsibility resting after a collision on one or other of the vessels involved. He would draw attention to a slight difference in meaning between the English "at sea" and French *en mer*, the latter meaning not only at sea but actually in the water.

48. Mr. SPIROPOULOS said that the Spanish expression *desaparecer en el mar* also implied that the person was in the water. Although he would not press his proposal, he would point out that, in general, international regulations on the subject applied equally to the vessel and to the persons on board.

49. Mr. FRANÇOIS (Special Rapporteur) suggested that, pending closer study of the question, further consideration of article 14 be deferred.[10]

It was so agreed.

Article 15 [9]: Safety of shipping[11]

50. Mr. FRANÇOIS (Special Rapporteur) said that whereas article 13 had been inspired by the London Convention, article 15, relating to signals in general, flowed from the International Code of Signals that had been freely accepted by all maritime States. That was one reason for making two separate articles, despite the very close relationship between them. If the Commission so desired, they could, of course, be combined. But for the seafarer unversed in the niceties of international law, it would be more convenient to have two separate articles using the same terminology. In view of the decision to defer further consideration of article 13, it might be wise to follow suit in the case of

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[7] See *infra*, 294th meeting, para 78.

[8] Article 14 read as follows:
"The master of a vessel is bound so far as he can do so without serious danger to his vessel, her crew and her passangers, to render assistance to any person found at sea in danger of being lost. After a collision the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers."

[9] See text in *Treaties, Conventions, International Acts, Protocols and agreements between the U.S.A. and Other Powers* (Washington, Government Printing Office, 1923), vol. III, p. 2948.

[10] See *infra*. 286th meeting, para. 65; 294th meeting, para. 78.

[11] Article 15 read as follows:
"Every State shall require its ships on the high seas to use the signals accepted by the majority of vessels engaged in international seafaring, wherever the use of different signals might endanger the safety of shipping."

article 15 pending an examination of the possibility of combining them in one text.

51. The CHAIRMAN suggested that if the two articles were kept separate, they should be consecutive.

Futher consideration of article 15 was deferred.[12]

Further consideration of article 15 was deferred.[12]

52. Mr. FRANÇOIS (Special Rapporteur) said that the Commission had previously decided[14] that the provisions of the Convention of 14 March 1884 for the protection of submarine cables[15] be covered in the articles and extended to include pipelines. Further, some provisions of the Convention having been found to be no longer entirely satisfactory, the *Institut de droit international* had in 1927 adopted certain recommendations for supplementing them.[16]

53. Articles 16, 17 and 18 had been drafted on the basis of the Convention, with the addition of provisions relating to pipelines, article 16 being a reproduction of article 5 of the rules on the continental shelf already adopted by the Commission. Article 19 was based on a resolution adopted by the *Institut*.

54. Mr. SCELLE said that there should be a new article laying absolute responsibility on the coastal State for the damage that would inevitably be caused by the exploitation of the natural resources of its continental shelf. There should also be a stipulation concerning the ever-present danger of pollution of the sea caused by the careless and inefficient setting-up of installations, for they constituted an acute danger of which the Commission should manifest its awareness. He would be prepared to submit a draft along those lines.

55. Paragraph 2 of the article was far from satisfactory. A term such as "reasonable measures" was quite unrealistic; who was to decide the precise connotation of "reasonable"? Further, the provision that the coastal State might not prevent the establishment or maintenance of submarine cables bordered on the absurd. The paragraph was so ill-conceived that one did not need to be a jurist to condemn its utter illogicality.

56. Mr. SPIROPOULOS, agreed and said that once the principle of the right to exploit the natural resources of the continental shelf had been accepted, paragraph 2 lost all meaning.

57. Mr. SCELLE pointed out that that carried the logical implication of the deletion of article 5 of the rules on the continental shelf.

58. Mr. FRANÇOIS (Special Rapporteur), agreeing that paragraph 2 might well be deleted, suggested as a possible solution the addition to paragraph 1 of the words "subject to the provisions of articles of the rules on the continental shelf".

59. Mr. SCELLE said that the Special Rapporteur's suggestion amounted to the subordination of the principle of the freedom of the seas to rights over the continental shelf. That was a most improper reversal of circumstance.

60. Mr. SPIROPOULOS said that it was true that in theory there was a contradiction between paragraph 1 and article 2 of the rules on the continental shelf. There might well be a conflict of interests arising out of the laying of a submarine cable which would interfere with an existing installation. In such a case, in the interests of humanity, prior right could be claimed by the coastal State, and in practice the minor diversion of a submarine cable in order to avoid an installation would be of little significance.

61. Mr. SCELLE expressed pained surprise at the idea of a submarine cable being diverted in the interests of a private undertaking that was exploiting the natural resources of the seabed and subsoil.

62. Mr. SALAMANCA said that once again the question had arisen of the compatibility of two conflicting rights. He had every hope, however, that Mr. Scelle would be able to draft a formula which he himself would be able to support. It had to be remembered, however, that paragraph 2 very largely met Mr. Scelle's point.

63. Mr. SCELLE regretted his inability to achieve the impossible, in view of the Commission's decision not to reconsider the articles on the continental shelf. No compromise text could be devised, for there was an irresoluble opposition between the freedom of the seas and private interests when they were regarded as overriding.

64. Mr. SPIROPOULOS suggested that the question was really one of drafting. Paragraph 1 was generally acceptable: it only remained therefore to bring paragraph 2 in line with article 5 of the rules on the continental shelf. The Special Rapporteur's proposed addition to paragraph 1 might provide a solution, but he would need to ponder that.

65. Mr. SCELLE urged that it would be more logical, instead of adding to paragraph 1 the phrase "subject to the provisions of the articles on the continental shelf", to amend article 5 of the latter by adding the words "subject to the provisions of the articles on submarine cables". The laying of submarine cables must be regarded as one of the manifestations of the freedom of the seas, and must take pride of place over commercial speculation.

On the proposal of the CHAIRMAN *further consideration of article 16 was deferred.*

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[12] See *infra*, 294th meeting, para. 78.

[13] Article 16 read as follows:

"1. All States may lay telegraph or telephone cables and pipe lines on the bed of the high seas.

"2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not prevent the establishment or maintenance of submarine cables."

[14] *Yearbook of the International Law Commission, 1950*, vol. I, 65th meeting, p. 200.

[15] See text in *British and Foreign State Papers*, vol. 75, p. 356.

[16] *Annuaire de l'Institut de droit international*, vol. 33 (1927), t. III, pp. 297–298.

Article 17 [35]: Submarine cables and pipelines[17]

66. Mr. LIANG, Secretary to the Commission, raised the point of the difficulty of satisfactorily accommodating articles 17, 18 and 19 in the plan of the complete draft. Indeed, the Special Rapporteur himself raised that point in the second paragraph of his comment. There was still an excess of detail in the three articles which, however appropriate in a convention, appeared to be out of place in a set of principles. As an example, he would quote the provision in the first sentence of article 17—the designation of the breaking or injuring in certain circumstances of a submarine cable or of a submarine pipeline as a punishable offence. Such concrete provisions might find a place in a convention, but it was doubtful whether they would fit into a statement of principles.

Further consideration of article 17 was deferred.

The meeting rose at 1 p.m.

[17] Article 17 read as follows:
"The breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communication, or in the breaking or injury of a submarine pipe line in like circumstance, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid the break or injury."

286th MEETING

Friday, 6 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

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

Present:

Members: Mr. Douglas L. EDMONDS, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of item 2 of the agenda: régime of the high seas (A/CN.4/79).

Articles 16-17 [34-35] (resumed from the 285th meeting) *and 18 [36]: Submarine cables and pipelines*[1]

2. Mr. FRANÇOIS (Special Rapporteur) replying to the Secretary's observations at the end of the previous meeting, said that articles 16, 17 and 18 could perhaps be deleted. Following the loss of a number of previous articles, however, the resulting draft would be a very meagre affair. With regard to submarine cables and pipelines, the Convention of 1884 for the protection of submarine cables contained seventeen articles and the *Institut de droit international* had made six recommendations. In his second report, he had retained seven of those and then, in accordance with the Commission's decision, had reduced them to four. The Secretary was now proposing a further cut, and he could not avoid the feeling that the tendency was becoming a little exaggerated.

3. In fact, articles 17 and 18 both embodied the main and essential principles of the 1884 Convention; in his opinion, article 17 contained a most important concept, which was supplemented by article 18. Upon reflection, he considered that he himself had carried the process of deletion too far, and that article 7 of the Convention —which had eventually been deleted from his second report—referring to compensation for the loss of fishing gear or anchors incurred in the avoidance of submarine cables or pipelines, should be reinstated.

4. Mr. LIANG (Secretary to the Commission) agreed that it was undesirable to delete articles as soon as the slightest difficulty arose over their acceptance, since the drafts prepared by the Commission should be as complete and comprehensive as possible. His doubts about articles 17 and 18 had been engendered by the fact that they had been taken direct but only in part, from conventions, and that they dealt with details of implementation rather than with general principles.

5. On the broader question of embodying provisions of international conventions in the texts that the Com-

[1] Article 18 read as follows:
"If the owner of a cable or pipe line beneath the high seas in laying or repairing that cable or pipeline causes a break in or injury to another cable or pipe line he shall be required to pay the cost of the repairs which such breaking or injury has rendered necessary."

mission was engaged in drawing up, he recalled the difficulties to which that method of work had given rise in the past; in the case, for instance, of certain provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, which had been incorporated in the Draft Code of Offences Against the Peace and Security of Mankind. As a principle, the Commission might well consider whether it was desirable to introduce into the articles it was drafting only certain parts of international conventions.

6. Mr. SPIROPOULOS pointed out that, in general, international law had hitherto been concerned to establish the rights and obligations of States. Article 17, by its determination of a punishable offence, introduced the concept of individual responsibility. Care should be taken not to upset the general pattern of the articles —of which article 15 was a good example—setting forth general principles. The Secretary was right in his contention; in the field of codification it was better to keep to general principles, introducing the question of individual rights or obligations only indirectly.

7. Mr. SCELLE could not agree. Although the system of *res communis* might be followed by certain socialist States whose merchant vessels were State property, that notion was still exceptional; the large majority of merchant vessels were owned by individuals or private undertakings. *Res communis,* which was an essential element in the integration of a political community, had originally been set up in the interests of the individual, and half a century previously progress in international law had been understood to consist in the increased safeguarding of individual interests. Since the concept of the high seas was essentially linked with that of *res communis,* the Special Rapporteur's approach in articles 17 and 18, based on individual responsibility, was entirely correct.

8. In reply to the Secretary, he would suggest that the Special Rapporteur had faithfully laboured for the achievement of the Commission's twofold purpose—the codification of international law and its development. His only criticism would be that, far from being too long, the sixth report on the régime of the high seas was not substantial enough. He would welcome not only the inclusion of provisions of conventions, but also their unification.

9. The CHAIRMAN asked how the previous speaker's views could be reconciled with article 7. Further, he had understood articles 17 and 18 as stipulating the subordination of the individual to the rules of individual States.

10. Mr. SCELLE, in reply, said that in article 7 he understood "jurisdiction" in its broadest sense.

11. As to articles 17 and 18, individual States were required to submit to majority rule.

12. He regretted the absence from the articles relating to merchant ships on the high seas of an article on the verification of the flag flown, in which a clear distinction would be drawn between the right of verification and that of board and search. The existing situation was dangerous in that exercise of the right of verification could easily, and almost imperceptibly, become an act of boarding and searching. It was the thin end of the wedge, and such a possibility should be guarded against. He hoped that the Special Rapporteur would draft a new article separating the two activities and stipulating that verification should take place on board the investigating warship.[2]

13. Mr. HSU wondered whether the Secretary had in mind any specific proposal that he could make to assist the Special Rapporteur. There was a choice between two methods in the work of codification: either to set out in the most suitable order the existing rules in the various international agreements, supplementing them when necessary; or to set out a separate system for digesting those rules. In the past, both methods had been used in the preparation of the Commission's special reports, and each had its drawbacks. The Special Rapporteur had adopted the second method and at the present stage it was impossible to change it; all that could be done was to make specific modifications where necessary.

14. Mr. LIANG (Secretary to the Commission) explained that he had not intended to suggest the deletion of articles 17 and 18; and he would certainly endorse the desirability of embodying in the work of codification essential principles of existing conventions. His doubt lay in the wisdom of taking, say, five articles out of a total of fifteen in a convention, thereby incurring the risk of destroying the integrity of the whole instrument. Paragraphs 17 and 18, however, might well be re-drafted and restricted to the enunciation of principles, deleting the details of the *modus operandi.* In that respect, he shared Mr. Spiropoulos' viewpoint. He feared that the Commission's draft might give rise to difficulties if it embodied only certain articles from existing conventions.

15. Mr. ZOUREK insisted that all the articles under consideration by the Commission should be formulated on the basis of the rights and obligations of States, not of individuals. In that he differed from Mr. Scelle, on the ground that international law should not concern itself with individuals; that was the path of self-destruction. As to Mr. Scelle's comments on *res communis* and the régime of the high seas, he would only reply that the theory of *res communis* had been critized by many leading international jurists, and had been rejected by, for instance, Gidel. The prerogative of States could be explained quite simply by applying the idea of mutually respected sovereignty. Thus there was no need to introduce the idea of *res communis.* He would further remind Mr. Scelle that in socialist States the conception of corporate bodies was recognized, and he found it difficult to see how it could be argued that States, the citizens of which accounted for one-

[2] See *infra,* 288th meeting, para. 14.

third of the population of the world, could be regarded as exceptions.

16. With regard to the Commission's method of work, he was in favour of including in the articles all the essential principles set forth in existing conventions.

17. Mr. SPIROPOULOS said that paragraph 1 of article 16 clearly established the right of States to lay submarine cables and pipelines. Article 17 stipulated that damage done thereto wilfully or through culpable negligence should be a punishable offence. Even had articles 17 and 18 not been drafted, would not the principle enunciated therein apply nevertheless? Under existing legislation throughout the world it was generally accepted that liability for damage to property lay with the person causing that damage. The two latter articles, therefore, added nothing to the force of article 16 and, whatever their technical appropriateness in the 1884 Convention, could well be deleted.

18. Mr. HSU suggested that further consideration of articles 16, 17 and 18 be deferred, in order to allow the Special Rapporteur and the Secretary to consult together with a view to re-drafting the texts.

19. Mr. SCELLE apologized for having raised the subject of the system of *res communis,* which, properly speaking, had no place in the work of codification. Nevertheless, whether the future world government took the form of a supra-national State or a federation of States, there would in either case be a system of public property the organization of which must be provided for. There was no question of an alternative between inserting all or none of the articles of the Convention, and the Special Rapporteur had been well guided in his principle of selection.

20. With regard to policing on the high seas, he thought the Special Rapporteur had perhaps been too restrictive in his approach. In view of the inevitable difficulties entailed by the settlement of disputes in national courts, his own preference would be for some kind of mixed court of appeal. The most satisfactory solution might be to apply some similar system to cases of collision on the high seas also. The International Court of Justice was too remote a body to have to deal with such cases. An article on the appropriate jurisdiction in that matter would suitably complete the work of codification.

21. Mr. FRANÇOIS (Special Rapporteur), replying to the various questions raised during the discussion, said that the question of the embodiment in the present draft articles of articles in existing conventions had been dealt with by Mr. Scelle. In codifying the régime of the high seas it was impossible not to draw on existing conventions, and it was surely only reasonable to embody—and in the same terminology, which might be widely accepted—any article in a convention that formulated an essential principle. As to the criticism that he ought to have included all the articles of the 1884 Convention, he would recall that his original report (A/CN.4/42) had contained many more articles, and that he had only followed the Commission's directive in reducing their number. He hoped the Commission would at least approve his present attempt.

22. With regard to the objection that he ought to have omitted reference to individuals, restricting the provisions of the articles to States alone, he thought that that was a question of drafting. Moreover the point was not important in States which recognized that international conventions need not be translated into domestic law in order to make them binding on their nationals. Many conventions in the matter imposed no obligations on States, but contained direct stipulations concerning individuals.

23. Mr. Spiropoulos had proposed the deletion of article 17. Would he also delete article 18, and article 7 of the 1884 Convention, which had been deleted from his (the Special Rapporteur's) second report? He saw no objection whatsoever to the occasional inclusion of an article which, while not strictly necessary in a narrow context, would certainly give a clearer general picture.

24. Lastly, he saw no reason why, as Mr. Hsu had suggested, further consideration of the articles should be deferred. Perhaps the problem could be more easily solved by a drafting committee.

25. Mr. ZOUREK said that criticism of article 17 seemed to him quite unjustified. If the efficacy of a provision was to be ensured, some form of sanction was called for. There was no novelty in such a stipulation, for sanctions had a place in other international agreements, such as the various conventions on narcotics and the Convention on the Prevention and Punishment of the Crime of Genocide. In fact, many national legislations had introduced such a stipulation, based on the Convention of 1884 for the protection of submarine cables.

26. He thought there had been a misunderstanding about the inclusion of the articles of the conventions. There had never been a question of including them all. What the Special Rapporteur had urged was merely the introduction of those articles containing essential principles; in addition, he had raised the question of article 7 of the 1884 Convention which, in his (Mr. Zourek's) opinion, did formulate such a principle.

27. Mr. SPIROPOULOS said that he would support Mr. Hsu's proposal. Paragraph 17 referred to a "punishable offence". Did that imply an obligation on individual States to punish an offender? The text should be clarified, since as it stood no such obligation was clearly stated.

28. Mr. HSU, while fully agreeing with the Special Rapporteur, said he would still prefer to see a draft of the Secretary's suggestions.

29. Mr. LIANG (Secretary to the Commission) preferred the Special Rapporteur's proposal; the matter could best be left to a drafting committee.

30. Mr. SALAMANCA said that through the diversity of its criticisms the Commission had placed the Special

Rapporteur in a very difficult position. No single practical suggestion, however, had been put forward and until some such were forthcoming the only possible course was to follow the text of the articles as drafted. With regard to the proposal that the Secretary should draft a proposal, he would point out that his official position precluded such a course. The Commission should make up its mind whether to proceed to a vote or to defer consideration of the articles.

31. The CHAIRMAN pointed out that the Secretary had not, in fact, put forward any proposals. His recollection was that when the question had first been discussed at an earlier session, the Commission had decided that the continental shelf was not *res communis*.[3]

32. He would suggest the retention in article 18 of the principle, which in turn would entail keeping article 17, including the principle of damages. Article 7 of the 1884 Convention should also be included in the articles on submarine cables and pipelines.

Article 16 was approved in substance and referred to the drafting committee.

33. Mr. FRANÇOIS (Special Rapporteur) suggested that the Commission approve the substance of article 17 and request the drafting committee to study the Secretary's suggestion and re-draft the article in appropriate form.

Articles 17 and 18 were approved in substance and referred to the drafting committee.

Article 19 [37]: Submarine cables and pipelines[4]

34. Mr. FRANÇOIS (Special Rapporteur) suggested that the provision contained in article 7, paragraph 1, of the Convention of 1884 for the protection of submarine cables should be referred to the drafting committee for insertion in article 19.

It was so agreed.

Article 20 [10]: Penal jurisdiction in matters of collision on the high seas[5]

35. Mr. FRANÇOIS (Special Rapporteur) said that the provision in article 20 was a very important one, and had already given rise to lengthy discussion and widely divergent views. He had fully explained in his comment the historical background to the article.

36. The CHAIRMAN observed that an incident had recently occurred which had some similarity with the famous "Lotus" case. A Swedish ship, the "Paramata", which had come into collision with and sunk a United States yacht on the high seas, had, on arrival at San Francisco, been held by the United States authorities and subsequently released on bail.

37. Mr. SCELLE said that if article 20 covered damage to submarine pipelines, cables and other installations that should be plainly stated, perhaps by some wording such as *notamment en ce qui concerne le lit de la mer* after the word *navigation*. As always, he was deeply perturbed by the threat to the freedom of navigation resulting from the exploitation of the seabed.

38. Mr. FRANÇOIS (Special Rapporteur) said that article 20 did cover such damage; but he thought that a modification of the kind outlined by Mr. Scelle would be going too far. It would be quite enough to clarify the point in the comment.

39. The CHAIRMAN believed that the contingency Mr. Scelle had mentioned was covered by the words "any other incident of navigation".

40. Mr. SCELLE suggested that the drafting committee should bear his point in mind.

It was so agreed.

41. In reply to a question by the CHAIRMAN, Mr. LIANG (Secretary to the Commission) undertook to ascertain how many countries had signed the Brussels Convention of 1952 for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation.[6]

42. Mr. SPIROPOULOS observed that it was not clear to whom the words "the persons concerned", at the end of paragraph 1, referred.

43. Mr. FRANÇOIS (Special Rapporteur) said they referred to the master or crew, but not to passengers, involved in the collision.

44. The CHAIRMAN observed that the meaning would be clearer if the word "these" was substituted for the word "the" before the word "persons", and the word "concerned" were deleted.

The amendment was accepted.

45. The CHAIRMAN pointed out that paragraph 2 related to the régime of the territorial sea.

46. Mr. FRANÇOIS (Special Rapporteur) agreed, and suggested that that provision might be taken up in connexion with the territorial sea.

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[3] See *Yearbook of the International Law Commission, 1951*, vol. I, 113th and 114th meetings, pp. 273–275.

[4] Article 19 read as follows:

"All fishing gear used in trawling shall be so constructed and so maintained as to reduce to the minimum the danger of fouling submarine cables or pipe lines on the sea bed."

[5] Article 20 read as follows:

"1. In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, proceedings may be instituted only before the judicial administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation, or of the State of which the persons concerned are nationals.

"2. No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying."

[6] See text in "International Conventions on Maritime Law", Great Britain, Cmd. 8954 (London, H.M. Stationery Office, 1953).

47. Mr. ZOUREK said that the implications of the latter part of paragraph 1, starting with the words "proceedings may be instituted", were not clear to him. Generally speaking, it was only after proceedings had been completed that responsibility for a collision was established.

48. Mr. FRANÇOIS (Special Rapporteur) agreed that the text was not perfect, but pointed out that it had been taken from the Brussels Convention of 1952. He himself had given a great deal of thought to the question raised by Mr. Zourek, but believed that in practice the provision would not give rise to difficulties.

49. Mr. SCELLE observed that both ships might be charged with responsibility for the collision, in which case some provision would have to be made for appeal against conflicting judgements. The ideal machinery for the settlement of that type of dispute was, of course, the mixed arbitral tribunal.

50. The CHAIRMAN said that he was very much attracted by Mr. Scelle's idea, since the impartiality of the judicial or administrative authorities of the flag State would almost inevitably be open to doubt.

51. Mr. KRYLOV said that he was far less bold in his approach than Mr. Scelle and did not think it expedient for the Commission to try to provide for every contingency. Surely, in any individual case of collision, common sense would prevail.

52. Mr. SPIROPOULOS considered it essential to draft a clear and precise text: the present version would only serve to create difficulties, and the fact that it had been taken from a previous convention was no defence.

53. He pointed out that, whereas, according to the existing text of article 20, proceedings could only be instituted by the flag State of the ship responsible for the collision, the difficulty was that it would not always be possible to establish responsibility immediately.

54. In answer to a question by Mr. SCELLE, the CHAIRMAN said that he had had personal experience both of the mixed courts in Egypt and of the mixed arbitral tribunals established after the First World War. In his opinion, the former had functioned very well, perhaps because all the judges had been neutral, and had succeeded in creating a tradition of complete impartiality; but the performance of the latter had been somewhat uneven, perhaps because they had only one neutral judge.

55. Mr. SCELLE observed that the machinery of the mixed courts in Egypt had been somewhat complex, but could be improved and simplified.

56. Mr. FRANÇOIS (Special Rapporteur) considered that the defects and ambiguity of article 20 had been somewhat exaggerated. In practice, it should be sufficient to ensure that the master of a ship responsible for a collision would be proceeded against by the authorities of the flag State. The Commission should, after all, bear in mind that a similar provision had been accepted in 1952 by a considerable number of maritime powers. He therefore proposed that the Commission approve the principle contained in article 20, and refer it to the drafting committee.

57. Mr. ZOUREK said that the risk of a conflict of jurisdiction had perhaps been exaggerated, and warned the Commission against reviving the obsolete Capitulations régime. In the present state of international law, and with the machinery contained in the Charter of the United Nations for solving international conflicts, there should be no need to provide for mixed courts.

58. Mr. SCELLE said that what he had in mind was a court of appeal, not a standing tribunal for the settlement of any dispute.

59. Mr. SPIROPOULOS said that, although the doubts he had expressed earlier had not been removed, after hearing the discussion and after further careful reflection, he had come to the conclusion that article 20 might be accepted as it stood, since it probably represented all that could be achieved at the present stage. Clearly, the difficulties involved had been recognized at the diplomatic conference in Brussels in 1952, when the same provision had been put forward as the best possible solution.

60. Mr. SCELLE said that he had no great liking for what might be described as the lazy way out, whereby the Commission resigned itself to the existence of a difficulty without making any attempt to overcome it. He proposed to discuss the matter further with the Special Rapporteur.

61. Mr. FRANÇOIS (Special Rapporteur) suggested that, subject to further consideration of Mr. Scelle's suggestion, article 20 might be adopted and referred to the drafting committee.

Subject to that reservation, *article 20 was approved by 8 votes to none, with 1 abstention.*

Article 21 [21]: Policing of the high seas[7]

62. The CHAIRMAN suggested that article 21 should be taken up at the following meeting, by which time the observations of the Polish Government (A/CN.4/L.53) would have been circulated.

63. Mr. ZOUREK, referring to the articles relating to the policing of the seas, said that the General Assembly, in resolution 821 (IX), had decided to transmit to the Commission the records and documents relating to the discussion in the *Ad hoc* Political Committee about the complaint of violation of the freedom of navigation

[7] Article 21 read as follows:

"Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy or the slave trade. Should such suspicions prove to be unfounded, and should the stopped vessel not have given by unjustified acts any ground for suspicion, the vessel shall be compensated for any loss due to the stoppage."

in the China Sea. He would be interested to learn from the Secretariat whether those documents were available.

64. Mr. LIANG (Secretary to the Commission) replied that the documents had been duly dispatched. If members had omitted to bring them to Geneva, he would endeavour to obtain more copies.

Further discussion of article 21 was deferred.[8]

Article 14 [11]: Safety of shipping
(resumed from the 285th meeting)

65. Mr. FRANÇOIS (Special Rapporteur), replying to Mr. Spiropoulos' question at the previous meeting[9] as to why in the first part of article 14 the master of a vessel was not obliged to render assistance to a vessel found at sea in danger of being lost but according to the second was obliged to do so after a collision, explained that the Convention of 1910 had not imposed such an obligation on the ground that it would hamper navigation, and would not, especially in the case of small ships, justify the expense involved.

66. Mr. SPIROPOULOS declared himself satisfied with the explanation.

Article 14 was approved unanimously.[10]

The meeting rose at 12.55 p.m.

[8] See *infra*, 288th meeting, para. 12.

[9] 285th meeting, para. 45.

[10] See *infra*, 294th meeting, para 78.

287th MEETING

Monday, 9 May 1955, at 4.30 p.m.

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

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Election of officers

(*resumed from the 282nd meeting*)

1. The CHAIRMAN invited the Commission to elect a chairman for the seventh session.

2. Mr. GARCÍA AMADOR proposed Mr. Amado who, having served on the Commission since its inception, had made a most significant contribution to its work, as well as to that of the Sixth Committee of the General Assembly. By electing Mr. Amado Chairman, the Commission would also be paying a tribute to Brazil's distinguished tradition in the field of international law.

3. Mr. SPIROPOULOS, seconding the nomination, said that Mr. Amado's outstanding qualities needed no commendation.

4. Mr. AMADO said that he was greatly honoured by the proposal that he should preside over the Commission, to which he was devoted, and in which he had been able to enlarge his own field of knowledge. However, much as he would like to assume that high office, he regretted that several months of fatiguing work had left him in a state which made it impossible for him to take on a task which might prove too taxing. Perhaps, too, he lacked sufficient patience to guide the Commission in the drafting of abstract rules, which in their essence seemed so remote from humanity, intensely difficult work demanding special gifts from an individual and even more so when confronted with a group of eminent men each with his own very definite ideas. He accordingly proposed the election of Mr. Spiropoulos.

5. The CHAIRMAN expressed the Commission's regret at Mr. Amado's decision.

6. Mr. GARCÍA AMADOR said that it was most unfortunate that Mr. Amado should feel unable to take the Chair, since he would undoubtedly have ensured that the session was a fruitful one.

7. He then seconded Mr. Amado's proposal of Mr. Spiropoulos.

Mr. Spiropoulos was elected Chairman by acclamation.

8. The CHAIRMAN, congratulating Mr. Spiropoulos on his election, thanked the Commission for the patience and kindness it had shown to himself.

Mr. Spiropoulos took the Chair.

9. The CHAIRMAN, thanking the Commission for the honour done to him, said that he accepted it with some hesitation, being fully conscious of the difficulties of his task, but aware that they would be greatly alleviated by the help of members and of the Secretariat.

10. On behalf of the Commission, he thanked Mr. Sandström for his impartial conduct of the Commission's business since the opening of the session.

11. He then called for nominations for two vice-chairman.

12. Mr. SCELLE proposed Mr. Krylov as first Vice-Chairman and Mr. García Amador as second Vice-Chairman.

13. Mr. ZOUREK and Mr. SANDSTRÖM seconded the proposal.

Mr. Krylov and Mr. García Amador were elected first and second Vice-Chairman by acclamation.

14. The CHAIRMAN called for nominations for a rapporteur.

15. Mr. SALAMANCA said that, as the Commission was going to devote a considerable amount of time at the present session to Mr. François' two reports, he should be asked to serve as rapporteur.

Mr. François was elected Rapporteur by acclamation.

Filling of casual vacancies in the Commission (item 1 of the agenda)

16. The CHAIRMAN announced that the Commission had decided at a private meeting to elect Sir Gerald Fitzmaurice to the casual vacancy caused by Mr. H. Lauterpacht's election to the International Court of Justice.

17. The Commission had also to fill a casual vacancy caused by Mr. Córdova's election to the International Court of Justice.

18. Mr. GARCÍA AMADOR moved that the Commission defer filling the second casual vacancy until the following meeting, since it was desirable that unanimity be achieved.

It was so agreed.

Request by the Japanese Government concerning the appointment of observers

19. Mr. LIANG (Secretary to the Commission) announced that he had received a telegram from United Nations Headquarters to the effect that the Japanese Permanent Observer to the United Nations had informed the Secretary-General of his Government's intention to send two observers in succession to attend the Commission's seventh session, and asking that appropriate facilities be granted them. He thought the Commission would probably wish to take a similar decision to that it had taken in the matter of the Polish observer.[1]

20. Mr. SANDSTRÖM proposed that the Commission grant the request in the same terms as in the case of the Polish observer.

After some discussion, *it was so agreed.*

The meeting rose at 4.55 p.m.

[1] See *supra*, 283rd meeting, paras. 44–54.

288th MEETING

Tuesday, 10 May 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Request by the Japanese Government concerning the appointment of observers (*continued*)

1. The CHAIRMAN invited the Commission to continue the discussion of the request by the Japanese Government concerning the appointment of observers to the present session, which the Secretary had brought to the Commission's notice at the end of the previous meeting.

2. Mr. ZOUREK pointed out that in view of the special interest which Japan, an essentially maritime country, took in the questions concerning the régime of the seas which were on the Commission's agenda, it was entirely appropriate to grant the Japanese Government's request to send two observers to the present session and he fully agreed with the decision adopted.

3. However, since certain members had referred to the admission of an official observer for the People's Republic of Poland as a precedent for admitting the Japanese observers he wished to make it clear that from the legal point of view there was an essential difference between the two cases, which were consequently not at all comparable. Mr. Jan Balicki represented a Member State of the United Nations and Member States had the right, if they so wished, to send observers to meetings of United Nations organs. Japan, on the other hand, was not a Member of the United Nations[1] and admission of its observers to meetings of the Commission was a favour which could be granted or withheld. The Commission could not therefore base its decision on the fact that a Member State was already represented by an

[1] Japan became a Member of the United Nations on 18 December 1956.

official observer. Nor could the admission of Japanese observers constitute a precedent for the future admission of observers from non-member States.

4. He asked for clarification of Press Release No. L/53, of 9 May 1955, in which, referring to the Japanese Government's request, it was stated that it had been granted "... it being understood that any observer's right to address the meeting was reserved."

5. Mr. LIANG (Secretary to the Commission) pointed out that in his statement at the previous meeting he had not quoted the Commission's decision on the Polish request as a precedent, but had implied that the decision taken by the Commission in respect of the right to make oral statements would necessarily be adhered to in the case of the Japanese request. If precedent there were, it could apply only to oral statements. The Commission's attitude in such matters had hitherto been that any State was at liberty to send observers to its sessions without, however, the implication of the enjoyment of any special status. The question of the full admission of observers as such had not been raised.

6. With regard to Press Release No. L/53, the Commission's secretariat had no control over those communiqués, for which the Information Centre of the European Office of the United Nations was solely responsible. The sentence referring to the Commission's decision on the Japanese request was not accurate, and he would request the Director of the Information Centre to issue a correction to the effect that the Commission, in conformity with its decision on the Polish request, had declared that observers had no right to make oral statements.

7. Mr. SANDSTRÖM recalled that an observer from Japan had attended meetings at the Commission's sixth session; he wondered whether observers from non-member States were admitted to sessions of the General Assembly.

8. Mr. LIANG (Secretary to the Commission) was not aware of any written regulations governing the attendance of observers. In the General Assembly, seats were reserved for them as a matter of courtesy; but the question of their precise status had never arisen. No requests for observers to address the Commission had been received at its sixth session.

9. Mr. SCELLE said that the incident had raised the question of the rights of observers. He was convinced that to allow them to make oral statements would be contrary to the spirit, and a threat to the very existence, of the Commission as a body of scholars and experts who came together in order to discuss, as individuals, problems of the development of international law. If representatives of governments were invited to attend as such, the whole character of the Commission's meetings would be changed. Political issues would be introduced, and that would profoundly affect the nature of the Commission's work. He felt strongly that, although it would be a good thing for observers to attend the Commission's sessions and to receive relevant documents, the Commission should firmly reject any suggestion that they be permitted to speak, since otherwise it would find itself transformed into an arbitral or conciliation body.

The CHAIRMAN *declared the discussion closed.*

Filling of casual vacancies in the Commission (item 1 of the agenda)

(resumed from the 287th meeting)

10. The CHAIRMAN had read out a telegram from Faris Bey el-Khouri announcing his impending arrival.

11. Mr. SCELLE suggested that it would be not only courteous but also the correct procedure to defer filling the remaining vacancy in the Commission until 16 May, when it was hoped that the three absent members, Sir Gerald Fitzmaurice, Mr. Radhabinod Pal and Faris Bey el-Khouri, would all be present.

Mr. Scelle's suggestion was put to the vote and adopted by 9 votes to none, with 2 abstentions.[2]

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.53)

(resumed from the 286th meeting)

DRAFT ARTICLES (A/CN.4/79, SECTION II)
(resumed from the 286th meeting)

Article 21 [21]: Policing of the high seas
(resumed from the 286th meeting)

12. Mr. FRANÇOIS (Special Rapporteur) said that the problem of the policing of the high seas was both complex and difficult. It was generally accepted that warships had the right to demand that merchant vessels at sea should show their flag upon request. Such a request for identification was perfectly natural, because it was not the usual practice for merchant vessels continually to fly their flags at sea. It was also widely recognized that, if the merchant vessel refused to show her flag or gave an evasive reply, the warships had the right to investigate her identity. That, again, was an essential condition for the control of piracy. Several authors went even further, and would allow in addition the right to board in doubtful cases. In that respect, the Harvard draft articles[3] did not make a definite pronouncement, and he himself had followed their example.

13. Sanctions for unjustified verification had previously been provided in the form of damages, the award of which was to be made by one of two methods. The first, and more severe, was that whereby, if the suspicion proved to be unfounded, compensation must be rendered for any loss due to the stoppage. The second, and less stringent, provided for compensation to be paid if it could be shown that the vessel had been stopped for insufficient reason. He had chosen the first of those alternatives because of the liability to abuse in the application of the second owing to the difficulty of judging motives.

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[2] See *infra*, 292nd meeting, para. 1.

[3] Harvard Law School, *Research in International Law* (Cambridge, 1932), p. 745.

14. With regard to the manner of verification, Mr. Scelle had suggested that the verification of the merchant vessel's flag should take place on board the investigating warship.[4] That proposal was neither wise in itself nor in the interests of sea-borne trade. It was true that that procedure had been followed in past centuries, but it had eventually been abandoned because of its proved inconvenience. Indeed, one of the provisions of the Treaty of the Pyrenees concluded in 1659 had stipulated that it should be the investigating warships that should send a boat to the merchant vessel. Without mentioning the risk to the crew, he need hardly stress the danger in even a moderate sea of carrying the ship's papers—the loss of which would be a most serious matter—to and from the investigating warship in a small open boat. Although there had been a departure from that earlier provision in some eighteenth century treaties, the practice of investigation on board the merchant vessel had been followed throughout the nineteenth century until, during the first world war, an exception had been made in the case of submarines, which carried no ship's boat. The practice of restricting to submarines the right to verify the flag on board the warship had since continued.

15. He could not share Mr. Scelle's fears, and, moreover, saw no chance of his proposal finding general favour. Mr. Scelle's point that the French Government had always objected to the existing practice—an objection which derived from traditional Anglo-French maritime rivalry—was of historical interest only. Under modern conditions diplomatic procedures were fully adequate to deal with possible abuse. He would urge the Commission to reject Mr. Scelle's proposal, and, for the time being, to restrict its consideration of the article to cases where there was suspicion of piracy, leaving the question of the slave trade for subsequent discussion.

16. Mr. SCELLE said that, after reflexion, he was of the opinion that article 21 was not a fitting context in which to deal with the issues of piracy or the slave trade, for in modern times both were exceptional. It was essential first to solve the main problem, that had been touched on in the discussion of article 9, namely, verification of the flag, concerning which he had reserved the right of further comment at the second reading. Merchant vessels should be restricted to the right to fly one flag only, and, if the vessel acquired a new nationality, it should be on the understanding that the original nationality be withdrawn. It was an essential condition of the policing of the high seas that a warship should be entitled to verify the flag of a merchant vessel in order to make sure that the latter was sailing under its own and only flag. It was paradoxical, it seemed, that the smaller the country the larger and more important its merchant navy. Consequently for economic reasons, there was a possibility of abuse of the process of verification by a powerful State. He did not deny that and was not defending the policy of Louis Philippe, but the interests of contemporary small States. He did not in any way deny that to divert a vessel from her course was a serious act which inevitably caused loss. He considered that verification of the flag was necessary, but was ready to admit that it should not be carried out on board the merchant vessel, and that if a boat had to be sent it was for the warship to send it. In that case, however, why could not verification take place in that boat midway between the warship and the merchant vessel? He proposed redrafting the article in a text which he would communicate to the Secretariat so as to make it clear that the warship was entitled only to approach, and not to board or search, the merchant vessel. After the merchant vessel had hove to her papers could be examined either on board the warship or, preferably in the warship's boat between the two vessels. Disputes concerning the payment of compensation in cases of abuse or unfounded suspicion could be referred to the Permanent Court of Arbitration, which in minor cases would be a more convenient court of appeal than the International Court of Justice.

17. The CHAIRMAN pointed out that the Commission had already decided to defer the question of verification of the flag.[5] It was article 21 that was under consideration.

18. Mr. SCELLE urged that the provisions relating to investigation and search of merchant vessels suspected of being engaged in piracy or the slave trade be restricted to certain seas.

19. Mr. SANDSTRÖM said that clarification was still needed of the precise meaning of the terms "warship" and "merchant vessel".

The Commission's decision to delete from article 12 the words "and non-commercial" carried the implication that in the context of article 21 a state merchant vessel could have the function of policing the high seas. For that reason, he doubted its wisdom.

21. Mr. LIANG (Secretary to the Commission) agreed that article 12, as amended, certainly gave government yachts and similar craft, even if engaged in commerce, the right of policing the high seas.

22. The CHAIRMAN suggested that there was a discrepancy between the English and French texts.

23. Mr. FRANÇOIS (Special Rapporteur) said that there had been no desire to extend the right of policing to State vessels other than warships. He thought there was no difference that could not be resolved by the Drafting Committee.

24. The CHAIRMAN pointed out that article 11 had established the extra-territoriality of warships on the high seas, a concept which had been more specifically determined in article 12.

25. Mr. SANDSTRÖM welcomed the Chairman's explanation, which met the point he had raised.

[4] 286th meeting, para. 12.

[5] 284th meeting, para. 53.

[6] 285th meeting, para. 17.

26. Mr. LIANG (Secretary to the Commission) said that, although the comment on article 12 made the situation clear, the text of the article left the matter in some doubt. It might be wiser to re-draft article 12 and to introduce the idea of immunity embodied in article 11.

27. Mr. EDMONDS agreed and thought that article 12 had been amended in error.

28. Mr. AMADO pointed out that article 12 was irrelevant in the context of the right of warships to police the high seas.

29. The CHAIRMAN suggested that article 12 be re-drafted by the Drafting Committee.

It was so agreed.

30. Mr. ZOUREK said that article 21 was of capital importance. It was interesting to trace the evolution of the Special Rapporteur's thought on the subject through his various draft reports. In his second report, for instance, which he would quote, the right of approach had been included. In article 21, however, that right was not mentioned, despite the fact that that was its proper place, but the rights to board and search—quite a different matter—were contemplated. It seemed to him, therefore, that the Special Rapporteur's mind had not moved in a direction favourable to the enjoyment of the right of freedom of the seas. It must not be forgotten that the rights to board and search had been claimed unilaterally, and had not been generally recognized. That concept, however, should be the point of departure for ultimate acceptance by all States. If, as had been argued, the rights to board and search had been introduced only to cover a vessel suspected of being engaged in piracy or the slave trade, they had no place in a general provision. Moreover, as the result of technical progress, and in particular of the use of wireless telegraphy, the claim to board and search was an anachronism, and would entail unnecessary loss to the merchant vessel concerned. Cases of piracy or slaving were exceptional and, generally speaking, were covered by specific treaties or by international custom.

31. Any article placed at the beginning of the section on the policing of the high seas should set forth two principles: the first, that merchant vessels should not be stopped on the high seas by the warships of any State other than the flag State; the second, that State vessels had the right to verify the nationality of foreign merchant vessels by requesting them to hoist their flag. Boarding and searching should be forbidden unless specifically provided for by treaty or international convention.

32. Mr. FRANÇOIS (Special Rapporteur) replying to Mr. Zourek, said that he had not changed his mind since writing his first and second reports (A/CN.4/17, A/CN.4/42),[7] in which he had pointed out that in time of peace the only police measure allowed in a general way by international law was the right of approach, that was to say, the right to ascertain the identity and nationality of the vessel, but where piracy was suspected there was a right to verify nationality by examining the ship's papers. Most authorities agreed that a warship was justified in boarding a merchant vessel and checking its nationality by examining its papers, provided there was reasonable ground for suspecting it to be engaged in piracy or the slave trade. Mr. Zourek appeared to think that such a provision went too far, that it would be enough for warships to require such vessels to show their flag, and that powers of verification should be exercised only by virtue of a special agreement between the States concerned. For his part, he felt that, particularly in view of the importance of suppressing piracy, by accepting his article the Commission would be fulfilling one of its tasks, which was to develop existing international law, though, of course, he recognized that, like any other legal provision, his article was open to abuse.

33. The case of slavery was, perhaps, slightly different, and article 21 might therefore be provisionally restricted to piracy. The Commission would note that there was no reference to the right to check nationality by examination of a ship's papers. That omission was deliberate, and was due to earlier criticism of his draft on the ground that it was too explicit. The present text might now be found too imprecise, and if the Commission thought fit he would be pleased to expand it.

34. Mr. SANDSTRÖM asked whether the Special Rapporteur intended to deal with such questions as verification of the flag in article 21 only, or whether Mr. Scelle was going to propose a separate article on the verification of the nationality of the vessel.

35. Mr. FRANÇOIS (Special Rapporteur) replied in the affirmative to the first part of Mr. Sandström's question.

36. Mr. SCELLE recalled that he had maintained from the outset that a separate article on the verification of the flag was indispensable, and that the omission of a general article concerning the general policing of the high seas, as distinct from provisions concerning the special cases of piracy and slavery, would be not only serious but also incomprehensible, because in the absence of any international body with police powers, order must be protected if anarchy was to be averted. The prevalence at the present time of fraudulent practices in the registration of ships further substantiated his thesis. G. Gidel had wisely called attention, in connexion with the policing of the seas, to Kelsen's theory about the possibility of having two or more jurisdictions existing concurrently in the same areas.[8]

37. Mr. AMADO thought it would be useful if Mr. Zourek would embody his views in a precise text. For his part, he was extremely puzzled by the Special Rapporteur's omission from article 21 of any mention of the right of approach, particularly since the possibility of cases of piracy and slavery was diminishing.

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[7] *Yearbook of the International Law Commission, 1950* and *Yearbook of the International Law Commission, 1951*, respectively.

[8] *Le droit international public de la mer* (Châteauroux, 1952), tome I.

38. Mr. SANDSTRÖM wished to know what purpose a general article on the verification of the flag would serve, apart from the special cases of piracy and slavery.

39. Mr. ZOUREK said that the difficulty in which the Commission found itself was due to the Special Rapporteur's having transformed a rule dealing with special cases into a general rule. The Commission should first define the existing rule on the right of approach, and then decide in which particular cases it should apply. Clearly, there was general agreement that some policing of the high seas was necessary, but views differed as to how it was to be carried out. At all events, the importance of the problem should not be exaggerated, since the world had moved beyond the conditions obtaining in the nineteenth century and with present technical facilities it was possible to obtain quickly, and without interminable enquiries on board, information about a vessel suspected of having infringed the rules of navigation on the high seas. It was on that point that he parted company with Mr. Scelle.

40. The CHAIRMAN suggested that the Commission should concentrate on the major issues involved, and first decide the general question of principle—whether it wished to recognize the existence of a right to verify the flag—before taking up the question of specific provisions concerning piracy and slavery.

41. Mr. SCELLE, in reply to Mr. Sandström, said that a general provision of the kind he had in mind could provide means of establishing whether ships were complying with general rules on, for instance, navigation, choice of route, signals, pollution and safety. Such countries as Liberia, Panama and Switzerland possessed no warships, and there was accordingly no means whatsoever of preventing abuse of the regulations by their merchant vessels. In his opinion it would be quite inadequate to deal with the question of verification of the flag in conjunction with piracy alone. Verification was essential to determine responsibility for any damage done by merchant vessels on the high seas.

42. Mr. KRYLOV asked whether he was right in thinking that Mr. Sandström favoured a provision dealing solely with piracy and slavery, and was opposed to a general article of the kind proposed by Mr. Scelle.

43. Mr. SANDSTRÖM said that Mr. Krylov's interpretation was not correct. He had simply asked for clarification, and was fully satisfied with the explanation given by Mr. Scelle.

44. Mr. AMADO said that he would be interested to learn whether the Special Rapporteur considered a general article necessary, and, if so, why.

45. Mr. KRYLOV believed that the general question of verification of the flag should be left aside, and that the Commission should deal only with piracy and slavery.

46. Mr. FRANÇOIS (Special Rapporteur) disagreed with Mr. Scelle, because no right of verification of the flag obtained in international law unless a vessel was suspected of being engaged in piracy or the slave trade. If the Commission decided to recognize such a right, it would be running counter to the opinion of the authorities. The innovation would inevitably give rise to abuse, and he would oppose it.

47. The CHAIRMAN, speaking as a member of the Commission, asked whether a Netherlands warship which encountered on the high seas a vessel flying the Greek flag would be empowered to board her on suspicion that she was a Netherlands ship.

48. Mr. FRANÇOIS (Special Rapporteur) replied that that was an exceptional case which could be covered. If the suspicion were well-founded, verification of the flag was permissible.

49. Mr. SCELLE pointed out that in the foregoing reply the Special Rapporteur had implicitly accepted his view that unless a warship had the right to verify the flag when suspecting a merchant vessel of flying one to which it was not entitled, anarchy would ensue. He could not admit the Special Rapporteur's affirmation that the right of verification did not exist in international law. It was enough to refer the Commission to a recent work of Charles Rousseau,[9] whom no one could accuse of being revolutionary, in which the procedure was explained at length.

50. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Scelle had misunderstood him. He had not asserted that all warships had the right to examine the papers of any merchant vessel; that could only be done if there was reasonable ground for suspecting that the laws of the flag State had been violated.

51. Mr. SCELLE said that his view, which was precisely the reverse of the Special Rapporteur's, was shared by several eminent authorities.

52. Mr. GARCÍA AMADOR was uncertain about the scope of article 21, and wondered whether it would apply to cases involving the security of a State, such as that recently considered by the Inter-American Peace Commission of the Organization of American States. It would be remembered that the boarding of a Guatemalan ship on the high seas had been found unjustified, since the charge that it had threatened the security of a State had not been proved.

53. The CHAIRMAN said that the foregoing remarks further confirmed his view that the Commission must first decide on the controversial issue of principle. The Special Rapporteur did not recognize the existence of a right of verification of the flag except in certain limited cases, and considered that the establishment of such a rule would derogate from the principle of the freedom of navigation. In the circumstances, members might like further time for reflexion and study. He therefore proposed that further discussion on the issue be deferred until the next meeting.

It was so agreed.

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[9] *Droit international public* (Paris, Sirey, 1953), pp. 418–421.

54. The CHAIRMAN suggested that in the meantime, as there seemed to be general agreement that a right of verification of the flag existed when there was reasonable ground for suspecting that the vessel was engaged in piracy or the slave trade, the text of article 21 might be referred to the Drafting Committee for re-examination in the light of the discussion.[10]

It was so agreed.

Article 22 [12]: Policing of the high seas[11]

55. Mr. FRANÇOIS (Special Rapporteur) observed that, although the practical importance of article 22 was not very great, it did serve a useful purpose in imposing upon States an obligation to co-operate in suppressing the slave trade. The provision might perhaps be extended to cover the suppression of piracy as well.

56. Mr. AMADO expressed doubts about the way in which the last sentence of article 22 was drafted. Any slave finding himself on territory where slavery was not recognized obviously ceased *ipso facto* to be a slave.

57. Mr. FRANÇOIS (Special Rapporteur) explained that the provision was taken from the Slavery Convention of 1926:[12] he would not insist on its retention.

58. Mr. EDMONDS stated that he had been extremely surprised at the memorandum (A/CN.4/L.53) submitted by the Polish Government in connexion with the article under discussion. The memorandum reproduced statements already made in the *Ad hoc* Political Committee of the General Assembly and there found to be without substance. The Commission was a quasi-legislative body, and did not possess either an arbitral or a judicial status. It could in no sense be regarded as the proper tribunal for the submission of assertions that acts of piracy had been committed by certain countries, including the United States of America, and calling for the imposition of sanctions. The Commission must consider article 22 solely in the light of the principles of law involved. It could not take into account allegations of fact, the truth of which it was in no position to determine. He was unable to understand how any government could submit such a memorandum to an international body exclusively engaged in drafting legal texts.

59. The CHAIRMAN wondered whether the Polish Government's observations did not relate more closely to article 23, since to the best of his recollection they did not raise the question of slavery.

60. Mr. EDMONDS said that he had raised the question at the present stage because the fifteenth and sixteenth paragraphs referred to article 22; indeed, the latter contained an amendment to it.

61. Mr. HSU considered that it was immaterial at what stage of the discussion the Commission took up the Polish Government's observations, since they did not relate to any of the articles before it.

62. Mr. FRANÇOIS (Special Rapporteur) pointed out that, although article 22 might be regarded as in the nature of an introduction to the provisions on piracy, it might be more convenient, for practical reasons, to discuss the Polish observations in conjunction with article 23, when it would be essential to consider such questions as piracy committed on the responsibility of individuals or of States.

63. Mr. EDMONDS said that he would have no objection to that course.

64. The CHAIRMAN said that, in view of Mr. Hsu's remarks, he would put to the vote the motion that the Polish Government's observations be discussed under article 22.

The motion was rejected by 4 votes to 3, with 3 abstentions.

65. Mr. SALAMANCA considered that the Commission had voted too hastily. The question of when the Polish Government's observations should be discussed might be left to the discretion of the Chairman, particularly as the relevant documents and records of the *Ad hoc* Political Committee were not yet in the hands of some members.

66. Mr. SANDSTRÖM, explaining his vote, said that he had supported the motion because the Polish Government had submitted an amendment to article 22.

67. Mr. ZOUREK observed that the Commission could take account of that amendment, since the Special Rapporteur had already said that he was prepared to amplify the scope of article 22 to include piracy.[13]

The meeting rose at 1.07 p.m.

[10] See *infra*, 289th meeting, para. 1.

[11] Article 22 read as follows:

"All States are required to co-operate for the more effective repression of the slave trade on the high seas. They shall adopt efficient measures to prevent the transport of slaves on vessels authorized to fly their colours and the unlawful use of their flag. Any slave who takes refuge on board a warship or a merchant vessel shall *ipso facto* be set free."

[12] League of Nations, *Treaty Series*, vol. 60, p. 255.

[13] See *infra*, 289th meeting, para. 43.

289th MEETING

Wednesday, 11 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 21 [21]: Policing of the high seas
(resumed from the 288th meeting)

1-2. The CHAIRMAN called upon the Commission to decide whether it wished to recognize the existence of a right of verification of the flag, on which a decision had been deferred at the previous meeting to give members time for reflection and further study.

3. Mr. SANDSTRÖM said that L. Oppenheim [1] certainly held the same view as the Special Rapporteur, that there existed only the right of warships to verify the flag of merchant vessels flying the same flag as their own. He himself was inclined to agree, as he had not been convinced by Mr. Scelle's argument about the matters for which international policing of the high seas was essential.

4. As the whole question had given rise to considerable divergence of opinion, he believed that a provision was necessary concerning the right of verification in the limited sphere of piracy and the slave trade.

5. Mr. SCELLE said that he was pressing for the recognition of a right to verify the flag because in the absence of such a right it would be impossible, first, to insist that no ship should possess more than one nationality, and secondly, to institute proceedings in cases of, for example, pollution of the sea by oil leading to wholesale slaughter of fish, because States would naturally disown vessels flying their flag if they were not entitled to it.

6. Mr. FRANÇOIS (Special Rapporteur) said that among the authorities—they did not include Ch. Rousseau—whom he had had time to consult since the previous meeting, he had found none to support Mr. Scelle's thesis.[2] It was interesting to note that the French Chamber of Deputies had refused to ratify the General Act of the Anti-Slavery Conference held at Brussels in 1890, in the belief that the reciprocity provided for would be ineffective because of the supremacy of the British Navy. France had subsequently reserved its position on all the articles dealing with the verification of nationality.

7. If Mr. Scelle's proposal were adopted, any warship would be entitled to verify a ship's papers even if there was no suspicion whatsoever about the true nature of its activities. Surely, the commander of a warship was not the proper authority to decide whether a merchant vessel was entitled to the flag it was flying. Mr. Scelle, who claimed to be the champion of the freedom of the seas, was in fact gravely compromising it, and his proposal would lead to anarchy.

8. Mr. SCELLE said that, if there were an international police for the high seas he would fully agree with the Special Rapporteur, but at present such police functions had to be discharged by warships. The dangers to which the Special Rapporteur had referred were very slight, because warships would hardly act without reasonable ground for suspicion, since otherwise compensation would be claimed for unjustifiable stoppage. He personally was convinced that it was as important to prevent ships from sailing under false colours as it was to suppress slavery and piracy.

9. As Gidel had carefully explained, there were two competing jurisdictions on the high seas: the national and the international. The aim of progress should be a well-ordered international community and with that consideration in mind he contended that unless a provision recognizing the right of verification were included, the value of the whole draft would be seriously impaired.

10. Mr. AMADO said that, as he had made clear at the previous meeting, he had been surprised that the Special Rapporteur should have omitted all reference to existing customary law concerning the policing of the high seas and the verification of the flag. He had listened with great interest to the Special Rapporteur but could not accept his statement that none of the authorities recognized the right to verify the flag. He would draw the attention of the Commission to the following passage in Oppenheim's *International Law:*

> "*Verification of flag:* It is a universally recognized rule of international law that men-of-war of all nations, in order to maintain the safety of the open sea against piracy, have the power to require suspicious private vessels on the open sea to show their flag. But such vessels must be suspicious.... It is, however, quite obvious that this power belonging to men-of-war must not be abused, and that the home State is responsible for damage, etc." [3]
>
> "...
>
> "*Abuse of flag:* It is another universally recognized rule that the men-of-war of every State may seize, and bring to a port of their own for punishment, any foreign vessel sailing under the flag of such State without authority." [4]

[1] *International Law*, 7th edition, edited by H. Lauterpacht (London, New York, Toronto, Longmans, Green and Co., 1948), p. 553.

[2] *Droit international public* (Paris, Sirey, 1953), pp. 418-421.

[3] *Op. cit.*, p. 553.

[4] *Ibid.*, p. 555.

11. With regard to the right of approach, Charles Rousseau in his *Droit international public* stated:

... En haute mer, le navire ne relève que de l'Etat auquel il ressortit. Un Etat ne peut même pas saisir un criminel en haute mer sur un navire qui ne porte pas son pavillon. L'Amirauté britannique revendiquait autrefois le droit d'arrêter à bord des navires étrangers les sujets réfractaires au service de la marine royale. Employé aux XVIIe et XVIIIe siècles, ce procédé, connu sous le nom de "presse" des matelots, donna lieu à de vives protestations de la part des Etats tiers; il fut la cause de la guerre de 1812 entre l'Angleterre et les Etats-Unis. En haute mer le navire de commerce reste soumis à ses autorités nationales, c'est-à-dire à la police des navires de guerre de sa nationalité, qui peuvent exercer à son égard un droit de visite et de perquisition (visit and search). Mais tout navire de guerre a le droit de vérifier le pavillon (right of approach) d'un navire de commerce quelconque qui lui paraît suspect. Cette mesure a pour but de constater la nationalité du navire et son droit au pavillon qu'il arbore (enquête sur le pavillon); ordre est donné au navire de s'arrêter par porte-voix, signaux optiques ou radioélectriques, ordre qui sera éventuellement appuyé par un coup de canon de semonce et, si le navire refuse de stopper, par un coup de canon dans les avants; si le navire obéit, le bâtiment de guerre vérifie ses papiers de bord pour connaître sa nationalité.[5]

12. Knowing the energy and conviction with which Mr. Scelle defended the freedom of the high seas, he had given the most serious consideration to his proposal, and was convinced that students of international law would wonder why the Commission had omitted any general provision about the policing of the high seas, and why it had confined itself solely to special measures connected with the suppression of piracy and slavery.

13. Mr. FRANÇOIS (Special Rapporteur) wished to make clear that he had said only that none of the authors whom he had consulted since the previous meeting shared Mr. Scelle's opinion. Mr. Sandström's perusal of Oppenheim had led him to the opposite conclusion to that reached by Mr. Amado. He (the Special Rapporteur; had based his views on the passage from Oppenheim's *International Law* quoted in his second report (A/CN.4/42),[6] from which it was clear that Oppenheim only recognized the right to verify the flag when piracy was suspected. He must reiterate that he could not admit that there was any general rule of international law of the kind claimed by Mr. Scelle.

14. Mr. KRYLOV said that the time had come for the Commission to take a decision. He had studied Rousseau, but still agreed with the Special Rapporteur that at present there was no general rule in international law concerning the policing of the high seas in general. However, he would be prepared to accept the provisions of article 21 for the two special cases of piracy and slavery.

15. Mr. EDMONDS said that most authorities, though not all, were of the same opinion as the Special Rapporteur. Oppenheim only admitted verification of the flag when there was reasonable ground for suspecting the vessel of being engaged in piracy or the slave trade. He considered that the third contingency mentioned by Mr. García Amador at the previous meeting should also be covered, and therefore proposed the addition at the end of the first sentence in article 21 of the words: "or, during times of imminent peril to the security of the State, in activities hostile to the State of the warship".

16. Mr. ZOUREK said that the arguments adduced at the present meeting proved that there was no generally recognized rule in international law concerning the policing of the high seas. Even the exponents of Mr. Scelle's thesis only admitted the right of approach when there was a well-founded suspicion of piracy or slavery. The lengthy discussion had arisen partly because the Special Rapporteur had failed to draft an introductory paragraph to article 21 stipulating that merchant ships on the high seas were subject only to the jurisdiction of the flag State. The exceptions to that rule should then be stated in a second paragraph. Unless the article were formulated in that manner, difficulties of interpretation would be inevitable.

17. He was also in favour of qualifying the reference to the slave trade by re-introducing some such wording as "as in the maritime zone in which it still exists", which the Special Rapporteur had used in his second report.

18. Without such modifications article 21 might open the way to arbitrary interference.

19. Mr. EDMONDS suggested that Mr. Zourek's suggestion was already covered by article 7, which had been provisionally accepted.

20. Mr. SCELLE said that to him, though perhaps not to some of the members of the Commission, it was the value of an opinion that was important, not the number of its exponents. In consulting treatises on international law, it was essential to bear in mind the context and the circumstances in which the views had been put forward. He attached, perhaps, less importance to the opinion of lawyers than to the Commission's duty of ensuring the progressive development of international law and, consequently, the integration of the international community. The theory of state sovereignty had had its day, and even though it still retained some utility, it would eventually have to give way to an international society which was inconceivable without a *res communis* and hence an international police.

21. Any thorough examination of the textbooks would reveal that so far as the high seas were concerned a clear distinction was drawn between general and special police measures. He must again warn the Commission

[5] *Op. cit.*, p. 419.

[6] *Yearbook of the International Law Commission, 1951*, vol. II, p. 82.

that it was taking the wrong road which could only lead to anarchy, since there could be no freedom without order.

22. Mr. HSU said that, although he was in general sympathy with Mr. Scelle's efforts on behalf of the cause of the community of nations, he wondered, since it was not yet a reality, whether it would be wise to follow him in the present instance, since a general provision of the kind envisaged would be open to serious abuse.

23. He believed Mr. Edmonds' amendment would be acceptable, since in present times of uncertainty it was undesirable for States to be precluded from taking positive steps until their security was actually threatened.

24. Mr. SANDSTRÖM supported the addition proposed by Mr. Edmonds.

25. The CHAIRMAN then put to the vote the question of principle, namely, whether the Commission should recognize that there existed a general right of verification of the flag.

The Commission decided in the negative by 6 votes to 2, with 2 abstentions.

26. Mr. EDMONDS explained that he had abstained from voting because he felt that the issue had been framed in too general a way. He favoured a right to verify the flag in the case of suspected piracy, slave-trading or immediate threat to the security of a State.

27. The CHAIRMAN then invited the Commission to consider Mr. Edmonds' amendment.

28. Mr. GARCÍA AMADOR said that he had been responsible for raising the question of security, and would be interested to hear the Special Rapporteur's views.

29. Mr. FRANÇOIS (Special Rapporteur) considered it to be self-evident that a warship could verify the flag of a vessel suspected of threatening the security of its own State, and therefore felt it unnecessary to include a specific provision on that point. Moreover, the scope of such a provision might be unduly extended.

30. Mr. ZOUREK observed that such a new exception to the principle of the freedom of navigation might destroy that freedom altogether, since States would tend to invoke the argument of legitimate defence to justify any act of interference.

31. Mr. LIANG (Secretary to the Commission) said that publicists used to assert as a rule of customary international law that some departure from the principle of freedom of the seas was permissible in certain circumstances involving considerations of self-preservation; a thesis to which Gidel had devoted considerable space. That thesis had been urged in the case of the S.S. "Virginius", and he recalled the lengthy discussion in the Dana edition of Wheaton's treatise on International Law.[7] If he might express an opinion, he would be inclined to agree with the Special Rapporteur that it was unnecessary to make an addition of the kind proposed by Mr. Edmonds, particularly as the right of legitimate self-defence had never been questioned and was in a different category from the question of piracy and the slave trade.

32. Mr. SANDSTRÖM pointed out that the entry into Norwegian ports in 1940 of German vessels carrying troops was the kind of case which would be covered by Mr. Edmonds' amendment. If it were not accepted, the question of State security could be dealt with in the comment.

33. Mr. SCELLE said that Mr. Edmonds' amendment would serve a useful purpose, but perhaps did not go far enough. In his view, article 21 should cover, for example, cases of illicit arms traffic, pollution of the sea, damage to submarine cables, etc.; otherwise it would be impossible to obtain compensation.

34. Mr. GARCÍA AMADOR said that he had raised the question of State security because article 21 as at present drafted would only allow interference when there was suspicion that a vessel was engaged in piracy or the slave trade, although interference was recognized to be justified in other instances. Perhaps the Commission might revert to the Special Rapporteur's earlier reports in considering how the article might be modified so as to protect the requirements of legitimate defence, which were unquestionably admitted in international law.

35. Mr. HSU, in reply to the Secretary's remarks, observed that in the present state of world tension it would be well to recognize explicitly the rights of self-defence.

36. Mr. ZOUREK, referring to Mr. Liang's attempt to present the right of self-defence as a rule of customary international law, said that no concept had been subject to greater abuse because it could not be defined. It would be remembered that the British Navy had sought to apply such a principle on the high seas during the nineteenth century and some English legal authorities had sought to justify those efforts, but their views had been rejected by other States. The right of legitimate defence did exist, but could only be exercised in proportion to the force used on the other side. There was no right to board a vessel on the ground that it was suspected of threatening the security of a State, except in cases expressly provided for in international law.

37. Mr. SALAMANCA drew the attention of the Commission to the fact that it was engaged in codifying international law for times of peace. Moreover, Article 51 of the United Nations Charter fully recognized the principle of legitimate self-defence. It was true that existing tensions and difficulties should be taken into account, but that could be done in the Sixth Committee of the General Assembly. In the mean-

[7] Wheaton, *International Law*, 8th edition, edited by R. H. Dana (Boston, Little, Brown and Co., 1866), pp. 638–661.

time, he did not think that any practical purpose would be served by Mr. Edmonds' amendment, which might lead the Commission into political argument. Regional agreements concluded in accordance with the Charter could provide measures against illicit arms traffic. He therefore agreed with the Special Rapporteur that there was no need to amplify article 21 by reference to the requirements of self-defence.

38. Mr. GARCÍA AMADOR maintained that the problem was one of drafting: the Commission could not change existing rules of international law relating to self-defence. In spite of arguments to the contrary, he still believed that article 21 required revision to avoid exclusion of the right to verify the flag in cases other than those connected with suspected piracy or slave traffic.

39. Mr. SALAMANCA said that although he agreed in principle with the previous speaker, he felt that the point could be adequately covered in the comment.

40. The CHAIRMAN asked whether Mr. Edmonds would be satisfied if it were made clear in the comment that article 21 did not exclude the exercise of the right of legitimate self-defence.

41. Mr. EDMONDS said that in submitting his amendment he had been guided by the consideration that it was the Commission's task to codify existing international law. However, he would not press his amendment if it were not favoured by the majority.

42. Mr. FRANÇOIS (Special Rapporteur) said he would re-draft article 21 and the comment in the light of the discussion.

Further discussion of article 21 was deferred.

Article 22 [12]: Policing of the high seas
(resumed from the 288th meeting)

43. Mr. FRANÇOIS (Special Rapporteur) had little to add to his previous remarks on article 22, except that it would be re-drafted to bring piracy as well as the slave trade within its scope.

44. Mr. SANDSTRÖM thought that article 22 should be re-drafted, because the word "co-operate" was inadequate. In the first place, the first sentence of the article placed an obligation on States, and it seemed paradoxical to talk of an obligation to co-operate. Furthermore, the article referred to the repression of the slave trade on the high seas (and would eventually refer to that of piracy as well); clearly States could not be obliged to take action on the high seas, and it would seem more accurate to say that they had the right, rather than the obligation, to participate in measures to prevent the slave trade.

45. The CHAIRMAN thought that Mr. Sandström's objections might be met by explaining in the comment what precisely was meant by the term "co-operation".

46. Mr. FRANÇOIS (Special Rapporteur) said that the language of article 22 had been borrowed from article 1 of the General Act of the Anti-Slavery Conference of 1890.[8] A change had been made, in that the words "slave trade on the high seas" had been substituted for the words "slave trade in certain zones" used in the original.

47. Mr. SANDSTRÖM said that the scope of article 22 was not very clear to him. Was it suggested, for example, that Sweden should be required as an obligation to participate in the repression of the slave trade in the Red Sea?

48. The CHAIRMAN said that the construction to be placed on article 22 was that all States had an obligation to co-operate in the repression of the slave trade on the high seas according to the circumstances of the moment. The main consequence would be that no warship should refuse its assistance for that purpose when called upon to do so.

49. Mr. KRYLOV recalled that Mr. Zourek had proposed that article 22 be re-drafted to refer to certain specific zones instead of to the high seas in general; he would like to hear the Special Rapporteur's views on that point.

50. The CHAIRMAN asked whether Mr. Zourek wished to move a formal amendment.

51. Mr. ZOUREK formally proposed that article 22 be amended by replacing the words "on the high seas" at the end of the first sentence by the words "in the zones covered by the treaties in force".

52. Mr. FRANÇOIS (Special Rapporteur) recalled that Mr. Zourek had made a similar proposal in respect of article 21.[9] He had the impression that he had not pressed the point, and that the Commission had thereupon agreed that policing should cover the high seas as a whole, and not just certain restricted areas.

53. The CHAIRMAN said that, as he understood Mr. Zourek's proposal, a vote would have to be taken on both article 21 and article 22, to decide whether their scope was to be restricted to the zones covered by existing conventions.

Article 21 [21]: Policing of the high seas
(resumed from para. 42)

54. Mr. GARCÍA AMADOR, speaking to a point of order, recalled that article 21 had still to be re-drafted. It would therefore be premature to move an amendment to it.

55. The CHAIRMAN said there could be no objection to a vote on the principle, subject to final drafting.

56. Mr. GARCÍA AMADOR said that Mr. Zourek's amendment would deprive article 21 of its general nature.

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[8] Martens, *Nouveau Recueil Général de Traités*, 2nd Series, vol. 16, p. 3; Malloy, *Treaties, Conventions, etc., between the United States and Other Powers*, vol. 2, pp. 1974–1982.

[9] See *supra*, para. 17.

57. Mr. ZOUREK explained that the main purpose of article 21 was to enable ships suspected of engaging in the slave trade to be investigated, with a view to the suppression of that trade. It would therefore be logical to restrict its scope to those zones covered by the relevant existing treaties.

58. Mr. FRANÇOIS (Special Rapporteur) recalled that in his second report he had drafted article 21 as follows: "All States are required to co-operate for the more effective repression of the slave trade in the maritime zone in which it still exists." [10]

59. Mr. KRYLOV said it would be difficult to determine in which exact maritime zones the slave trade still existed. A reference to the existing treaties would be much more precise; the Anti-Slavery Convention of 1890, for example, gave very precise geographical indications.

60. The CHAIRMAN said that the issue before the Commission was simply whether the right of interference, in the interests of repression, should be recognized all over the world, or be limited to certain specific zones.

61. Mr. AMADO enquired what was the position with regard to piracy.

62. Mr. ZOUREK said that his remarks applied to the slave trade alone.

63. Mr. SCELLE said that article 22 related only to the slave trade. As the traffic in women and children was not covered by that article, its adoption would imply the retrogression rather than the development of international law.

64. Mr. AMADO said that the fact that article 22 concerned only the slave trade proper was an argument in favour of Mr. Zourek's proposal.

65. Mr. LIANG (Secretary to the Commission) pointed out that, although article 22 only concerned the slave trade, article 21 dealt with other matters as well. The two articles could not therefore be treated in the same manner.

66. The CHAIRMAN put to the vote Mr. Zourek's proposed amendment, to the effect that the scope of the right of interference laid down in article 21 be restricted to the maritime zones covered by existing anti-slavery conventions.

Mr. Zourek's amendment was adopted by 7 votes to none, with 3 abstentions.

Article 22 [12]: Policing of the high seas
(resumed from para. 53)

67. Mr. SCELLE said article 22 laid down a rule of international law which placed an obligation upon States. However, to stop at that would be tantamount to expressing a mere pious wish. That was clearly inadequate, and the article should provide a sanction by prescribing the international responsibility of any State which infringed its obligations under the article. Such a stipulation of liability would make it possible for other States to claim compensation from the State at fault.

68. Mr. GARCÍA AMADOR agreed with Mr. Scelle that provision must be made for international responsibility. Unfortunately, the obligation in article 22 was a very indefinite one, and it was impracticable to provide a sanction. It was in fact what was known in French as *une obligation imparfaite*, one to which no sanction attached. The same was true of Spanish law.

69. Mr. HSU asked the Special Rapporteur whether the slave trade was still prevalent in the zones covered by the relevant treaties. If the problem had lost its urgency, perhaps it would be undesirable to include provisions concerning it in the draft articles relating to the régime of the high seas, which were not meant to be a complete codification.

70. Mr. FRANÇOIS (Special Rapporteur) wished to make it clear that, if Mr. Zourek's amendment were adopted, the obligation on States to co-operate in the repression of the slave trade would be restricted to certain maritime zones. There was no limitation, however, on the number of States under such obligation. It therefore followed that all those States which accepted the draft articles would be required to co-operate in the repression of the slave trade in the maritime zones in question, instead of only those States which were at present parties to the anti-slavery treaties. That implied an extension of the existing system of repressing the slave trade.

71. Replying to Mr. Hsu, he stated that the slave trade was, unfortunately, still a very real problem in certain areas, that the United Nations was alive to the problem and was taking steps to deal with it.

72. Mr. AMADO said that Mr. Scelle's objection to the somewhat paradoxical phrase *obligation de coopérer* could be met by opening the article along the following lines: *Tous les Etats sont tenus de coopérer.*

73. Mr. SCELLE agreed with Mr. García Amador that in French and, indeed, in Latin-American jurisprudence the term *obligation imparfaite* meant a duty or an obligation to which no sanction attached. But it was precisely in order to transform the imperfect obligation into a true obligation (*obligation parfaite*) that he proposed the provision of sanctions. It would of course be difficult to determine in every specific case whether there had been an infringement of a treaty obligation; that was a classic problem and one to which the classic answer was to allow the court of competent jurisdiction to determine whether, in the particular instance, the law had been infringed. He would give a simple example: nothing was more difficult than to distinguish between voluntary homicide and culpable involuntary homicide, but in every country competent courts were

[10] A/CN.4/42, *Yearbook of the International Law Commission, 1951*, vol. II, p. 85.

deciding particular instances of that kind every day. His proposal was therefore that a sanction be laid down, to enable the compulsory jurisdiction of the Permanent Court of Arbitration to function, in other words, to enable any interested State to have recourse to such arbitration where an infringement of the draft articles occurred.

74. With reference to Mr. Amado's suggestion concerning the opening words of article 22, he said that if the Commission was unwilling to impose on States an obligation to co-operate, but only to express a wish that they do so, the best French drafting would be: *Tous les Etats devraient coopérer*. It was clear that unless a sanction was provided, the draft articles which the Commission was discussing would read like a moral decalogue instead of a set of legal principles.

75. Mr. LIANG (Secretary to the Commission) said that all the draft articles had sanctions attached to them, although provision for sanctions in case of infringement was of course not repeated in every one of them. Thus article 2, which laid down that "the high seas shall be immune from all acts of sovereignty or territorial dominion on the part of any State", certainly entailed sanctions in case of violation of the rule embodied in it. Article 22, as drafted in Mr. François' sixth report (A/CN.4/79), was not in the form of a *voeu*.

76. Whatever changes might be deemed advisable in the French text, the English text of article 22 imposed a clear obligation which necessarily implied international responsibility. It would be undesirable to refer specifically to international responsibility, or to the liability of States, in that particular article, for if that were done the other articles in which no such provision had been included could be misconstrued as lacking any sanction in respect of their provisions.

77. Mr. SCELLE proposed that the compulsory jurisdiction of the Permanent Court of Arbitration be specifically provided for in both article 21 and article 22. Omission to provide for such compulsory arbitration would make the draft articles equivocal.

78. Mr. ZOUREK said that article 22 was in no sense an imperfect rule of law. Should such a construction be placed upon it, the same might be said of many other rules of international law which did not provide for compulsory arbitration. The provision contained in article 22 was essential in the interests of the maintenance of international co-operation without it being necessary to provide for compulsory arbitration.

He proposed that the article be amended, first, by inserting the words "and piracy" after the words "the slave trade" in the first sentence; second, by inserting the words "and punish" after the words "to prevent" in the second sentence; and third, by inserting a comma, followed by the words "and piracy by," after the words "the transport of slaves on" in the same sentence.

79. Finally, he took exception to the last sentence, which implicitly recognized the existence of slavery.

80. Mr. SANDSTRÖM said that the second sentence of article 22 provided for prevention of the practice referred to in the first sentence. It would therefore be inadvisable to restrict the scope of the first to certain specific maritime zones, because that would imply consequential geographical limitation of the preventive measures. The net result would be that any slave-trading operations carried on outside the zones specified would be immune from repression.

81. Finally, he formally proposed that the final sentence be deleted.

82. The CHAIRMAN put to the vote Mr. Zourek's proposal that piracy be included within the scope of article 22.

The proposal was adopted by 8 votes to none, with 2 abstentions.

83. The CHAIRMAN then put to the vote Mr. Zourek's proposal that the scope of article 22 be restricted to the maritime zones covered by existing international treaties relating to the suppression of the slave trade.

The proposal was adopted by 6 votes to 3, with 1 abstention.

84. Mr. SANDSTRÖM said that he was opposed to limitation to any particular zones and had accordingly voted against Mr. Zourek's proposal. The slave trade was subject to penalties in the penal codes of all States, but there was certainly no State which restricted such provisions to slave trade in particular maritime zones.

85. Mr. LIANG (Secretary to the Commission) said that, in view of the amendments just adopted to the first sentence of article 22, the second sentence should be made a separate article. It was necessary to make clear that the prevention of the transport of slaves was not limited to any particular zone.

86. Mr. SANDSTRÖM said that Mr. Liang's proposal did not meet his requirements. He had voted on the understanding that article 22 constituted a whole. He construed the obligations imposed in the first sentence in the light of the sense of the second sentence, which provided for the implementation of those obligations.

87. Mr. LIANG (Secretary to the Commission) maintained that the first and second sentences of article 22 could well be separated. The second sentence was narrower in scope than the first, which stipulated the general obligation resting on States to co-operate in putting down the slave trade. That co-operation might well be achieved by means which would not necessarily be confined to measures for preventing the transport of slaves on the high seas.

88. The CHAIRMAN called for comments on the proposal that the last sentence be deleted.

89. Mr. SANDSTRÖM said that the last sentence was a truism; it went without saying that a slave taking refuge on another ship became a free man: unless that were so, it would be impossible to put down the slave trade.

90. Mr. SALAMANCA thought it necessary to provide specifically that the captain of a ship arresting a slave-trading ship was entitled to set the slaves free; he would not merely inform the master of the prize that his traffic was illicit.

91. Mr. KRYLOV could not agree that the sentence in question should be deleted. Some eternal truths should be repeated as often as possible. It went without saying that a slave taking refuge on board a ship became free *ipso facto*; but that fact was still worth stating explicitly on the principle that *ce qui va sans dire va encore mieux en le disant*. He proposed, however, that the sentence should be amended to read "shall *ipso facto* be free", instead of "shall *ipso facto* be set free". That change would add force to the concept of automatic recovery of freedom.

92. Mr. SANDSTRÖM supported Mr. Krylov's proposal, in favour of which he formally withdrew his own.

93. Mr. AMADO also expressed support for Mr. Krylov's proposal: certain commonplace sayings were none the less sacred.

94. The CHAIRMAN, referring to Mr. Scelle's proposal concerning compulsory arbitration, said that it concerned all the draft articles, and not merely one of them. It might therefore be more appropriately discussed after the Commission had completed its first reading of the draft articles.

95. Mr. GARCÍA AMADOR said that perhaps Mr. Scelle's requirements could be met by the arbitration and jurisdiction clause included among the usual final clauses.

96. The CHAIRMAN then called for a vote on article 22 as a whole and as amended.

Article 22, as a whole and as amended, was adopted by 7 votes to none, with 3 abstentions.

The meeting rose at 12.55 p.m.

290th MEETING

Thursday, 12 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Installation of new member

[Installation of Sir Gerald Fitzmaurice]

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.53)

(resumed from the 289th meeting)

DRAFT ARTICLES (A/CN.4/79, SECTION II)
(resumed from the 289th meeting)

Observations of the Government of Poland

7. Mr. HSU, referring to the observations of the Polish Government concerning freedom of navigation on the high seas (A/CN.4/L.53), wished to place the following comments on record:

8. In its memorandum, the Polish Government had made a charge against the Republic of China, as well as two proposals to the Commission concerning articles 22 and 23 of the draft articles relating to the régime of the high seas included in the Special Rapporteur's sixth report on that subject. One of those proposals, which was of no significance in itself, had already been dealt with by the Commission at the previous meeting; he would therefore comment upon the charge and the second proposal.

9. The charge was that the Republic of China had committed acts of piracy by seizing vessels on the China Seas, including two tankers flying the Polish flag. But, according to the Republic of China, the tankers were the property of its enemy, the Chinese Communists, and therefore had no right to fly the Polish flag. But even if they were bona fide Polish vessels, they would, according to the Republic of China, still be subject to seizure, as they were engaged in contraband traffic. Hence, unless Poland could prove that the two tankers had not been engaged in such traffic, the charge against the Republic of China could not stand.

10. The Polish Government, of course, had made no attempt to prove the charge. What it had done was simply to propose such a change in the law on piracy as would lend colour to the charge and, in support of that proposal, to allege that the law which the Special Rapporteur correctly stated in his report was in conflict with established international legal opinion. By so doing, apart from laying a false charge against the Republic of China, it had questioned the technical competence of the Special Rapporteur and branded as

pirates all those nations that had exercised belligerent rights during the past few centuries.

11. In the autumn of 1954, Poland had brought the same issue in similar fashion before the General Assembly, where, as was to have been expected, the case had failed. He had no doubt that the Polish Government would also fail in the attempt now being made in the Commission. But he felt that he must express his regret, as Mr. Edmonds had done at an earlier meeting,[1] that Poland should have seen fit to endeavour to make ill-considered use of United Nations organs, political or technical.

12. That said, it remained true that all proposals could be treated on their merits, no matter how unworthy the purposes for which they might have been made. He therefore reserved his right to speak again should the Commission decide to deal with the Polish proposal.

13. Mr. ZOUREK pointed out that Mr. Hsu had not even attempted to justify the criminal acts committed in the China Seas against merchant vessels on the high seas and was astonished how anyone could think of suggesting that it was for the governments of the victims of piratical attacks to prove that their vessels had been boarded and looted. Such a procedure would be tantamount to transferring the burden of proof from the criminal to his victim, which was absolutely inadmissible. The acts of piracy committed in the China Seas were well-known and had been recounted in detail in the documents which had been transmitted to the Commission in accordance with General Assembly resolution 821 (IX) of 17 December 1954, and circulated to each member. The facts about the violation of the principle of freedom of navigation by Chiang Kai Shek's ships had been summarized in the Polish Government's memorandum transmitted to the Commission by Mr. Jan Balicki, official observer for the Polish Government. It was common knowledge that the vessels had been attacked or stopped on the high seas, forcibly taken to Taiwan, the cargoes looted and the crews forcibly detained or subjected to ill-treatment or threats. He emphasized that such piratical attacks had not been made against Polish vessels only but also against vessels of other nations including those of Denmark, Italy, Japan, the Netherlands, Panama, the Soviet Union and the United Kingdom.

14. The Government of Poland had acted entirely within its rights in submitting its observations to the Commission and that for two reasons. To begin with, it was entitled to do so as a Member of the United Nations which had suffered considerable loss owing to the systematic violation of the freedom of navigation in the China Seas. But in addition the General Assembly resolution of 17 December 1954 expressly invited States Members to transmit to the Commission their views on the principle of the freedom of navigation on the high seas.

15. In accordance with that resolution (821 (IX)) the Polish Government's memorandum (A/CN.4/L.53) expounded that government's view about the principle of freedom of navigation on the high seas and at the same time adduced specific facts which undoubtedly constituted a violation of that principle. It should be emphasized that the facts had never been denied by those responsible for them. For the time being he did not wish to go into details because the Commission must first decide how to deal with the problem. It could either examine the facts recorded in the documents transmitted by the General Assembly and to which the Polish memorandum also referred, or it could declare, as some members seemed to have suggested, that it was not competent under the terms of its Statute to examine those facts. He would bow to the Commission's decision, being prepared if called upon to give further details on the facts or on points of law.

16. Mr. SANDSTRÖM did not think that, in transmitting to the International Law Commission the records and documents of the relevant meetings of the *Ad hoc* Political Committee, the General Assembly's intention had been that the former should pronounce judgment on a particular case. Its purpose had been merely to give governments an opportunity of making known to the International Law Commission their views on freedom of navigation on the high seas.

17. The Commission's task was limited to examining the rules governing piracy on the high seas in general; it had no competence to deal with specific cases. But that did not prevent members of the Commission from making use of any material contained in the Polish complaint which, in their opinion, might be relevant, by way of example, in the discussion of piracy in general.

18. Mr. HSU agreed with Mr. Sandström. He would therefore refrain from replying in detail to the points raised by Mr. Zourek—particularly the question of merchant vessels other than those flying the Polish flag. He could not but regret that Mr. Zourek should have seen his way to supporting the Polish complaint which was tantamount to seizing the International Law Commission of a matter which did not concern it.

19. Mr. SCELLE agreed with Mr. Sandström. The Commission was about to consider article 23 and to make an objective examination of piracy. It was therefore incumbent upon it to set aside all questions of a subjective character.

20. Mr. KRYLOV said that the duel the Commission was witnessing might well have taken place between Mr. Hsu and the eminent British jurist who had just been elected to the Commission. For, indeed, no less than 140 British ships had been arrested, detained or seized in recent years by "unknown ships" in the China Seas.

21. In any discussion of article 23, it was desirable that members should be in possession of all relevant facts.

[1] 288th meeting, para. 58.

Therefore the Polish complaint and Mr. Zourek's remarks were both entirely justified. He would revert to the matter when the text of article 23 came up for examination, when he would have occasion to quote the authoritative opinion of Mr. Lauterpacht. At the present stage, he would say only that he had confidence in the Commission's decision.

22. The CHAIRMAN congratulated members on the manner in which they had dealt with the questions raised by the memorandum submitted by the Polish Government. The General Assembly resolution did not ask the Commission to deal with the Polish charge: it simply invited governments to transmit to the Commission their views concerning the principle of freedom of navigation on the high seas. Members had now had an opportunity of making known their views on the Polish memorandum, the only one to be submitted by a government in pursuance of General Assembly resolution 821 (IX). All the Commission could do was to take note of the memorandum and members' remarks, all of which would be taken into consideration when article 23 was discussed. It was not for the Commission to express either approval or disapproval of the memorandum; nor was it incumbent upon it to go into the facts of the case, for it was not a court of justice.

23. Each member was at liberty, when contributing to the discussion on article 23, to take into consideration the Polish memorandum and the comments thereon; indeed, they might well derive inspiration from them for the amendment of that article.

24. Mr. SCELLE said that it was necessary first to make an objective examination of article 23; only after such discussion would it be possible for each member to decide whether in his opinion the particular case at issue constituted an act of piracy.

25. Mr. ZOUREK considered that the view expounded by the Polish Government in its memorandum was correct. Indeed it had neither been questioned nor had the facts given in the memorandum been denied. He pressed for a formal decision concerning the objection that the Commission was not competent to discuss the facts relating to the violation of the freedom of navigation in the China Seas which were the subject both of the documents transmitted to the Commission in pursuance of General Assembly resolution 821 (IX), and of the Polish Government's memorandum.

It was decided by 8 votes to none, with 2 abstentions, that the Commission had no competence to deal with the complaint made by the Government of the Polish People's Republic in its memorandum (A/CN.4/L.53).

26. Mr. GARCÍA AMADOR explained that he had not abstained. He had deliberately taken no part at all in the vote. In accordance with the terms of its Statute (A/CN.4/4),[2] the Commission had for its exclusive object the promotion of the progressive development of international law and its codification. The Polish memorandum therefore raised an issue upon which the Commission was explicitly forbidden to take a vote.

27. Mr. AMADO said that he too had refused to take part in the vote for the same reasons.

Article 23 [14]: Policing of the high seas[3]

28. The CHAIRMAN invited Mr. François (Special Rapporteur) to open the discussion on article 23 of his draft articles on the régime of the high seas.

29. Mr. FRANÇOIS (Special Rapporteur) said that the subject of piracy had been studied very thoroughly by the Harvard Research Centre, to which Professor Joseph W. Bingham had submitted an exhaustive report, together with the text of a draft international convention consisting of 19 articles published by the Harvard Law School in 1932.[4] He had felt that he could not do better than to take the principal articles in Professor Bingham's report, and the comments thereon, as a basis for the discussion on the subject of piracy, dealt with in articles 23 *et seq* of his own sixth report. His own draft had only six articles on piracy, namely, articles 23 to 28. He had attached no comment to his individual articles, that appended to the Harvard articles, to which he referred members, being exhaustive and entirely satisfactory.

30. The Commission was concerned with the notion of piracy in international law, and not with the national concept of that crime. Under the legislation of some States, certain acts were treated as piracy if they were committed in their territorial sea. Such was the case with the United Kingdom, the laws of which treated as piracy any attempt to carry on slave trading in waters under British jurisdiction. The concept of piracy in international law was a narrower one: it applied only to those acts which were liable to prosecution by the authorities of any State, even if the interests of that State were not at stake.

31. As the Commission was concerned only with piracy in international law, it was not concerned with municipal law on the subject.

32. Turning to article 23, the drafting of which was admittedly somewhat complex, he explained that it was

[2] United Nations publication, Sales No.: 1949.V.5.

[3] Article 23 read as follows:

"Piracy is any of the following acts committed in a place not within the territorial jurisdiction of any State:

"1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without the *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

"2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

"3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."

[4] *Research in International Law* (Harvard Law School, Cambridge, 1932), pp. 769–838.

based on three important principles: the principle that *animus furandi* did not have to be present; the principle that only acts committed on the high seas could be described as piracy; and the principle that acts of piracy were necessarily acts committed by one ship against another ship—which ruled out acts committed on board a single vessel.

33. The Harvard draft did not consider *animus furandi* a necessary element in the definition of piracy. The Harvard definition of an act of piracy included acts of "violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property", the comment thereon adding:

> "... some writers have insisted that a purpose of private gain is essential. Others have argued that the motive may vary and that even vengeance or bare malice may be the inspiration of piratical attacks. The historical evidence in support of each side of this dispute need not be canvassed, for it is clear that the function of this draft convention—the definition of the common jurisdiction of all States over certain types of major offences committed beyond the territorial jurisdiction of every State—will not be well accomplished unless the common jurisdiction (and therefore as a matter of convenient terminology, the definition of piracy) covers all serious offences otherwise like traditional piracy, although the motive of the offender may be an intention to slay, wound, rape, enslave or imprison or to destroy property and not an intention to rob or to gain wealth otherwise."[5]

34. There were dissenting views; for instance, the Dutch writer on international law, J. de Louter, in his *Droit international public positif* (Vol. I, p. 412), defined piracy as any act of armed violence at sea *dans un but de lucre.*

35. Most authorities, however, shared the opinion expressed in the Harvard draft. Mr. Matsuda, Rapporteur of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, had summed it up as follows in his report:

> "Certain authors take the view that desire for gain is necessarily one of the characteristics of piracy. But the motive of the acts of violence might be not the prospect of gain but hatred or a desire for vengeance. In my opinion it is preferable not to adopt the criterion of desire for gain, since it is both too restrictive and contained in the larger qualification 'for private ends.' It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of motives. ..." (League of Nations publication, *V. Legal, 1927,V.1., document C. 196.M.* 70.1927.V., p. 117)

36. L. Oppenheim, perhaps more guardedly, had expressed a similar opinion:

> "The object of piracy is any public or private vessel, or the persons of the goods thereon, whilst on the open sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her. On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy; it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo." (L. Oppenheim, *International Law* (fourth edition), sect. 275, Vol. I, pp. 503-504).

37. Other concurrent opinions included those of Wheaton and Dana, and W. E. Hall and Pearce Higgins:

> "It has sometimes been said that the act must be done *lucri causa,* and the English common-law definition of *animus furandi* has been treated as a requisite; but the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons, or classes of persons, or by a particular national authority. ..." (Wheaton, *International Law* (eighth edition), sect. 124, footnote by Dana)

> "The distinctive mark of piracy is seen to be independence or rejection of State or other equivalent authority. It becomes clear that definitions are inadequate which, as frequently happens, embrace only depredation or acts of violence done *animus furandi."* (W. E. Hall, *International Law* (eighth edition, by Pearce Higgins), p. 311)

38. Following the Harvard precedent, he had defined as piracy acts of violence or of depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose. As was explained in the Harvard comment:

> "... the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of States, or of recognized belligerent organizations, or of unrecognized revolutionary bands. Under present conditions there seems no good reason why jurisdiction over genuine cases of this type should not be confined to the injured State, the State or recognized government on whose behalf the forces were acting, and the States of nationality and domicile of the offender." (*loc. cit.,* p. 786)

39. The injured State was not, of course, debarred from taking such action as it saw fit in cases of that nature, but that did not mean that such incident could be

[5] *Ibid.,* p. 790.

described as piracy, because the characteristic of piracy was the possibility of repression by any State, even where it was not the injured party.

40. In the matter of political motive, the Matsuda report stated:

> "Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that crime. Such a rule does not assure any absolute impunity for the political acts in question, since they remain subject to the ordinary rules of international law." (*loc. cit.*, p. 117)

41. That view was shared by the authors of the Harvard report:

> "Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only. There is authority for the view that this accords with the law of nations. ..." (*loc. cit.*, p. 798)

42. The report went on to quote L. Oppenheim:

> "Private vessels only can commit piracy. A man-of-war or other public ship, so long as she remains such, is never a pirate. ..." (*loc. cit.*, section 273)

43. In cases of a political nature, it was open to the aggrieved State to take reprisals or to claim damages, or, again, to take certain other measures:

> "The provisions of this convention do not diminish a State's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy." (*Research in International Law*, Harvard Law School, p. 857)

44. The situation described in the Polish Government's memorandum (A/CN.4/L.53) could only be dealt with on the basis of the principles thus enunciated. No warship, even if it belonged to a government which was not recognized by some States, could be described as a pirate ship in the international sense of the word. The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, could only exist where the political element was lacking and where the ship concerned was not the public property of a State.

45. All that was made clear by the words "for private ends", as used in article 23, and the Polish memorandum was in fact a challenge to that element of his definition of piracy. He would insist on those words being retained.

46. The subsequent phrase in the definition, namely: "without the *bona fide* purpose of asserting a claim of right", had been included in the Harvard draft in order to leave outside the scope of piracy quarrels between fishermen arising from rival claims to catch.

47. The second essential element of the Harvard definition of piracy was that it must occur on the high seas.[6]

48. The view adopted in the Harvard draft had been followed by the majority of States and of writers.

> "Piracy as an 'international crime' can be committed on the open sea only. Piracy in territorial coast waters has as little to do with international law as other robberies within the territory of a State. Some writers maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea. They maintain, therefore, that if 'a body of pirates land on an island unappropriated by a civilized Power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy.' With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea." (L. Oppenheim, *loc. cit.*, sect. 277)

49. Exclusion from common jurisdiction did not preclude the possibility of prosecution, as was made clear in the Harvard comment:

> "The State in whose territory the act is committed would have jurisdiction independently of the convention and in many cases other States would have jurisdiction also." (*loc. cit.*, page 789)

50. W. E. Hall had expressed a dissenting view:

> "If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the State through descent from the sea, by a body of men acting independently of any politically organized society." (*loc. cit.*, p. 314)

51. Commenting upon the phrase "acts committed in a place not within the territorial jurisdiction of any State", which he had included in article 23 following the Harvard precedent, he emphasized that in that context the words "territorial jurisdiction" were to be construed in their narrowest sense as comprising the land territory, the inland waters, and the territorial sea of a State, but not ships flying the flag of that State.

52. Finally, the third element of the definition of piracy was the requirement that the act complained of should be committed by one ship against another. The Harvard comment thereon was as follows:

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[6] *Research in International Law*, *op. cit.*, p. 809.

"This limitation also is designed to exclude offences committed in a place subject to the ordinary jurisdiction of a State. The limitation follows traditional law. Some definitions of piracy are broad enough to include robberies and other acts of violence or depredation committed on broad a merchant ship on the high sea by a passenger or a member of the crew who is not in control of the ship. Mutiny on the high seas has sometimes been included. The great weight of professional opinion, however, does not sanction an extension of the common jurisdiction of all States to cover such offences committed entirely on board a ship which by international law is under the exclusive jurisdiction of a State whose flag it flies. Even though a mutiny succeeds, the common jurisdiction would not attach. It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation (of the sort specified in Article 3, 1) on the high sea or in foreign territory." (*loc. cit.*, pp. 809-810)

53. T. J. Lawrence had expressed a dissenting view:

"A single act of violence will suffice, such, for instance, as the successful revolt of the crew of a vessel against their officers. If they take the ship out of the hands of the lawful authorities, they become pirates, though if their attempt fails and lawful authority is never superseded on board, they are guilty of mutiny and not piracy." (T. J. Lawrence, *The Principles of International Law*, fifth edition, p. 233).

54. L. Oppenheim summed up better the consensus of legal opinion on that issue:

"If the crew, or passengers, revolt on the open sea, and convert the vessel and her goods to their own use, they commit piracy, whether the vessel is private or public. But a simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as international law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use." (*loc. cit.*, sect. 274)

55. In conclusion, he invited members' views on the three leading principles of his definition of piracy, which he suggested should be put to the vote one by one.

56. Mr. GARCÍA AMADOR recalled that he had not been elected to the Commission till after it had discussed the subject of piracy. He would therefore ask the Special Rapporteur why a fairly detailed study of piracy had been embodied in the draft articles, considering that the latter were not meant to be an exhaustive codification of the law of piracy. The matter of collisions on the high seas, for instance, had been the subject of only one article.

57. Mr. FRANÇOIS (Special Rapporteur) said that the Commission had originally at its second session (1950) decided not to codify exhaustively the international law of the sea, but to examine only certain aspects thereof. Later, at its fifth session (1953) the Commission had instructed him to expand the report so as to include other topics in maritime law, and he had accordingly drafted the text which appeared in his sixth report. He felt that it would have been a serious omission not to have included a careful examination of the problem of piracy. He agreed that only the main principles of the régime of the high seas should be dealt with, but could not accept the deletion of the six articles on piracy.

58. Mr. LIANG (Secretary to the Commission) regretted that it was impossible to circulate the Harvard report. In making that exhaustive study, Professor Bingham had considered piracy only in relation to the jurisdiction of States on the high seas; it had not been his intention to study piracy as a crime against the law of nations, or to report on international criminal law.

59. Mr. SALAMANCA wondered whether the Commission should not consider whether it could adequately deal with piracy in six abridged articles; if it came to a negative conclusion, it would either have to make a more detailed study or omit the subject altogether.

60. The CHAIRMAN said that it would be proper for members to consider at that stage whether the issue raised by Mr. Salamanca amounted to a prior question, namely, a proposal to exclude the subject of piracy.

61. Mr. AMADO observed that, if Mr. Scelle's thesis concerning the policing of the high seas had been accepted, the section of the Special Rapporteur's draft at present under discussion would have been divided into two parts, comprising, first, general provisions and secondly, special provisions. Had Mr. García Amador borne in mind the fact that the title of the section was "Policing of the high seas", he would have realized that his observations lost some of their force.

62. It was a customary rule of international law that piracy in the classical sense, that was, any act of violence committed by a ship on the high seas in a private capacity, was a crime against the *jus gentium*. The scope of that concept had now been extended by analogy to include acts committed in the air, and the element of private gain had almost disappeared, giving place to the political motive. In that connexion, he would draw the Commission's attention to article 3 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare of 6 February 1922,[7] though that instrument had never come into force, and the Nyon Arrangement of 14 September 1937,[8] both of which illustrated the manner in which the traditional concept had evolved.

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[7] Manley O. Hudson, *International Legislation*, vol. II, p. 794.

[8] *Ibid.*, vol. VII, p. 831.

63. He did not find the Special Rapporteur's formulation derived from the 19 articles of the Harvard draft particularly satisfactory, for it seemed to have taken the form of an enumeration, instead of an abstract statement of principle. However, it was for the Commission to decide whether the text was adequate.

64. Mr. KRYLOV, reserving the right to speak again later, said, by way of preliminary comment, that difficulties inevitably arose over legal concepts that dated back to the Middle Ages. In view of the development of the concept of piracy, the definition given in article 23 must be modified, since it was difficult to understand in its present form. According to Lauterpacht's edition of Oppenheim's *International Law,* the historical notion of piracy as an act of violence committed on the high seas by ships acting in a private capacity had now been replaced by a wider interpretation.

65. He accordingly proposed the deletion of the words "for private ends without the *bona fide* purpose of asserting a claim of right". The first three words in that passage were now out of date, and the others wholly unacceptable.

66. Mr. SANDSTRÖM considered that the exception under discussion to the general rule enunciated in article 7, that merchant ships on the high seas were subject solely to the jurisdiction of the flag State, was so important that it called for the insertion of a provision on the lines of article 2 of the Harvard draft, appropriately modified to make it conform with article 21 of the Special Rapporteur's text.

67. He also believed that the Special Rapporteur's text was unduly complicated, largely because he had taken into account piracy committed in places not within the territorial jurisdiction of any State. In his view, it would suffice to restrict the provision to acts committed on the high seas.

68. In conclusion, he suggested that, in view of the complexity of the subject, the Commission should dispose of the points raised one by one.

69. Mr. HSU observed that the authors of the observation submitted by the Polish Government (A/CN.4/L.53) had not examined the English text of article 23 carefully enough. If a comma were inserted after the word "person" and the comma after the word "property" deleted, the intention of paragraph 1 would be perfectly clear.

70. Mr. SCELLE deplored the tendency to formalism. He would be unable to support a provision defining piracy by reference to jurisdiction and not the nature of the act. Article 23 as at present drafted was based on a methodological error. According to such a text the Barbary corsairs would not have been pirates, because their acts had been committed on land.

71. Mr. ZOUREK said that, as demonstrated by the Special Rapporteur, the principle of *animus furandi* was not an essential element in the concept of piracy.

72. He could not agree, however, with his view that piracy could only be committed by private ships. Many authorities, including L. Oppenheim, held that state-owned vessels could also be guilty of piracy, and that notion had been further substantiated by the 1937 Nyon Arrangement.

73. Some members had referred to the penal aspect of the problem, but that should raise no difficulty since, under customary law, piracy was recognized as an international crime.

74. The Harvard text was defective in several respects. It was, for instance, impossible to justify robbery, rape or wounding by asserting a claim of right, and he therefore supported Mr. Krylov's amendment.

75. Mr. FRANÇOIS (Special Rapporteur) did not think that either the Treaty relating to the Use of Submarines and Noxious Gases in Warfare of 1922, which was not in force, or the Nyon Arrangement had altered the doctrine in general acceptance before those two instruments had been drawn up, namely, that no act committed by a warship could fall within the definition of piracy. He was therefore convinced that the contrary doctrine, according to which piracy could only be committed by private vessels, still held good.

76. He shared the doubts of other members of the Commission about extending article 23 to include an attack in or from the air, as in the Harvard draft, and would be prepared to delete the reference thereto from paragraph 1.

77. He could also agree to delete the words "without the *bona fide* purpose of asserting a claim of right"; a justification which might always be invoked. The question of fishing disputes could be elucidated in the comment. On the other hand, he could not accept Mr. Krylov's proposal to delete the words "for private ends", which, as he had already explained, were crucial.

78. He would be prepared to accept Mr. Sandström's proposal concerning the incorporation of the substance of article 2 of the Harvard draft, since article 26 of his own text dealt only with seizure and did not cover punitive action.

79. Mr. Scelle, in his keen concern to establish an international police, considered that acts committed on land should be treated on the same footing as acts committed on the high seas, thereby departing from the doctrine held by most authorities whereby States could only take steps against acts of piracy committed on the high seas. The acceptance of the new idea propounded by Mr. Scelle would only serve to complicate the issue.

80. Sir Gerald FITZMAURICE reminded the Commission of the peculiar feature of the events leading up to the Nyon Arrangement, namely, the sinking of ships in the Mediterranean by submarines of which no country was willing to admit ownership. As no government admitted responsibility, it had been possible to assume that the submarines had been pursuing their private ends without any authority from their government. If

he was right in arguing that the Nyon Arrangement had been based on that fact, the Special Rapporteur's point that piracy was essentially a crime committed by private individuals not in the performance of a public or authorized duty was reinforced. But the point might perhaps be brought out a little more clearly, since the expression "for private ends" did not immediately convey that an act committed by a vessel of war on the authority of its government did not constitute piracy in the ordinary sense of the term as understood in international law, though it might be an act of aggression.

81. Mr. KRYLOV observed that vessels other than submarines had also been considered at the Nyon Conference, to which the Special Rapporteur had perhaps not given sufficient attention.

82. Mr. AMADO, referring to the Special Rapporteur's remarks, said that he had mentioned the Nyon Arrangement to illustrate his argument about the way in which the theory of piracy had evolved. He had certainly not overlooked the traditional concept, and had not drawn any legal conclusion from that instrument.

83. As the Special Rapporteur had declared his willingness to accept some of the proposals made during the discussion, perhaps he would submit a revised text of article 23 for consideration at the following meeting.

84. The CHAIRMAN, announcing that he had no more speakers on his list, said that the general discussion might be regarded as closed, and requested members to prepare their amendments for submission at the following meeting.

The meeting rose at 1 p.m.

291st MEETING

Friday, 13 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 23 [14]: Policing of the high seas (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 23.

2. Mr. FRANÇOIS (Special Rapporteur) said that, in the light of the discussion at the previous meeting, he had prepared and circulated a revised version of article 23, from which he had omitted the provisions contained in paragraphs 2 and 3 of the original text, since they dealt with details of international penal law. His new text read as follows:

> "Piracy in the sense of these rules is any act of violence or depredation, committed for private ends by the crews or the passengers of a private vessel against another vessel on the high seas, with intent to rob, rape, wound, enslave, imprison or kill a person, or with intent to steal or destroy property.
>
> "The acts, committed on board a public vessel, whose crew mutinies, directed against other vessels, are assimilated to acts committed by a private vessel."

3. Mr. EDMONDS submitted a new text as an amendment to paragraph 1 of the original version of article 23. It read:

> "... any act of violence or depredation committed on the high seas or in the superjacent air with intent to rob, rape, wound, enslave, imprison, or kill a person or to steal or destroy property for private ends, except in the course of the *bona fide* assertion of a claim."

4. His text, though simpler, was essentially the same as that of the Special Rapporteur's first draft apart from some minor editorial changes. The Commission would note that, in view of modern technical progress, he had retained a provision dealing with acts committed in the air and also the very important exception to the definition in the case of a *bona fide* assertion of a claim.

5. The CHAIRMAN pointed out that Mr. Edmonds had drafted his amendment which in reality constituted a new proposal, before he had had sight of the Special Rapporteur's revised text. The Commission would therefore have to decide which of the two versions should be regarded as the basic text.

6. Mr. KRYLOV moved that the Commission defer further consideration of article 23 until the following meeting in order to give members more time to

examine the texts just submitted. That of Mr. Edmonds was extremely interesting and, being brief, especially attractive.

7. The CHAIRMAN said that, as the Commission had already discussed the original text of article 23 at considerable length, he saw no reason why it should not take up the new texts immediately; it could postpone its decision until the next meeting.

8. Mr. AMADO, while considering Mr. Krylov's request perfectly legitimate, felt that the Commission could proceed forthwith to discuss Mr. Edmond's amendment.

9. Mr. FRANÇOIS (Special Rapporteur) pointed out to Mr. Krylov that his own new text was also short and extremely simple. Moreover, as it contained no new element, he did not see why it should not be disposed of without further delay. If discussion of article 23 were postponed, there would be little for the Commission to do at the present meeting, since it would have to leave aside the remaining articles on piracy and fisheries, and the articles on the right of pursuit and water pollution would not call for much discussion, their substance having been approved at the third session.

10. Mr. KRYLOV could not agree that the Special Rapporteur's text was perfectly clear. It departed very considerably from the original, and required careful study. He was therefore obliged to press his proposal.

11. Mr. EDMONDS said that, in order to save time, he would be perfectly prepared for the time being to withdraw his text in favour of the Special Rapporteur's.

12. Mr. SANDSTRÖM agreed with the Special Rapporteur about the conduct of the discussion. The Commission could still take its final decision at a later meeting.

13. Mr. ZOUREK suggested as a compromise that the Commission should take up articles 29 - 34 forthwith and revert to article 23 if there were still time at the present meeting.

14. Mr. HSU, on the assumption that Mr. Krylov's motion was rejected, asked whether further discussion of article 23 would be possible before the vote. In his view, the new texts before the Commission called for some debate, and it would hardly be reasonable to postpone it until the following meeting.

15. Mr. AMADO said that the procedure suggested by Mr. Zourek would be acceptable to him.

16. Mr. GARCÍA AMADOR said that if Mr. Zourek's suggestion were accepted he would propose that the articles concerning fisheries should not be taken up until the report of the Conference on the Conservation of the Living Resources of the Sea had been circulated.

17. The CHAIRMAN observed that, as most members seemed to favour postponing the decision on article 23 until the following meeting, the Commission might defer discussion of the articles on policing of the high seas and proceed with article 29.

It was so agreed.

Article 29 [22]: Policing of the high seas[1]

18. Mr. FRANÇOIS (Special Rapporteur) said that he had drafted article 29 in conformity with the decisions taken by the Commission at its third session, when the substance of the article had been discussed at length.

19. Mr. KRYLOV asked whether such a provision properly belonged to the régime of the high seas. Was it not more closely related to the régime of the territorial sea?

20. Mr. FRANÇOIS (Special Rapporteur) replied that, since it related to the policing of the high seas and laid down the exception to the general rule that merchant ships on the high seas were subject solely to the jurisdiction of the flag State, its place was in the present draft.

21. Mr. ZOUREK, observing that certain difficulties were raised by the last sentence of paragraph 1 concerning pursuit begun within the contiguous zone, reminded the Commission that the final decision on the matter of that zone had not yet been taken. If paragraph 1 were put to the vote, it must be on the understanding that that sentence would be subject to further modification.

22. Sir Gerald FITZMAURICE asked the Special Rapporteur to elucidate paragraph 4, the meaning of which seemed somewhat obscure, perhaps because of the use of the word "authorized".

23. Mr. FRANÇOIS (Special Rapporteur) explained the the purpose of paragraph 4 was to cover such cases as that of the *S.S. Martin Behrman,* in 1947 in Indonesia, which had raised the question of whether a vessel arrested in territorial waters and escorted to a port for examination could claim the right to be set at liberty if some portion of the high seas had been traversed on the way. Certain authorities had held that such cases should

[1] Article 29 read as follows:

"1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inlands waters or the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against any interest for the protection of which the said zone was established.

"2. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

"3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the pursued vessel or one of its boats is within the limits of the territorial sea. The commencement of the pursuit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

"4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State pending proceedings before the competent authorities shall not be authorized solely on the ground that a portion of the high seas was crossed by such ves el in the course of its voyage."

be assimilated to hot pursuit, and their view had been accepted by the Commission at its third session.

24. Mr. LIANG (Secretary to the Commission), referring to the point raised by Sir Gerald Fitzmaurice, said that the word "authorized" in the English text was not a faithful translation of the French, which would be better rendered either by "required" or by "claimed". The Spanish text was correct.

25. Sir Gerald FITZMAURICE was not certain that he could agree with the Special Rapporteur about the substance of paragraph 4, since he believed that there was a real difference between the case dealt with there and hot pursuit. A vessel actually arrested in the territorial sea and then taken out on to the high seas regained her freedom and ceased to be lawfully liable to detention. Since the territorial sea was a continuous zone round the coast, there was no need for a vessel to be taken outside it at all while under escort to port. He doubted, therefore, whether paragraph 4 was correct, and was not convinced of the need to assimilate cases of the kind described by the Special Rapporteur to hot pursuit.

26. Mr. FRANÇOIS (Special Rapporteur) said that in certain circumstances it might not be possible to conduct a vessel to a port without traversing the high seas.

27. Mr. LIANG (Secretary to the Commission) recognized that it was necessary to envisage the impossibility of reaching a port without crossing the high seas, or of the wrong route being taken, leading outside the territorial sea, or of a dispute concerning the limits of the contiguous zone. Nevertheless, he found it difficult to persuade himself that the principle of hot pursuit was involved at all. He did not, therefore, believe that, if the Commission adopted the substance of paragraph 4, it should follow provisions concerning hot pursuit, particularly since as at present drafted the paragraph did not require the initial arrest to be made in the territorial sea after hot pursuit.

28. Sir Gerald FITZMAURICE observed that, although special circumstances making it impossible to remain within the territorial sea while escorting might justify such an exception, if that thesis were accepted the purpose and limitation of the provision should be made clear by adding at the end of paragraph 4 such wording as "where circumstances rendered it impossible to avoid traversing a portion of the high seas".

29. He agreed with the Secretary that, as it was difficult to perceive the connexion between such a provision and those relating to hot pursuit, it should be transposed to another section of the report.

30. Mr. SANDSTRÖM was opposed to an unduly stringent provision, considering that it should be broad enough to cover other cases as, for example, the arrest of a vessel in the territorial sea of an island separated from the coastal State by part of the high seas. As the matter bore some relation to hot pursuit, he did not think there was any need to incorporate it in a separate article.

31. The CHAIRMAN observed that Sir Gerald Fitzmaurice's amendment appeared to be generally acceptable; the question of the proper place for paragraph 4 might be left to the Drafting Committee.

32. Mr. AMADO considered that, as the last sentence in paragraph 4 was a considerable extension of the theory of the right of pursuit, it called for special mention in the comment.

33. Sir Gerald FITZMAURICE asked for a separate vote on the third sentence in paragraph 1.

34. Mr. ZOUREK considered that the vote on that sentence should be deferred for the reasons he had already given.

The first two sentences of paragraph 1 were adopted unanimously.

35. Mr. SANDSTRÖM suggested that the Commission might consider whether the last sentence in paragraph 1 could appropriately be included in an article on the right of pursuit.

36. Mr. FRANÇOIS (Special Rapporteur) explained that at first the Commission had considered assimilating the contiguous zone to the territorial sea for cases of hot pursuit, but had later decided that pursuit could be undertaken in the former only if the vessel had trespassed against any interest for the protection of which the zone had been established.

37. Mr. SCELLE agreed with Mr. François that the contiguous zone was a special extension of the territorial sea for the protection of specific interests. A. de Lapradelle[2] had been untiring in his efforts to secure the substitution of the doctrine of contiguous zones for that of the territorial sea, with all the difficulties of establishing a uniform limit that the latter involved. He (Mr. Scelle) could fully support the stand taken by the Commission at its third and fifth sessions, and would only point out that the words "any interest" in the third sentence of paragraph 1 were not sufficiently clear. The meaning would be better expressed by the words "special interests".

38. Mr. GARCÍA AMADOR agreed that some reference should be made to the contiguous zone, which the Commission had agreed to assimilate to the territorial sea for purposes of the exercise of the right of pursuit, but as it had not yet finally determined which interests were to be protected by the establishment of a contiguous zone, or, in particular, whether fisheries were to be covered, the decision taken on the last sentence of paragraph 1 must be subject to reservation.

39. Mr. LIANG (Secretary to the Commission) wondered why the Special Rapporteur did not reproduce the article on the contiguous zone adopted at the fifth session.[3] He felt that similar, if not identical,

[2] A. de Lapradelle, *La Mer* (Paris, 1934).

[3] "Report of the International Law Commission on the work of its fifth session" (A/2456), *Yearbook of the International Law Commission, 1953*, vol. II.

wording should have been used in the present draft. The word "rights" should be used instead of the word "interest", that was, rights conferred by customary law or international conventions.

40. Mr. SANDSTRÖM considered that the last sentence in paragraph 1 would cause confusion and conflicted with article 3.

41. Sir Gerald FITZMAURICE wished to draw attention to one important point concerning the distinction between the territorial sea proper and the contiguous zone. He agreed with Mr. Amado that the third sentence in paragraph 1 represented a very considerable extension of the concept of the high seas. The territorial sea as such was subject to the jurisdiction of the coastal State. That State had no jurisdiction over the waters of the contiguous zone, but possessed certain rights in respect of vessels traversing it. It was therefore open to question whether the doctrine of hot pursuit was applicable to the contiguous zone in the same way as to the territorial sea ; if it were, its application must clearly be limited to the particular rights exercized in that zone.

42. Mr. AMADO, referring to the French text, urged the Commission to consider very carefully the consequences of using the word *entamer,* which would mean abandoning an established principle of international law. In his view, the word should be *poursuivre* or *continuer.*

43. Mr. SCELLE observed that, so far as the French language was concerned, the word *intérêts* had the same significance in the present context as the word *droits.*

44. Referring to Sir Gerald Fitzmaurice's objection, he said that the whole concept of the territorial sea was too rigid, and was inadequate to meet all needs. The theory of the contiguous zone was, in his opinion, a great advance, but if it was to serve any useful purpose at all, any trespass against the interests for whose protection the zone had been established must be prevented or punished, and therefore pursuit must be allowed.

45. Mr. AMADO noted that Mr. Scelle had made a considerable concession by relaxing his determined defence of the high seas. For his part, however, he could not reconcile himself to the use of the word *entamer.*

46. The CHAIRMAN, speaking as a member of the Commission, observed that hitherto the recognized rule in international law had been that pursuit could only begin in the territorial sea. Personally, he had no knowledge of any dissenting opinion on that point. He therefore agreed that the text put forward by the Special Rapporteur was an innovation and that it was for the Commission to decide whether such a new rule should be created.

47. Sir Gerald FITZMAURICE observed that the distinction between the territorial sea and the contiguous zone went deeper than would appear from Mr. Scelle's remarks.

48. As he saw it, foreign vessels in the territorial sea were subject to the laws of the coastal State, whereas in the contiguous zone international law recognized that the coastal State had a right to enforce certain of its laws if it could, but also that foreign vessels had no actual obligation to obey. The position was, in some respects, analogous with that of the right of warships of belligerent States to enforce laws concerning contraband in respect of neutral vessels. If the doctrine he had expounded was correct, it was logical to allow hot pursuit against an infringement of the law of the coastal State committed within its territorial sea, but the situation was not the same in the contiguous zone, where it was legitimate for foreign vessels to avoid, if they could, the enforcement of laws by vessels of the coastal State.

49. Mr. SCELLE observed that the preceding speaker had expounded the classical concept of the absolute division between the territorial sea and the high sea, the sovereignty of coastal States in the former being sacrosanct. He (Mr. Scelle) conceived sovereignty in that context as the defence of rights. The contiguous zone was a necessary projection of the coastal State's jurisdiction over the sea, and he used that word advisedly because he believed in the indivisibility of the sea. However, that apart, his principal argument was that unless the right of pursuit applied also to the contiguous zone, it would be idle to create such a zone, and Sir Gerald Fitzmaurice's thesis left him unmoved.

50. The CHAIRMAN said that, in view of the opinion upheld by Sir Gerald Fitzmaurice, Mr. Amado and Mr. Sandström, with which he himself agreed, he would put to the vote a proposal to delete the third sentence from paragraph 1.

The proposal was rejected by 6 votes to 5, with 1 abstention.

51. Mr. ZOUREK explained that he had abstained from voting because he had moved that the decision be deferred until the Commission had finally disposed of the article on the contiguous zone contained in the draft on the territorial sea.

52. The CHAIRMAN observed that, as a result of the vote, the Commission had adopted the Special Rapporteur's text, in which he would suggest the substitution of the word "right" for the word "interest".

It was so agreed.

53. The CHAIRMAN said that paragraphs 2, 3 and 4 would be put to the vote subject to drafting changes to accommodate Mr. Sandström's observations concerning the advisability of introducing a reference to the contiguous zone in paragraph 3 and Sir Gerald Fitzmaurice's amendment to paragraph 4, which had been accepted by the Special Rapporteur.

Paragraphs 2, 3 and 4 were adopted unanimously, subject to the above reservation.

54. Mr. AMADO reserved his right to reconsider his views on those three paragraphs at the second reading.

55. Mr. GARCÍA AMADOR similarly reserved his opinion, but only in respect of the question of the contiguous zone.

Articles 30-32 [25-28]: Fisheries; and article 33: Sedentary fisheries [4]

56. The CHAIRMAN recalled that at its fifth session the Commission had adopted three draft articles on fisheries, which had been submitted to the General Assembly in the report on that session.[5] Those draft articles were now the responsibility of the General Assembly, so that the Commission had no reason to adopt a different set of rules. Articles 30, 31 and 32 of the Special Rapporteur's draft were identical with those in the report on the fifth session. Only for the most serious reasons—or if the General Assembly specifically requested it to do so—should the Commission reconsider the articles in question.

57. Mr. GARCÍA AMADOR recalled that, by resolution 900 (IX) adopted on 14 December 1954, the General Assembly had decided to convene an international technical conference in Rome on 18 April 1955 on the conservation of the living resources of the sea.

58. That conference, which had ended on 10 May 1955 —three days ago—was, as required by operative paragraph 1 of the enabling resolution, making "appropriate scientific and technical recommendations", which, in accordance with paragraph 6 of the resolution, were to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report" which it was to prepare "pursuant to resolution 899 (IX) of 14 December 1954".

59. It was accordingly clear that the General Assembly intended that the report of the Rome Conference [6] should be addressed not to governments for comments, but rather to the International Law Commission, in order to enable the latter to re-examine in its light the three draft articles on the international regulation of fisheries adopted in 1953. His interpretation of the General Assembly's intention was confirmed by the fact that the Rome Conference had been convoked in pursuance of a suggestion made by the International Law Commission itself.[7]

60. The powers of the Commission in matters of form and procedure were very different from those it possessed on substantive issues. On questions of substance the Commission was completely free, but on questions of procedure it must abide by the instructions of the General Assembly.

61. He was not suggesting that the Commission must necessarily amend the three articles on fisheries; but he wished to emphasize that it was the Commission's right, indeed its duty, to re-examine those articles in the light of the report of the Rome Conference, which it should receive within a week.

62. Mr. FRANÇOIS (Special Rapporteur) explained that he had drafted articles 30 to 32 in terms similar to those of the 1953 articles on the assumption that the Commission would not re-open the question of fisheries, but would simply confirm the three articles. It was, however, clear from Mr. García Amador's remarks that those articles would have to be reconsidered in the light of such recommendations as might have been made by the Rome Conference. He therefore withdrew them for the time being.

63. Mr. LIANG (Secretary to the Commission) said that the Rome Conference had been called in order to study the technical aspects of fisheries conservation and to furnish technical information to the International Law Commission.

64. He recalled the conclusion reached in the Commission's report on its fifth session to the effect that the protection of fisheries was a highly technical matter. But the Commission had indicated that that objective could best be achieved by means of detailed conventions, preferably on a regional basis.[8] He had participated in the work of the Rome Conference for the first two weeks and it was his feeling that its recommendations would not be cast either in the shape of draft conventions or as a set of draft articles.

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[4] Articles 30 to 33 read as follows:

Article 30:

"A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall at the request of one of the interested parties be referred to the international authority referred to in article 32."

Article 31:

"In any area situated within 100 miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area."

Article 32:

"States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State."

Article 33:

"Subject to the existing rights of the nationals of other States, the sovereign rights of a coastal State over its continental shelf shall extend to sedentary fisheries."

[5] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

[6] *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea* (United Nations publication, Sales No. 1955.II.B.2).

[7] Report of the I.L.C. (A/2456), *op. cit.*, para. 104.

[8] *Ibid.*

65. Mr. SALAMANCA agreed with Mr. García Amador and with the Secretary. He pointed out that the General Assembly resolution 900 (IX) had been preceded by resolution 899 (IX), adopted at the same plenary meeting.

66. Resolution 899 (IX) opened by recalling that, in resolution 798 (VIII) of 7 December 1953, the General Assembly, "having regard to the fact that the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters were closely linked together juridically as well as physically", had decided not to deal with any aspect of those matters "until all the problems involved had been studied by the International Law Commission and reported upon by it to the General Assembly". Following that reference to resolution 798 (VIII), the General Assembly had gone on to request the International Law Commission to "devote the necessary time to the study of the régime of the high seas, the régime of territorial waters and all related problems in order to complete its work on these topics and submit its final report in time for the General Assembly to consider them as a whole, in accordance with resolution 798 (VIII), at its eleventh session".

67. It was clearly incumbent upon the Commission to make a reappraisal of all the "related problems" thus referred to it by the General Assembly.

68. Such was the procedural position. But the factual situation which the International Law Commission had to face lent even greater strength to his argument. The Commission had taken up the "related problems" one by one; that fragmentary approach had, not unnaturally, yielded piecemeal solutions. The lack of uniform criteria had been one of the reasons why certain States had adopted unilateral measures concerning the continental shelf and fisheries—measures which they felt were justified by their own peculiar geographical situation and conservation problems. Those measures had been considered excessive by many other States.

69. The Commission had, in fact, created four maritime zones: the territorial sea, the contiguous zone, the waters superjacent to the continental shelf, and the high seas proper. It was imperative that some integrated system should be devised for dealing with the "related problems". Could the Commission present such a system to the States which had taken the unilateral measures he had mentioned, the latter might be induced to revise their attitude and to adopt the Commission's system for protecting their fishery rights as well as their interests in the continental shelf. Thus the Commission might reconcile them with those other States which objected to the unilateral measures they had been obliged to take in the absence of guidance from the Commission.

70. The CHAIRMAN agreed with Mr. García Amador's and Mr. Salamanca's reading of General Assembly resolutions 899 (IX) and 900 (IX). The Commission had been invited to take into consideration the conclusions reached by the Rome Conference, and should re-examine the articles on fisheries in their light.

71. Mr. ZOUREK pointed out that article 33 was a new provision dealing with sedentary fisheries, which had not appeared in the articles approved in 1953; it might therefore be useful to retain it.

72. Mr. FRANÇOIS (Special Rapporteur) said that article 33 was based on paragraph 71 of the Commission's report on its fifth session; but a separate provision of that kind was not absolutely necessary in the draft articles on the régime of the high seas.

73. Mr. KRYLOV said that a comment such as that contained in paragraph 71 of the Commission's report on its fifth session was not enough. A comment was binding only upon its author.

74. Mr. GARCIA AMADOR said that at the Rome Conference sedentary fisheries had been discussed from the point of conservation. Article 33 of Mr. François' article dealt with the question of sovereign rights over sedentary fisheries. Sovereign rights and conservation, however, were intimately connected in the matter of fisheries, and it was therefore highly desirable that the discussion of article 33 should, like that of the three preceding articles, be deferred until the Commission received the report of the Rome Conference.

Further discussion on articles 30 to 33 was deferred.

Article 34 [23]: Water pollution[9]

75. Mr. FRANÇOIS (Special Rapporteur) said that article 34, dealing with water pollution, resembled the provisions included in his report in respect of safety of shipping and the use of signals (articles 13 and 15). Those subjects were of a highly technical nature, and it was out of the question for the Commission to examine them in any detail; all that the Commission could do was to lay down general directives.

76. He recalled that at the 285th meeting he had agreed to use the expression "the majority of vessels engaged in international seafaring" in both article 13 and article 15, article 13 as originally drafted having read: "the majority of maritime States".[10] He proposed to make a similar amendment to article 34.

Article 34 was adopted in principle by a unanimous vote.

77. Mr. GARCIA AMADOR pointed out that the adoption by the Commission of article 34 in principle could only be a provisional decision. It was clear from the comment to that article that water pollution was detrimental to fish rather than to navigation. It therefore followed that the decisions of the Rome Conference would affect the final drafting of article 34.

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[9] Article 34 read as follows:

"All States shall draw up regulations, consistent with those agreed upon by the majority of maritime States, to prevent water pollution by fuel oil discharged from ships."

[10] 285th meeting, para. 19.

Proposed article 35 : Arbitration

78. Mr. SCELLE recalled that, during the discussion on certain of the draft articles on the régime of the high seas, he had made proposals relating to compulsory arbitration, but had withdrawn them on the understanding that a single provision on arbitration should be included at the end of the draft articles.

79. He therefore proposed the following additional article :

> "Disregard or violation of the positive or negative obligations imposed on governments or private persons by the provisions of the present rules on the use of the high seas constitutes an unlawful act for which States may be held responsible. States agree to submit any disputes arising therefrom to an arbitral tribunal constituted in accordance with the procedure prescribed in the Convention of 1907 on the Permanent Court of Arbitration, or with that prescribed in the rules on arbitral procedure drafted by the International Law Commission."

80. The CHAIRMAN said that, although the English, French, Russian and Spanish texts of the proposed new article would only be available at the next meeting, it might be useful if members could indicate their views on the general principle involved.

81. Mr. SCELLE said that his proposal for compulsory arbitration was essential to the draft articles, in that it provided for sanctions. Some of the provisions in the draft articles were, perhaps, not sufficiently clear, and it was necessary to emphasize that they constituted binding rules of international law : for example, the rule that no State was entitled to use a signalling system differing from that adopted by the majority of vessels engaged in international seafaring.

82. There were many cases in which the Commission had attached a compulsory arbitration clause to its drafts, and he felt it was equally necessary to do so in the present instance.

83. Mr. SANDSTRÖM recalled that he had also proposed a compulsory arbitration clause in the matter of collisions on the high seas.

84. Mr. GARCÍA AMADOR said that the compulsory arbitration clause was embodied in most treaties, and had now become virtually a standard clause ; it could therefore be considered as part of international practice. He accordingly strongly supported Mr. Scelle's proposal.

85. However, it was necessary first to agree on the substantive provisions of the law before laying down the procedure for enforcing it. He would quote as an example the case of piracy. In Mr. Scelle's draft, provision was made for the liability of States in respect of illicit acts on the high seas ; no provision was made for the liability of individuals. But piracy, which the Commission would be examining at its next meeting, was characterized by the fact that it was a crime committed by individuals in defiance of the authority of all States, including their own. It seemed, therefore, that the substantive provisions relating to, *inter alia,* piracy should be discussed before the Commission proceeded to draft in detail a provision for compulsory arbitration such as that put forward by Mr. Scelle.

86. Mr. ZOUREK said that Mr. Scelle's proposed article 35 came, perhaps, somewhat prematurely. The provision for compulsory arbitration formed part of the usual final clauses which were attached by the Commission to its drafts when the latter had taken their final shape. At present, the Commission was engaged on preparing a first draft, which would be submitted to governments for their comments. When those comments were forthcoming, the Commission would, in their light, prepare a final draft : then would be the appropriate moment to discuss compulsory arbitration.

87. Mr. LIANG (Secretary to the Commission) recalled that, at its fifth session in 1953, the Commission had discussed at length the matter of a general arbitration clause in connexion with the articles adopted by it at that session dealing with the continental shelf ; paragraphs 86-90 of the Commission's report for that session (A/2456, *op. cit.*) contained detailed comments thereon.

88. The relevant draft article adopted in 1953 was the final article—article 8—which read :

> "Any dispute which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties." (A/2456, *op. cit.,* para. 62.)

89. The Commission now seemed to be faced by a choice between adopting Mr. Scelle's proposed article 35, or using article 8 of the draft articles on the continental shelf. The main difference between the two texts was that article 8 of the 1953 draft was of a general character, whereas in his proposed article 35, Mr. Scelle made specific references to the 1907 Hague Convention for the Pacific Settlement of Disputes,[11] following which the Permanent Court of Arbitration had been established, as well as to the Commission's draft on arbitral procedure adopted at its fifth session (A/2456, *op cit.,* para. 57). The two texts could not very well be placed on the same footing. The 1907 Convention was a multilateral treaty, whereas the Commission's rules on arbitral procedure were merely a draft.[12]

The meeting rose at 1 p.m.

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[11] J. B. Scott, *The Reports of the Hague Conferences of 1899 and 1907* (Oxford, 1917), p. 292.

[12] Discussion of proposed article 35 was resumed at the 295th meeting.

292nd MEETING

Monday, 16 May 1955, at 4 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Filling of casual vacancies in the Commission (item 1 of the agenda)

(*resumed from the 288th meeting*)

1. After a short discussion, *it was decided by 9 votes to 1, with 2 abstentions, to hold a private meeting on the question of the filling of the casual vacancy caused by Mr. Córdova's resignation.*

2. On the resumption, the CHAIRMAN announced that Mr. Luis Padilla Nervo had been elected to fill the casual vacancy caused by Mr. Córdova's resignation.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*resumed from the 291st meeting*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*resumed from the 291st meeting*)

Articles 23 [14] (resumed from the 291th meeting) and *24-28 [16-20]: Policing of the high seas*[1]

3. The CHAIRMAN announced that there were a number of proposals before the Commission concerning articles 23 to 28.

4. The first proposal was that of the Special Rapporteur: it was a simplified version of the draft in the Special Rapporteur's sixth report (A/CN.4/79), and read as follows:

"*Article 23*

"Piracy in the sense of these rules is any act of violence or depredation, committed for private ends by the crews or the passengers of a private vessel against another vessel on the high seas, with intent to rob, rape, wound, enslave, imprison or kill a person, or with intent to steal or destroy property.

"The acts, committed on board a public vessel, whose crew mutinies, directed against other vessels, are assimilated to acts committed by a private vessel.

"*Article 24*

"A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing acts described in article 23."

Article 25

No change.

"*Article 26*

"Every State may seize by its public vessels, in a place not within the territorial jurisdiction of another State, ships committing acts of piracy, and things or persons on board. The State may exercise jurisdiction over them."

5. There was no change to article 27, and article 28 had been dropped.

6. The second proposal was by Mr. Sandström, and con-

[1] Articles 24 to 28 read as follows:

Article 24:

"A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 23, paragraph 1, or to the purpose of committing any similar act within the territory of a State by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the State to which the ship belongs."

Article 25:

"A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the State from which it was derived."

Article 26:

"In a place not within the territorial jurisdiction of another State, a State may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board."

Article 27:

"A ship seized on suspicion of piracy outside the territorial jurisdiction of the State making the seizure is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the State making the seizure shall be liable to the State to which the ship belongs for any damage caused by the seizure."

Article 28:

"A seizure because of piracy may be made only on behalf of a State, and only by a person who has been authorized to act on its behalf."

sisted in the replacement of articles 23 to 28 as drafted in the sixth report (A/CN.4/79) by the following texts:

"*Article 23*

"1. Any State may seize on the high seas a ship on or from which an act of piracy has been committed or which is intended for piracy (pirate ship) and possessed by pirates, the ship or ships taken by the pirates and the persons or things on board the ships.

"2. The State making the seizure may bring the offenders before its courts for punishment, or if the crime was committed within the jurisdiction of another State, deliver them to that State at its request.

"3. The State making the seizure is entitled to dispose of the goods seized provided that it protects the legitimate interests of third parties.

"*Article 24*

"For the purposes of the present rules, piracy shall be understood to mean:

"(*a*) Any act of violence or depredation committed with intent to rob, wound, enslave, imprison, or kill, or with intent to steal or destroy property, and undertaken by private persons for private (non-political) ends, provided that such act is connected with an attack at sea or an attack on land made from a pirate ship;

"(*b*) Seizure of a ship by the crew or passengers for the purpose of committing thereon, or using it for committing, acts mentioned in paragraph (*a*) above, or attempting such seizure;

"(*c*) Any act of participation in one of the ventures referred to in paragraphs (*a*) or (*b*) above, with knowledge of its purpose;

"(*d*) Any act designed to instigate or facilitate such a venture.

"*Article 25*

"Article 27 of the draft."

7. Thirdly, there was the amendment proposed by Mr. Edmonds to article 23, to make it read:

"Any act of violence or depredation committed on the high seas or in the superjacent air with intent to rob, rape, wound, enslave, imprison, or kill a person or to steal or destroy property for private ends, except in the course of the *bona fide* assertion of a claim."

8. Fourthly, there were the amendments proposed by Mr. Zourek to the Special Rapporteur's simplified text of article 23. Mr. Zourek proposed the following changes:

(*a*) Delete the words "for private ends" from the first paragraph;

(*b*) Delete the words "in the sense of these rules" from the same paragraph;

(*c*) Replace the words "private vessel" in the second line of the first paragraph by the words "vessel or aircraft";

(*d*) Delete the words "against another vessel on the high seas";

(*e*) Add the following phrase, based on the Special Rapporteur's original draft, to the first paragraph:

"provided that the act is connected with an attack on or from the high seas or in or from the air"; and

(*f*) Replace the second paragraph of article 23 by the following:

"In the event of civil war, the acts of violence or depredation referred to in the foregoing paragraph, committed against vessels or aircraft not belonging to the Parties to the conflict or to their nationals, constitute acts of piracy."

9. Mr. FRANÇOIS (Special Rapporteur) said that the situation could be summed up in comparatively simple terms. The main differences between his own draft and Mr. Sandström's proposal concerning article 23 were: (*a*) that Mr. Sandström proposed to include within the definition of piracy attacks by pirates on a coast; (*b*) that under Mr. Sandström's draft acts of violence or depredation committed on board a ship would come within the definition of piracy.

10. The best course for the Commission would be to vote on the principles involved, and when agreement had been reached thereon, to appoint a drafting committee, composed of the authors of the various proposals, to draw up a final text.

11. Mr. SCELLE said that piracy always had its origin at sea; pirates organized their activities from a ship. If they committed depredations along a coast, such depredations would come under the jurisdiction of the local courts. But problems of jurisdiction were not necessarily linked with the definition of the crime of piracy. An act of piracy which made its perpetrators liable to prosecution by the courts of any country if they were seized on the high seas did not preclude the possibility of local jurisdiction by the coastal State.

12. Sir Gerald FITZMAURICE agreed that predatory acts committed in a place within the territorial jurisdiction of any State would normally come under the jurisdiction of the local authorities of that State. But in the case of predatory acts committed on a territory which was *res nullius*—for example, on certain Pacific islets and rocks where guano was collected—such acts would not have taken place in an area within the territorial jurisdiction of a State. They would thus apparently fall within the definition of piracy.

13. Mr. FRANÇOIS (Special Rapporteur) said that there were three schools of thought on the problem. One view was that piracy could only take place on the high seas. Another was that piracy could only occur in a place not within the territorial jurisdiction of any State,

a definition which included not only the high seas, but also unoccupied lands such as had been mentioned by Sir Gerald Fitzmaurice. The third, held by a very few writers on international law, W. E. Hall,[2] for example, was that piracy could consist in acts of violence within the territory of a State after descent from the sea.

14. As explained at the Commission's 290th meeting, the Harvard report,[3] together with the whole weight of jurisprudence, was in favour of the limitation embodied in his own revised draft.

15. The Commission was first and foremost concerned with the codification of international law and it should therefore, so far as possible, not depart from existing law.

16. Mr. SANDSTRÖM said that in drafting his text he had had more in mind the Commission's duty to promote the progressive development of international law rather than its codification, and found it inadmissible that a warship meeting a pirate vessel on the high seas should be obliged to refrain from seizure because the act of piracy had been committed in territorial waters or on land.

17. Mr. SCELLE entirely agreed with the preceding speaker.

18. Mr. ZOUREK asked whether the Special Rapporteur excluded from his definition of piracy attacks made on the coast by vessels descending from the high seas. The consequence of such a limitation would be that once those vessels had returned to the high seas they could not be pursued.

19. Mr. FRANÇOIS (Special Rapporteur) said that, unless pursuit had started in the territorial sea, once the vessel had reached the high seas nothing could be done.

20. Mr. AMADO agreed with the Special Rapporteur's strict definition of piracy.

21. The CHAIRMAN then put to the vote Mr. Sandström's text.

Mr. Sandström's text was rejected by 6 votes to 4 with 1 abstention.

22. Mr. AMADO explained that he had abstained from voting on Mr. Sandström's text because he did not consider it to be far removed from that of the Special Rapporteur.

23. The CHAIRMAN, speaking as a member of the Commission, expressed the view that the two texts were diametrically opposed.

24. Mr. FRANÇOIS (Special Rapporteur) considered that the Commission should decide whether, in the light of Sir Gerald Fitzmaurice's statement, it should assimilate to the high seas territory not under the jurisdiction of any State.

The question was decided in the affirmative by 11 votes to 1.

25. Mr. FRANÇOIS (Special Rapporteur) referring to the question of whether a mutiny alone sufficed to make the ship a pirate, said that he had followed the Harvard draft in maintaining that it would only become a pirate ship if the persons in dominant control committed acts of piracy against another ship.

26. Mr. SANDSTRÖM observed that an act of piracy did not necessarily require the presence of two vessels. Indeed, the latest development was to be found in cases in which passengers or crew boarded vessels with the intention of seizing and gaining control of the ship once it was out at sea.

27. If the draft were to be effective that contingency must be covered.

28. Mr. AMADO asked what kind of acts committed by crew or passengers aboard a vessel transformed it into a pirate.

29. Mr. SANDSTRÖM, observing that he was uncertain whether the fact of mutiny alone could transform a ship into a pirate, said that he had had in mind the different case of persons posing as crew or passengers in order to commit acts of piracy once the vessel had reached the high seas.

30. Mr. SCELLE observed in passing that it was not vessels but persons who became pirates. He regarded Mr. Sandström's view as well founded. Mutineers were not, *ipso facto,* pirates, but only if they committed acts within the definition of that crime.

31. Mr. FRANÇOIS (Special Rapporteur) said that even if mutineers killed the captain and ship's officers the vessel did not thereby become a pirate unless acts of piracy were committed against another ship.

32. If Mr. Sandström's view were accepted, persons committing robbery on board ship would be pirates.

33. Mr. SANDSTRÖM drew the attention of the Special Rapporteur to the fact that, under the definition in subparagraph (*b*) of his (Mr. Sandström's) text of article 24, such persons must seize or attempt to seize the ship.

34. Sir Gerald FITZMAURICE endorsed the Special Rapporteur's view of the interesting problem raised by Mr. Sandström. In the light of the fact that, according to most legislations, passengers were subject to the ship's discipline and the orders of the master, the case of passengers taking possession of a vessel was fundamentally similar to that of mutiny and seizure of the ship by the crew in violation of the laws of the flag State, but in both cases the seizure might have another object than piracy. For example, it might be prompted by political motives and the desire to navigate the vessel to a different port.

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[2] *International Law* (eight edition, by Pearce Higgins), p. 314; see *supra,* 290th meeting, para. 50.

[3] Harvard Law School, *Research in International Law* (Cambridge, 1932), pp. 786–810.

35. It was only after an act of piracy had been committed that the vessel became a pirate, and in that respect Mr. Sandström's wording in sub-paragraph (*b*) of article 24 was not satisfactory, since the purpose of seizure of a ship by crew or passengers could not be known until their subsequent action provided evidence.

36. In conclusion, he expressed general agreement with the Special Rapporteur, subject to one point. In view of the last decision taken by the Commission it would be preferable to make it clear that piracy was not confined to acts committed on the ship itself, but that it essentially consisted in acts committed against another ship or persons not on the pirate vessel itself.

37. Mr. FRANÇOIS (Special Rapporteur), expressing the view that a pirate could only be seized by a warship, observed that Mr. Sandström's text extended that power to other State vessels.

38. Mr. SANDSTRÖM explained that he had had in mind the definition of a warship contained in article 12 which had already been approved.

39. Mr. ZOUREK asked whether the seizure could be made by a police boat.

40. Mr. FRANÇOIS (Special Rapporteur) replied that it would be preferable for practical purposes to limit the right of seizure to warships. Any extension of the principle he advocated, which was supported by most authorities, might encourage abuse.

The Commission upheld by 9 votes to 1, with 2 abstentions the Special Rapporteur's view that ships which had committed acts of piracy or were suspected of piracy, could be seized only by a warship.

41. Mr. AMADO observed that in his new text of article 26 the Special Rapporteur had used the expression "public vessels".

42. Mr. FRANÇOIS (Special Rapporteur) stated that there had been a mistake; those words should be replaced by the word "warships".

43. Mr. SCELLE, explaining his vote, said that in the belief that acts of piracy could also take place in the territorial sea or on land, he could not accept the thesis that warships alone could seize vessels guilty of such acts. If police vessels also were empowered to seize pirate ships, the possibility of error might well be reduced.

The meeting rose at 6 p.m.

293rd MEETING

Tuesday, 17 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 23 [14]: Policing of the high seas (continued)

1. The CHAIRMAN asked the Special Rapporteur to indicate what further issues beyond those already disposed of at the previous meeting had yet to be considered by the Commission in respect of article 23.

2. Mr. FRANÇOIS (Special Rapporteur) replied that the Commission had to decide, first, whether or not an attack by one aircraft against another should, in certain circumstances, come within the definition of piracy; secondly, whether an attack by an aircraft on a ship came within the definition; and thirdly, whether military aircraft should have the same powers as warships to apprehend vessels suspected of piracy.

3. Though Mr. Edmonds had included in his definition attacks by one aircraft on another, he (the Special Rapporteur) did not think that was necessary in a draft dealing specifically with the high seas.

4. On the other hand, he would be prepared to re-introduce into the definition attacks on vessels on the high

seas delivered from aircraft, as proposed by Mr. Zourek in his amendment. He had omitted that provision from his revised text in the interests of simplification, though, as the Commission would remember, he had originally followed the Harvard draft[1] in order to take modern technological developments into account.

5. With regard to the third issue, he considered that military aircraft should be permitted to take action against pirate vessels in the same way as warships. It was feasible for aircraft sighting a vessel *in flagrante delicto* to launch an attack with bombs, or in the case of a sea-plane or flying-boat to send a party to verify the ship's papers.

6. Mr. EDMONDS explained that he had submitted his amendment after the Special Rapporteur had announced his intention of deleting from his draft article the reference to attacks in or from the air. Perhaps his own text did not clearly bring out that his intention had been to cover attacks by aircraft on ships.

7. The second purpose of amendment had been to re-introduce the proviso concerning the *bona fide* assertion of a claim. However, the Special Rapporteur's revised text would be acceptable to him.

8. Mr. HSU welcomed Mr. Edmonds' explanation, as he had doubted the necessity to speak about superjacent air. An aircraft operating from a pirate vessel would, of course, also be a pirate, and an aircraft making attacks from the land would involve the responsibility of the territorial State. If that State disclaimed responsibility for it, the case would be similar to those involving ships dealt with at the Nyon Conference of 1937. Hence, unless the Commission decided to expand the traditional concept of piracy, he did not think attacks by aircraft need be specially noted.

9. Mr. GARCÍA AMADOR agreed with the Special Rapporteur that, for purposes of the present draft, attacks by aircraft on other aircraft need not be taken into account, but that an attack by an aircraft on a vessel on the high seas must be regarded as an act of piracy since it violated international penal law. Mr. Edmonds' amendment would, therefore, be acceptable if applicable solely to the second case.

10. Mr. ZOUREK expressed doubts about such a restrictive conception of piracy, particularly as it was more easy for persons bent on committing acts of piracy to obtain airdraft than ships. The Commission should take technical progress into account, and, in particular, the consequent possibility of flying-boats committing acts of piracy. Though inclined to support the view that an attack by one aircraft on another in the air could not be an act of piracy, he urged the Commission to consider the numerous other acts committed by an aircraft not in pursuance of official instruction that would constitute genuine acts of piracy. Surely such acts were precisely the same as those committed by ships within the definition under discussion. Sub-paragraph (*e*) in his amendment had been prompted by his conviction that technical progress must not be ignored.

11. In reply to a question by Mr. KRYLOV, Mr. FRANÇOIS (Special Rapporteur) stated that he could not accept Mr. Zourek's view when applied to an attack by one aircraft on another.

12. The CHAIRMAN put to the vote the question of whether an attack by one aircraft on another should fall within the scope of the definition of piracy.

The question was decided in the negative by 8 votes to 3, with 1 abstention.

13. The CHAIRMAN put to the vote the question of whether an attack by an aircraft against a vessel in the high seas should fall within the scope of the definition of piracy.

The question was decided in the affirmative.

14. The CHAIRMAN put to the vote the question of whether provision should be made in the draft allowing military aircraft to take steps against ships committing acts of piracy.

The question was decided in the affirmative.

15. Mr. GARCÍA AMADOR observed that once a definition of piracy had been extended to include attacks by aircraft on ships, there could be no objection to conferring upon military aircraft the same powers as those enjoyed by warships in the suppression of piracy.

16. Mr. FRANÇOIS (Special Rapporteur) said that finally the Commission had to decide whether to restrict piracy to acts committed for private ends, thus excluding acts committed for political motives or by warships.

17. Mr. KRYLOV felt bound to repeat the argument he had adduced at the 290th meeting[2] and, in that connexion, referred to the preamble to the Nyon Arrangement of 1937, where the attacks made by vessels or aircraft in the Mediterranean Sea were described as acts of piracy and contrary to the elementary principles of humanity. Perhaps politicians had short memories, but as a body of jurists the Commission should bear in mind the Nyon Arrangement, which Sir Gerald Fitzmaurice had mistakenly implied to be insignificant. Even if the Arrangement was no longer valid—indeed it might already have been formally denounced by some of its signatories—the Commission must recognize that it was not purely of an ephemeral nature, but contained the seeds of a new principle to which due weight should be given. Modern developments were more germane to the discussion than historical questions associated with the activities of the Barbary corsairs.

8. In conclusion, he stated that the Special Rapporteur's revised text would be acceptable to him provided the word "private", before the word "vessel", were deleted from the second line.

[1] Harvard Law School, *Research in International Law* (Cambridge, 1932), pp. 790–816.

[2] 290th meeting, paras. 64–65.

19. Mr. ZOUREK said that there could be no doubt that formerly piracy had been understood in the sense attributed to it by the Special Rapporteur; but it was equally certain that the concept in modern positive international law had now been extended in the manner indicated by Mr. Krylov. The Special Rapporteur had already admitted, and the Commission had accepted, the thesis that an insurgent vessel committing acts of piracy against a third State was a pirate. Yet, if the proviso "committed for private ends" were retained, international crimes of violence and depredation would be recognized as lawful if it could be shown that they had been committed at the instigation, or on the express instructions, of a public authority. Such a step would constitute recognition of the principle that certain acts were justified because they had been committed on superior orders—a principle which had been rejected outright by the Nürnberg Tribunal, as well as by the Commission in its formulation of the Nürnberg principles and subsequently in its draft Code of Offences against the Peace and Security of Mankind. He would be unable, therefore, to support the present restriction which, in the circumstances, seemed to him inexplicable. Surely not a single member of the Commission would contend that the vessels and aircraft whose actions had provoked the Nyon Conference had been pursuing "private ends". He urged the Commission to abandon the Special Rapporteur's original draft and to codify twentieth-century practice rather than obsolete principles.

20. Sir Gerald FITZMAURICE said that, notwithstanding Mr. Krylov's arguments, he adhered to his original view that the Nyon Arrangement was a special one, although many acts similar to those it envisaged had occurred since. As he had stated at the 290th meeting,[3] the real basis of the agreement reached at Nyon was the assumption that the acts had been unauthorized because no government would admit responsibility; otherwise the normal representations would have been made. Acts of a piratical character committed by warships on superior orders were more than acts of piracy, and might constitute aggression or an act of war engaging the responsibility of the flag State.

21. Mr. HSU had little to add to Sir Gerald's remarks. In his view, it would be absurd to extend the concept of piracy to cover acts of aggression authorized by a government. No government of good faith would disclaim responsibility for such acts committed by its own vessels, and no provision to meet such a contingency was required in the present draft articles.

22. Mr. FRANÇOIS (Special Rapporteur) observed that Sir Gerald Fitzmaurice had already brought out the distinctive features of the Nyon Arrangement. It would be well to remember that that instrument had been signed by only nine States, and that the innovation they had introduced had been severely criticized by international lawyers. In the circumstances, it was impossible to hold that the Commission should be in any way bound by that agreement.

23. Replying to Mr. Zourek, he rejected the suggestion that he was seeking to ensure that certain acts committed by warships should be regarded as lawful; he urged the Commission to reflect most carefully on the consequence of allowing seizure of a warship by a State on suspicion that it had committed acts of piracy. Such a step carried far more serious implications than in the case of seizure of merchantmen.

24. Turning to sub-paragraph (*f*) of Mr. Zourek's amendments, he pointed out that the whole question of civil war aroused complex issues such as the recognition of revolutionaries as belligerents and recognition of governments, which could not be disposed of in the way suggested by Mr. Zourek, who wished to assimilate to acts of piracy all acts against a State not party to the conflict. He was categorically opposed to such a provision, which would increase rather than restrain disorder on the high seas.

25. Mr. AMADO recalled that he had previously referred to the Nyon Arrangement[4] in order to illustrate the way in which the classical concept of piracy had been extended by analogy, but that he had offered no opinion on that development whatsoever. In his view, the first characteristic of an act of piracy was that it had to be committed by individuals, either members of the crew or passengers, on a ship. Sir Gerald Fitzmaurice had at the previous meeting indicated the circumstances in which mutiny could lead to piracy. He would also suggest that the Commission give some thought to the meaning of the words "private vessel", since in almost all countries merchant vessels were, at least to some extent, subsidized by the State.

26. Mr. LIANG (Secretary to the Commission), referring to Mr. Zourek's suggestion that the Commission had already taken some kind of a decision which would bring acts committed by insurgents within the definition of piracy, said that he had no recollection of such a decision and would have to examine the summary records.

27. With regard to whether, in the case of a civil war, it was possible to consider acts by one party as akin to piracy, he pointed out that in the jurisprudence and doctrine of the United States of America at least, a distinction was made between belligerency and insurgency. The latter problem had not been studied to the same extent in European doctrine, and its development as an independent concept was largely the result of decisions reached by the United States Supreme Court and some others.

28. His own study of the work of Professor George Grafton Wilson[5] on the subject of insurgency had led him to conclude that once a state of insurrection had

[3] *Ibid.*, para. 80.

[4] *Ibid.*, para. 62.

[5] "Insurgency and International Maritime Law", *American Journal of International Law*, vol. I (1907), pp. 46–60.

been recognized to exist, the vessels of the insurgents could not be condemned for acts of piracy because it was assumed that they were acting under the orders of a public authority. He agreed with the Special Rapporteur that the problem of piracy in connexion with civil war deserved independent study, and in his opinion Mr. Zourek's amendment could be taken up only in connexion with the draft code of offences against the peace and security of mankind. As indicated by Sir Gerald Fitzmaurice, the present theory was undoubtedly that only private ships were capable of acts of piracy.

29. Mr. KRYLOV, referring to the Nyon Arrangement, pointed out that history often repeated itself, with the result that something which had begun as a special case became general. He had not mentioned the question of the violation of freedom of navigation in the China Seas, because he had carefully read the discussions on the subject in the *Ad hoc* Political Committee at the ninth session of the General Assembly, and had nothing further to add to the concrete facts already adduced on that occasion by the Polish and Soviet Union representatives. In the meantime, the legal situation was as he had described it, and he would therefore insist that the Commission vote on his proposal to delete the word "private" from before the word "vessel". The question of whether the expression "for private ends" should be retained might be referred to the Drafting Committee.

30. Mr. GARCÍA AMADOR pointed out that it was not always easy for even the most distinguished experts to establish the legal distinction between various kinds of acts. In the present instance, he believed that intention could be the only guide, and that, if acts of aggression, which were an entirely separate issue, were to be excluded, piracy must therefore be defined as an act committed for private ends.

31. He agreed with the Special Rapporteur and the Secretary that sub-paragraph (*f*) of Mr. Zourek's amendment would only complicate the issue. It was interesting to note that at a conference held the previous year at Caracas it had been found impossible to agree on provisions concerning piracy for insertion in a protocol to the Convention on duties and rights of States in the event of civil strife, signed at Havana in 1928 by twenty-one States. It was not for the Commission at the present stage to enter into the extremely complicated questions arising out of a civil war, and it should therefore not go beyond the traditional concept of piracy.

32. Mr. ZOUREK pointed out that an act of aggression must involve at least two States, and that there were many different possibilities of a *de facto* authority obtaining possession of a vessel or aircraft in order to commit acts of piracy which could in no sense be regarded as acts or aggression. Despite the Secretary's affirmation, he could cite many authorities who held that the acts of an insurgent against a third party were acts or piracy. He was unable to see how the Commission could overlook, for purely theoretical reasons, the existence of patent cases of piracy committed not for private ends but for political reasons.

33. Mr. HSU observed that a government, whether recognized or not by other States, continued to exist. He feared that if State A did not recognize State B, State B would retaliate by not recognizing State A and if each treated the vessels of the other as pirates the peace of the world would be gravely endangered.

34. The CHAIRMAN put to the vote Mr. Krylov's amendment for the deletion of the word "private" before the word "vessel" in the Special Rapporteur's revised text.

Mr. Krylov's amendment was rejected by 10 votes to 2, with 1 abstention.

35. The CHAIRMAN then put to the vote the retention of the words "for private ends" in the Special Rapporteur's revised text.

It was decided, by 11 votes to 2, that those words should be retained.

36. Mr. AMADO, explaining his vote, said that, so far as the French text was concerned, he preferred Mr. Sandström's wording *pour des buts personnels* to the Special Rapporteur's phrase *a des fins d'ordre personnel.*

37. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would take Mr. Amado's observation into account.

38. He then suggested that, as the remaining articles on piracy were not controversial, they might be referred forthwith to the drafting committee for consideration in the light of the Commission's discussions and decisions.

It was so agreed.

Article 2 [2]*: Freedom of the high seas*
(resumed from the 284th meeting)

39. The CHAIRMAN invited the Commission to resume its consideration of article 2.

40. Mr. FRANÇOIS (Special Rapporteur) submitted the following revised text to replace articles 2 to 5 in the original draft:

> "This rule does not affect the provisions concerning policing of the high seas, contiguous zones and the continental shelf, forming part of the present rules of maritime law."

41. Mr. SANDSTRÖM considered that it was necessary to state in positive terms the basic principle of the freedom of the high seas. He accordingly proposed that the new article 2 be re-drafted as follows:

> "The high seas shall be open to all nations. No State may subject them to its jurisdiction, or claim for itself or its nationals the right to make any use of them which impedes free navigation or fishing. This rule does not affect the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf, forming part of the present maritime law regulations."

42. The Commission would note that the text contained nothing new.

43. Mr. ZOUREK said that, in view of the paramount importance and fundamental character of the principle of freedom of the high seas, which was universally accepted in practice and theory, he considered an introductory article essential, and proposed that it read:

"The high seas being open for use by all nations, all States and their nationals shall enjoy on an equal footing

"(*a*) Freedom to sail without let or hindrance on the high seas under the exclusive control, save as otherwise agreed, of the State where the vessel is registered;

"(*b*) Freedom to fly over the high seas for peaceful purposes;

"(*c*) Freedom to fish and hunt therein;

"(*d*) Freedom to lay submarine cables and pipe lines therein."

44. Mr. FRANÇOIS (Special Rapporteur) observed that the three texts did not differ greatly. However, he considered that sub-paragraph (*b*) of Mr. Zourek's text might be eliminated from a draft dealing with the high seas, and doubted whether the question of submarine cables was of sufficient importance to warrant inclusion in a general article of that kind. From that point of view, he preferred Mr. Sandström's version, which mentioned only fishing. He also favoured the reference in the latter text to the fact that no State might subject the high seas to its jurisdiction, and felt that mention of the contiguous zones should help to forestall misunderstanding. As he considered Mr. Sandström's text generally acceptable, he wondered whether Mr. Zourek would be prepared to withdraw his own.

45. Mr. SCELLE expressed a preference for Mr. Zourek's text, although it was not fully satisfactory, since it was incomplete and open to misinterpretation in that it failed to stipulate that the seabed and superjacent air were subject to the same régime as the high seas.

46. On the other hand, he agreed with Mr. Zourek's statement of the positive law on the freedom of navigation, which was consistent both with the definition adopted in 1880 by the Institute of International Law and with the practice followed for centuries.

47. He found the third sentence in Mr. Sandström's text defective, because as at present framed it seemed to reverse the relative importance of the general principle and of the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf.

48. The CHAIRMAN, speaking as a member of the Commission, observed that the right to lay submarine cables was expressly recognized in article 16.

49. Mr. ZOUREK noted that the Chairman had raised a drafting point which might be considered by the drafting committee.

50. He could not agree with the Special Rapporteur that sub-paragraph (*b*) should be deleted from his text because he considered that rules for the superjacent air must be included in a draft on the high seas, as had already been done in the case of the territorial sea.

51. Though he would be prepared to borrow from Mr. Sandström's text some such wording as: "No State may subject them to its jurisdiction", which had found favour with the Special Rapporteur, he could not withdraw his own text because Mr. Sandström had failed to make a complete and precise statement of the principle and because, as Mr. Scelle had pointed out, he had in the third sentence subordinated the principle of the freedom of the high seas to the provisions concerning policing.

52. Mr. HSU agreed with Mr. Zourek and Mr. Scelle about the necessity of specifying in article 2 the freedom to fly over the high seas for peaceful purposes. It could be said that ships made use, albeit to a very limited extent, of the air bove the high seas; it was therefore legitimate to ask at how many inches above the surface of the water the high seas came to an end and the superjacent air commenced.

53. Sir Gerald FITZMAURICE agreed with the principle of the freedom of the high seas for all legitimate purposes, as formulated by Mr. Zourek. As a matter of drafting, he preferred the wording of the first two sentences of Mr. Sandström's text.

54. With regard to the final sentence of Mr. Sandström's text—which the Special Rapporteur had endorsed in his proposed second paragraph to article 2—he felt serious doubts. In so far as the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf entailed derogations from the absolute freedom of the high seas, the legitimacy of those derogations would be apparent from the Commission's articles on those topics.

55. Mr. SALAMANCA drew attention to the words "save as otherwise agreed" in paragraph (*a*) of Mr. Zourek's draft, which suggested that only international agreements could justify action on the high seas on the part of a State other than the flag State. The Commission was considering not only the régime of the high seas, but also related questions, such as the contiguous zones and the rights of the coastal State over the continental shelf and superjacent waters.

56. It was necessary for the Commission to take a comprehensive view of all those problems and to devise integrated solutions to them. It was the lack of a coherent system governing the high seas and the closely related problems he had mentioned which had led certain States to adopt unilateral measures which some other States had considered excessive. It was the duty of the Commission to take a broad view of the real situation, and to re-appraise all the problems involved.

57. He recalled the words of Gidel in his lecture entiled "Law and the continental shelf" (*Le Plateau continental devant le droit*), delivered at Valladolid in

1951 under the auspices of the *Instituto Francisco de Vitoria*.[6] Professor Gidel had stated that the concept of the freedom of the high seas had now lost the absolute and tyrannical character which it had derived from its origin as a reaction against claims to sovereignty over the high seas.

58. Mr. AMADO said that in article 2 the whole emphasis must be laid on the principle of the freedom of the high seas. Any derogations from that important general principle must be presented as exceptions to the general rule. He could not therefore approve of the last sentence of Mr. Sandström's text—or of the Special Rapporteur's similar proposal—namely: "This rule does not affect the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf..." That wording suggested that the derogations were the rule rather than the exception.

59. If the Commission felt that a reference to the policing of the high seas, the contiguous zones and the continental shelf was necessary, it could only be worded as follows:

> "The provisions concerning the policing of the high seas, the contiguous zones and the continental shelf, forming part of the present draft articles, do not affect the principle of the freedom of the high seas."

60. The CHAIRMAN said that at that stage of the discussion he would tentatively suggest that Mr. Zourek's and Mr. Sandström's drafts might be combined in the following way: Article 2 would begin with the words "The high seas shall be open to all nations. No State may subject them to its jurisdiction". That formulation would then be followed by the more detailed exposition of the four freedoms in paragraphs (*a*) to (*d*) of Mr. Zourek's proposal.

61. Finally, the Commission would have to decide whether it was necessary to include a final paragraph referring to the policing of the high seas, the contiguous zones and the continental shelf.

62. Mr. SANDSTRÖM said that he would not insist on his own text, and was prepared to agree to the Chairman's suggestion.

63. Mr. FRANÇOIS (Special Rapporteur) agreed to include in article 2 a reference to the freedom to fly over the high seas for peaceful purposes.

64. With regard to the reference to the related questions, he agreed with Mr. Salamanca that an integrated approach was necessary. The Commission was presenting several drafts; on the high seas, on the continental shelf, on fisheries, and on the contiguous zones. It was necessary to make it clear that those several drafts constituted one single system; otherwise serious misconceptions might arise. Should the Commission, at its present session, adopt an article expressing unqualified recognition of the principle of the freedom of the high seas, that decision might erreoneously be construed as implying some attenuation of the decisions taken at the fifth session (A/2456, paragraphs 62, 94 and 105) in the adoption of the draft articles on the continental shelf, on fisheries and on the contiguous zones which derogated from the principle of freedom of the high seas.

65. Mr. SCELLE said that the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf did not constitute exceptions to the principle of the freedom of the high seas. They constituted limitations of or restrictions on the absolute freedom of the high seas. He agreed with Mr. Amado that the general principle must first be laid down, and then the limitations set forth in a subordinate clause.

66. The CHAIRMAN, at the request of the Special Rapporteur, asked the Commission to vote on the principle of including in article 2 a reference to the provisions concerning the policing of the high seas, the contiguous zones and the continental shelf.

67. Sir Gerald FITZMAURICE, intervening on a point of order, said that if a vote were taken on the last sentence of Mr. Sandström's (and the Special Rapporteur's) draft, he would have to vote against it; but if the sentence were amended along the lines suggested by Mr. Amado and Mr. Scelle, he would be able to support its inclusion in article 2.

68. Mr. FRANÇOIS (Special Rapporteur) agreed to the amendment suggested by Mr. Amado and Mr. Scelle.

Article 2 was unanimously adopted subject to re-drafting as proposed by the Chairman, and to re-casting of the final sentence.

Article 8 [4]; Merchant ships on the high seas
(resumed from the 284th meeting)

69. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. Zourek's draft for article 8 (A/CN.4/L.56).[7]

70. Mr. SANDSTRÖM pointed out that in the discussion[8] on article 7, the Commission had amended the text so as not to qualify the jurisdiction of the flag State as exclusive. A similar amendment would be called for in the case of article 8.

Article 8 was approved in principle.

Article 9 [6]: Merchant ships on the high seas
(resumed from the 284th meeting)

71. Mr. SANDSTRÖM proposed that article 9 be replaced by the following text:

"A ship cannot be validly registered in more

[6] *Revista española de derecho internacional* (1951), IV, 1, pp. 187 *et seq.*

[7] Article 8 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

"Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in the present articles, they shall be subject to its exclusive jurisdiction on the high seas."

[8] 284th meeting, para. 35.

than one State. A new registration shall not be valid until the previous registration is extinguished."

72. Mr. Zourek's proposed article 9 (A/CN.4/L.56)[9] appeared to suggest that it was possible for a ship's nationality to be changed at will. If that were so, the rule laid down in article 7 regarding the jurisdiction of the flag State would become meaningless.

73. Mr. ZOUREK said that Mr. Sandström's objection was met by his proposed article 10, in which it was laid down that "each State is entitled to fix the conditions to which registration and transfer of registration are subject".

74. The first two sentences of his proposed article 9 were inspired by international conventions on the registration of aircraft; the final sentence had been added to prevent a ship having two nationalities or flags.

75. The CHAIRMAN pointed out that the difference between Mr. Zourek's and Mr. Sandström's texts was not a matter of mere drafting. According to Mr. Zourek's draft, a ship flying, say, the British flag, would not require any authority from the British authorities before being re-registered in another country. The new registration would automatically cancel the old one.

76. Mr. ZOUREK explained that his purpose had been to prevent dual nationality of ships. His proposed article 10 enjoined respect for the legislation of both States concerned in the transfer of registration.

77. The CHAIRMAN pointed out that, if that were the construction placed by Mr. Zourek on his proposal, his text would have to be re-drafted.

78. Mr. AMADO pointed out that the term "transfer" was misleading.

79. Sir Gerald FITZMAURICE agreed with Mr. Amado. The case which it was intended to cover was apparently that of a ship taking a new registration. Existing international law made it possible in such a case for that ship to have a double registration. If Mr. Zourek intended the Commission to impose a definite rule that the second registration cancelled the first, that would be a case of *lex ferenda.* There would be great practical difficulties in the way of such an attempt.

80. Mr. Zourek's wording for article 9 seemed to suggest that a ship would be able to evade all its obligations under its old registration by taking out a new one. He hardly thought that such was Mr. Zourek's intention.

81. Mr. Sandström's text, on the other hand, was rather too drastic in the opposite sense. It would enable the authorities of a State to maintain a stranglehold on the ships flying its flag, since they would be able to prevent valid registration elsewhere.

82. Perhaps the Commission could find a *via media* between those two extreme courses.

83. Mr. SANDSTRÖM said that in drafting his proposal he had had in mind the case of the sale of a ship.

84. Mr. AMADO objected to the words in Mr. Zourek's draft: "registration may, however, be transferred from one State to another". A ship was private property, and did not belong to a State, nor was it transferable from one State to another. It could, however, be transferred as property from one person to another by way of sale or inheritance, and such change of ownership might affect its flag; in other words, the ship could come under the protection of a different State as the result of a transfer of property.

85. The CHAIRMAN said that the Commission was concerned with the codification of international law relating to the regime of the high seas, namely, the rights and duties of States in that connexion. The problem of the transfer of ownership of a vessel, including its effects on the flag of that ship, was a matter of maritime law rather than international law.

86. Mr. AMADO said that the first sentence of Mr. Sandström's text, namely, "a ship cannot be validly registered in more than one State", was sufficient to formulate the general principle of international law on the subject.

87. Mr. ZOUREK said there appeared to be divergent interpretations of what was meant by the nationality of a ship; whether the term referred to the ship's flag, to its right to a particular flag, or to the nationality of those owning or operating it. He agreed with Mr. Sandström that, for the purposes of the development of international law, it was sufficient to formulate the principle embodied in the first sentence of his own proposal, which was identical with Mr. Sandström's. It was not necessary to add anything else.

88. Mr. KRYLOV agreed that the first sentence was sufficient for article 9.

89. Mr. Zourek's proposed article 10 was a statement of fact which, though unobjectionable, would not solve the problem of dual nationality.

90. Finally, he proposed that Mr. Zourek's article 10 *bis* should be set aside as dealing with too special a case.

91. Mr. LIANG (Secretary to the Commission) said that, in its present state, international law allowed any State to decide how it would attribute its nationality to a ship and authorize it to use the flag of that State.

92. The Commission had two courses open to it. It could adopt a course of *lex ferenda* and lay down a new principle according to which no ship could validly be registered in more than one State. Alternatively, it could affirm the *lex lata,* and regulate the effects of dual nationality as had been done in article 9 of the draft

[9] Article 9 as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

"A ship cannot be validly registered in more than one State. Its registration may, however, be transferred from one State to another. Transfer of a registration automatically cancels the previous registration."

articles in the Special Rapporteur's sixth report (A/CN.4/79).

93. Strictly speaking, article 10 of the original draft (A/CN.4/79) was not concerned with the problem of the transfer of registration, but with the conditions under which a ship might acquire the nationality of a State or the right to fly its flag.

94. Mr. SANDSTRÖM said that the mere enunciation of the principle that a ship could not be validly registered in more than one State was not sufficient. If the Commission were to stop there, every State would be free to legislate according to its own lights, in order to prevent dual nationality; that would lead to chaos.

95. The Commission should either abandon the whole question of dual nationality or else lay down in what way such dual nationality could be avoided. For his part he had no preference for any particular method of preventing dual nationality.

96. Mr. SCELLE agreed with Mr. Sandström that it did not serve any useful purpose to lay down a principle unless its application was also provided for. If the Commission adopted article 10 of the Special Rapporteur's draft, it would be laying down a uniform international rule in the matter, a rule which would supersede municipal law; the conditions laid down by article 10 would apply to all States, which would no longer be free to legislate on the question.

97. The CHAIRMAN said that the Commission was not concerned with the unification of the rules governing the nationality of ships, but only with international law relating to the regime of the high seas.

98. Sir Gerald FITZMAURICE endorsed Mr. Liang's remarks on the present state of international law and the two courses open to the Commission.

99. The status of vessels was relevant to the regime of the high seas, but it was important in other connexions as well.

100. In view of the fact that the existing law of nations admitted the possibility of dual nationality for a ship, the best course would be for the Commission simply to state the consequences of that fact, rather than to endeavour *de lege ferenda* to eliminate the consequences of dual nationality.

101. Mr. FRANÇOIS (Special Rapporteur) recalled that his original draft article 9 had specified that a ship sailing under the flags of two or more States should be treated as if it were a ship without nationality. In that connexion it was important that the Commission should take a decision on article 10.

102. Mr. Zourek's proposal (A/CN.4/L.56) reduced article 10 to one short sentence and completely changed the meaning. He recalled that his own original draft, setting out the conditions for the recognition of a new registration, had been adopted by the Commission at its third session with only one dissenting vote.[10]

[10] *Yearbook of the International Law Commission, 1951*, vol. I, 121st meeting, para. 56.

103. He accordingly proposed that discussion on article 9 be deferred until the Commission had reached a decision on article 10.[11]

It was so agreed.

The meeting rose at 1 p.m.

[11] See *infra*, 294th meeting, para. 52.

294th MEETING

Wednesday, 18 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CN.4/L.56) (*continued*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*continued*)

Article 10 [5]: Merchant ships on the high seas
(resumed from the 285th meeting)

1. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Zourek's proposed articles 10 and 10 *bis* (A/CN.4/L.56)[1] were the very opposite of the text of article 10

[1] Articles 10 and 10 *bis* as proposed by Mr. Zourek (A/CN.4/L.56) read as follows:

Article 10:

"Each State is entitled to fix the conditions to which registration and transfer of registration are subject."

as adopted at the third session of the Commission with only one dissenting vote.[2] That text had been aimed at restricting the freedom of States by laying down the conditions under which a State could permit a ship to be registered in its territory and to fly its flag.

2. He could not accept Mr. Zourek's text for article 10 since it would allow States to fix for themselves the conditions under which their registration would be granted.

3. Mr. ZOUREK said that article 10 as drafted by the Special Rapporteur really dealt with two problems: the nationality of ships and the nationality of commercial companies and partnerships. It could not be expected that States would adopt uniform legislation concerning either.

4. The article was also unsatisfactory in another respect. It provided for registration only on the basis of ownership, although in many States—Czechoslovakia, for example—it was possible for a ship to be registered by an operator who was not the owner.

5. He felt, with other members of the Commission, that the best course would be simply to state the general principle, and not to go into such details as the nationality of partners or shareholders in commercial concerns owning ships. As regards the principle, he was in favour of recognizing the flag of a ship only in cases where it had been registered by a person or a legal entity of the same nationality as the flag, or if it actually belonged to the flag State.

6. Mr. SCELLE preferred the Special Rapporteur's draft to Mr. Zourek's proposal, because the former laid down conditions for the acquisition of a given flag by a ship. In fact, he would favour even stricter conditions; in particular, that the captain and the majority of the crew of the ship should have the same nationality as the flag: that condition had been proposed by Mr. François at the third session, but the Commission had not adopted it.[3]

7. With regard to proviso (*a*) of article 10, he proposed that persons permanently resident in the territory of the State concerned should also be required to be domiciled there before they could register a ship in that State. He also proposed that the requirement in proviso (*b*) should be a majority of nationals—or fifty-one per cent ownership—which was usual in most countries.

8. As to proviso (*c*), it was not sufficient to require that such joint stock companies should be organized under the laws of, and have their registered offices in the territory of, the State concerned; it must also be stipulated that the company should have its operating head office, as distinct from its nominal registered office, in that State. Finally he proposed the addition of a requirement that the majority of the managers and directors of the company be nationals of the flag State.

9. Mr. FRANÇOIS (Special Rapporteur) said that in his second report (A/CN.4/42),[4] submitted to the Commission at its third session, he had drawn inspiration, with regard to the nationality of ships, from the work of the Institute of International Law at its session held in Venice in 1896.[5] The Institute's draft had served as the basis for discussion at the Commission's third session (121st meeting), when Mr. Manley O. Hudson had suggested a number of improvements to it.

10. As explained in his second report, the legislation of the majority of countries required the captain, and frequently also a proportion of the crew, of a ship to possess the nationality of the country concerned as a condition for registration in that country. He had accordingly then proposed a set of rules embodying principles adopted by nearly all States and constituting the basis of international law on the matter. Provisos (a), (*b*) and (*c*) concerning the ownership of the ship as then drafted did not differ substantially from the proposals now before the Commission. He had, however, proposed a further requirement, namely, that the captain should possess the nationality of the State to which the flag belonged.[6] That second condition was extremely useful, in that it constituted an assurance that the law of the flag State would be properly enforced on board by a captain familiar with it and was a guarantee against unjustified concession.

11. The Commission had examined the question and approved the principle underlying his conclusions, namely, that States were not entirely at liberty to lay down conditions governing the nationality of ships as they thought fit but must observe certain general rules of international law governing the subject. It had given a first reading to the concrete provisions proposed by the rapporteur;[7] but the majority, while recognizing its desirability, had considered the rule concerning the nationality of the captain too strict, considering that allowance must be made for the fact that certain States still lacked sufficient qualified personnel to enable them to comply with the condition.

12. Although not sharing that opinion, he had naturally deferred to the Commission's decision, and had accordingly omitted the requirement concerning the captain's nationality from the relevant article in his sixth report.

Article 10 *bis*:

"In exceptional cases and for urgent reasons, the right to sail under the national flag may be granted by the government of any State for a strictly limited time to a ship which has not yet been entered in the national register, provided, however, that the owner or charterer of the ship is a national of the State in question."

[2] See *Yearbook of the International Law Commission, 1951*, vol I, 121st meeting, para. 56.

[3] *Ibid.*, paras. 103–127.

[4] In *Yearbook of the International Law Commission, 1951*, vol. II.

[5] Asser-Reay Report to the Institute of International Law, Venice 1896, *Annuaire de l'Institut de droit international*, vol. 15, p. 52.

[6] A/CN.4/42, para. 16.

[7] See "Report of the International Law Commission covering the work of its third session" (A/1858), para. 79, in *Yearbook of the International Law Commission, 1951*, vol. II.

13. Mr. SCELLE said that insistence on the captain's nationality being that of the flag would serve as a protection against the growing use of fictitious flags. In recent years there had been cases of the artificial inflation of the merchant navies of certain small States that had been prompted by a desire on the part of the owners and operators of the ships to evade the obligations imposed by the flag of the State to which they really belonged. If that tendency were not checked, the day might come when the flag of some small, and possibly land-locked principality, would fly over the largest merchant fleet in the world.

14. Mr. KRYLOV agreed with Mr. Scelle, and supported his proposal for the re-instatement of the requirement that the captain should have the nationality of the flag.

15. With regard to the three categories of owners dealt with in provisos (*a*), (*b*) and (*c*), one important category of ships, those owned by the State, had been omitted. Such ships should constitute a first category to be followed by the other three.

16. In view, too, of the disparity between the Anglo-Saxon and the French legal systems in the matter of commercial partnerships and companies, it might be as well to make the references to such legal entities in more general and flexible terms.

17. Sir Gerald FITZMAURICE agreed with Mr. Krylov that certain types of partnership, such as the *société en commandite* of French legal terminology, had no exact parallel in English law, so that the reference in proviso (6) to such a company would be inoperative so far as countries using the Anglo-Saxon legal system were concerned. But he would personally have no objection to leaving the provision as it was: the rest of the article applied to the United Kingdom, for example, and the provision concerning *sociétés en commandite* would apply only to countries in which such a partnership was known.

18. Mr. SANDSTRÖM pointed out that the possibility offered by proviso (*c*) of registering a ship in a State where the joint stock company owning it was itself organized and registered made the apparent stringency of provisos (*a*) and (*b*) quite illusory: it was very difficult to regulate the organization of joint stock companies, and it would therefore be quite easy to evade all restrictions by the simple process of transferring ownership to a joint stock company formed for that sole purpose.

19. It might be true that the reinstatement of the requirement concerning the captain's nationality, as proposed by Mr. Scelle, was the only way of preventing the use of fictitious flags, but so drastic a step would be unfair to certain States which did not yet possess a sufficient number of qualified officers.

20. Mr. AMADO noted that no reference had been made to certain types of company, in particular the *société à responsibilité limitée* (corresponding roughly to a private limited company) and companies partly owned by the State. The latter were of especial importance because in many countries ships were owned by companies in which the State held half, or sometimes fifty-one per cent, of the stock.

21. To meet all contingencies, he proposed that reference be also made in article 10 to: "any other form of commercial company organized in accordance with the laws of that State".

22. Mr. SCELLE considered it would be illusory to endeavour to trace the ownership of the stock of a company, and that the only valid criterion for the nationality both of a company and of any ship it owned was the nationality of the directors and managers, that was, of the persons responsible for the control and direction of the firm in question and of the ship itself.

23. Mr. ZOUREK said that the detailed provisions of clauses (*a*), (*b*) and (*c*) of the Special Rapporteur's text for article 10 could not be expected to bring order into the matter of the nationality of ships. As Mr. Sandström had just pointed out, it would be only too easy to transfer a ship to the ownership of a joint stock company with a purely fictitious registered office in a country chosen, for their own convenience, by the ship's real owners. Such possibilities of manipulation were indeed the reason why the legislation of many States required joint stock companies organized under their laws to be effectively controlled by their nationals; some countries even required all shares to be nominative.

24. Mr. SANDSTRÖM said that even the requirement that the directors of the proprietary company should be nationals of the flag State might prove illusory, since it was possible to appoint nominees with no effective powers.

25. Mr. AMADO said that the discussion showed quite clearly that the only possible way to ensure that the flag really represented the nationality of the ship was to insist that the captain be a national of the flag State. He recalled that in earlier times the master's word of honour used to be accepted as evidence of the identity of a ship.

Article 10 was approved in principle by 7 votes to 4, with 2 abstentions, subject to drafting changes to incorporate Mr. Scelle's suggestion regarding domicile and Mr. Amado's proposal that all types of company be covered.

Mr. Scelle's proposal that the captain must possess the nationality of the flag State was rejected, by 4 votes to 4, with 4 abstentions.

Mr. Krylov's proposal that the category of State-owned ships be included in article 10 was adopted, by 9 votes to none, with 4 abstentions.

Mr. Scelle's proposal that clause (b) be amended to refer to more than half the partners, instead of half the partners of the partnership or company concerned, was adopted, by 9 votes to none, with 3 abstentions.

26. The CHAIRMAN said that the Drafting Committee would re-draft article 10 accordingly. There remained,

however, Mr. Sandström's proposal that a second paragraph be added to the article, reading:

> "Each State shall also determine the conditions under which a registration may be cancelled (extinguished."

27. Mr. FRANÇOIS (Special Rapporteur) recalled that at its previous meeting[8] the Commission had discussed Mr. Zourek's proposal concerning article 9 (A/CN.4/L.56), which laid down that a ship could not validly be registered in more than one State; that proposal was still under consideration by the Commission, which had deferred its decision on article 9.

28. The intention of the Commission was to prevent dual nationality of ships. Should a ship sail under more than one flag, it would appear that only one of those flags should be regarded as legitimate.

29. Unfortunately, the case could occur of the ownership of a ship being legitimately transferred to a person or to a legal entity of a different nationality, and it would be undesirable in such an event to adopt the principle embodied in Mr. Sandström's proposed second paragraph to article 10; for that provision would give the flag State what would amount to a stranglehold on the ship, in that its authorities would be in a position to refuse to cancel the old registration, thus gravely embarrassing the new owners in respect of the change of registration to which they were entitled.

30. There were two alternative courses, either of which the Commission could properly take. One was to make no reference at all to the possibility of dual flag—an occurrence which was, in any event, very rare. The other was to revert to the text of article 9 in his sixth report (A/CN.4/79), which laid down that a ship sailing under more than one flag should be treated as though it had no nationality. Thus a ship holding certificates of registry (or sea-letters and/or sea-briefs) emanating from more than one State would be penalized by deprivation of the right to all protection.

31. Mr. SANDSTRÖM said that the legislation of certain States prohibited the sale of their ships to aliens. If that were true of the flag State, a provision such as his proposed second paragraph was necessary.

32. Sir Gerald FITZMAURICE pointed out that the provisions of article 10, which recognized the national character of a ship, did not render dual nationality impossible. It would be possible for a ship to qualify for the nationality of one State on the ground that it belonged to nationals or residents of that State, while at the same time qualifying for the nationality of another State on the ground that its owners had registered the operating company in that State. Article 10, as adopted by the Commission, rendered dual registration more difficult, but did not preclude it altogether.

33. Mr. SCELLE agreed with Sir Gerald Fitzmaurice that article 10 did not dispose of the problem of the dual flag, which was somewhat similar to that of dual nationality of individuals; the only solution to the latter was to allow the person concerned to choose between his two nationalities. In the case of ships, the only way to arrive at unity of flag was to allow the owner or the responsible operator of a vessel with dual nationality to choose between the flags involved.

34. Mr. FRANÇOIS (Special Rapporteur) said that under the terms of article 9 of his draft a third-party State would be entitled to draw its own conclusions regarding the true nationality of a ship sailing under more than one flag.

35. Mr. SCELLE considered the Special Rapporteur's solution unsatisfactory, in that different States might take conflicting decisions regarding one and the same ship.

36. Mr. ZOUREK said that Mr. Scelle's suggestion that the option be given to the owners or operators of the ship did not tally with the provisions of article 10 as adopted by the Commission, which laid down the conditions on which the nationality of a ship would be recognized. It therefore followed that a ship which ceased to satisfy those conditions would automatically lose its first nationality, and would thus be entitled to acquire a new one corresponding to that of the new controlling interest as defined in the rules laid down in the article.

37. A provision along the lines suggested by Mr. Sandström was necessary to give States the right to regulate the cancellation of their registration.

38. Mr. LIANG (Secretary to the Commission) pointed out that the Commission had adopted article 10 before taking a decision on article 9. He would submit that, in view of the first sentence of article 10 as adopted ("Each State may fix the conditions on which it will permit a ship to be registered in its territory and to fly its flag"), the Commission would be contradicting itself if it also adopted article 9 in the form proposed by Mr. Zourek and Mr. Sandström: "A ship cannot be validly registered in more than one State." Such a provision would nullify the right accorded to States by article 10 to fix the conditions on which ships might be registered in their territory.

39. Comparing the situation with that of dual nationality of an individual, it was clear that if the principle were established that a person could have only one nationality, it would be impossible to accord also to each State the right to fix the conditions on which it would grant its nationality.

40. The language of the second sentence of article 10 left some doubt as to its legal implications. The suggestion that the conditions laid down therein were required for the purposes of the recognition by other States of the ship's national character was something of a novelty.

41. Were the provisions of article 10 concerning the conditions for recognition of the national character of a

[8] 293rd meeting, paras. 71–103.

ship intended to be mandatory, then the second sentence constituted a limitation of the right acknowledged to States in the first sentence. Should a ship fail to fulfil the conditions laid down in the last three clauses of article 10, it would follow that the State concerned would not be at liberty to grant it registration.

42. If the Commission intended to legislate along the lines suggested by Mr. Zourek and Mr. Sandström, proclaiming that a ship could not be validly registered in more than one State, it would be necessary to amend the first sentence of article 10.

43. It was improbable that a majority of States would accept such a limitation of their freedom of action. The United Nations Secretariat was making a compilation of national legislations relating to the nationality of ships, which had already revealed the great variety of conditions which States stipulated for the grant of registration. Article 10 contained only a fraction of the conditions usually imposed, and States could hardly be expected to relinquish all those which did not conform with the criteria adopted by the Commission.

44. Mr. FRANÇOIS (Special Rapporteur) repeated his view that dual nationality of ships was an extremely rare occurrence, and proposed that article 9 be deleted.

45. Sir Gerald FITZMAURICE said it would be undesirable to delete article 9 altogether. Its provisions made it a perfectly legitimate article in the context. Those provisions formulated existing international law, which had been expressed as follows by Oppenheim:

> "A vessel sailing under the flags of two different States, like a vessel not sailing under the flag of any State, does not enjoy any protection whatever."[9]

46. It would be difficult for the Commission to lay down precise rules for preventing dual nationality. What it could do was to draw attention to the consequences of dual nationality when it occurred, and provide a sanction: it was proper to proclaim that ship-owners using more than one flag would be penalized by withdrawal of protection.

47. Mr. SCELLE agreed with Sir Gerald Fitzmaurice. The provision would not in practice be invoked in the case of a ship flying two flags simultaneously, which would be too simple. It was aimed at stopping the abusive practice of a vessel sailing successively under more than one flag, a practice which enabled a ship to emulate the bat in La Fontaine's fable, which would alternatively, as convenient, say either: "Je suis oiseau, voyez mes ailes", or "Je suis souris, vivent les rats!" Unscrupulous shipowners could, and unfortunately often did, change the flag of their ships to suit their purposes, and sometimes to evade their obligations.

48. Mr. ZOUREK said that the first two sentences of his proposed article 9 were inspired by conventions on the registration of aircraft; they had the immense advantage of facilitating the new registration when a legitimate change of ownership entailed a change of nationality. For his part, he would only insist on the first sentence of his proposal.

49. Mr. AMADO said that the first sentence of Mr. Zourek's proposal stated a valuable principle.

50. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had still to take a decision on Mr. Sandström's proposed second paragraph to article 10.

51. The CHAIRMAN proposed that further discussion of Mr. Sandström's proposal be deferred until the Commission had voted on article 9.

It was so agreed.

Article 9 [6]: Merchant ships on the high seas
(resumed from the 293rd meeting)

52. Mr. SANDSTRÖM suggested that, in order to prevent dual nationality, a provision might be included to the effect that no ship could be registered in a new State until its previous registration had been cancelled.

53. Mr. SCELLE proposed that a provision be included giving the persons responsible for a ship the right to make a declaration before a judicial authority with the object of determining the effective nationality of the ship: such provision for an option would run parallel with the provisions in force in most countries for solving problems of dual nationality of individuals.

54. Faris Bey el-KHOURI approved of the Special Rapporteur's draft for article 9, which laid down the consequences in international law of dual flag; it was impossible to avoid dual nationality of ships altogether, and the Special Rapporteur's was the only wise solution.

55. He also approved of Mr. Scelle's proposal that the owner or owners of a ship should have the option of choosing between two or more possible flags; but if they did not make a frank choice and used more than one flag, the sanction of withdrawal of protection should apply.

56. Mr. SANDSTRÖM said that he was prepared to withdraw his text, which had been put forward as a counter-proposal to Mr. Zourek's amendment the precise implications of which he might have failed to appreciate.

57. The CHAIRMAN considered that, under the terms of the original text of article 9, it would be in the interest of shipowners to register in one State only; otherwise they would suffer the penalty of their ships being treated as ships without nationality.

58. Mr. ZOUREK said that until he knew the fate of article 9, which, to him, was totally unacceptable, and would give rise to great difficulties in practice, he could not decide whether or not to maintain his amendment. Rather than see it included in the present draft articles he would prefer it to be deleted.

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[9] *International Law*, seventh edition, vol. I, pp. 546–547; eighth edition, vol. I, pp. 595–596.

59. Mr. SCELLE observed that if article 9 were deleted the Commission would be allowing ships to sail under more than one flag.

60. The CHAIRMAN put to the vote the proposal that article 9 be deleted.

The proposal was rejected by 8 votes to 2 with 3 abstentions.

61. Mr. KRYLOV proposed the deletion of the words "and shall be treated as though it were a ship without a nationality", since it was not at all clear who should take the decision.

62. Mr. FRANÇOIS (Special Rapporteur) pointed out that the State into one of whose ports a ship sailing under two flags entered would be free to decide to which of the two States it belonged, or whether it should be regarded as a ship without nationality. He could not support Mr. Krylov's amendment, for he was convinced that the heaviest possible sanction should be imposed against dual nationality.

63. Sir Gerald FITZMAURICE said that Mr. Krylov's question had been answered by Oppenheim in the following passage:

> "The Law of Nations does not include any rules regarding the claim of vessels to sail under a certain maritime flag, but imposes the duty upon every State having a maritime flag to stipulate by its own municipal laws the conditions to be fulfilled by those vessels which wish to sail under its flag. In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a state."[10]

64. Thus ships sailing under two or more flags were assimilated to ships without a flag and hence without any claim to protection.

65. Mr. GARCÍA AMADOR supported Mr. Krylov's proposal because he did not think there was any justification for a sanction of the kind proposed by the Special Rapporteur.

66. Mr. SCELLE considered that Mr. Krylov's amendment would not affect the meaning of the article, since ships sailing under two or more flags would still be unable to claim any of the nationalities in question.

67. The CHAIRMAN, speaking as a member of the Commission, disagreed with Mr. Scelle's interpretation since it was only with respect to another State that such ships would be unable to claim the nationalities of the flags it flew. It was the State aggrieved which should decide what law should be applied.

68. Mr. SCELLE maintained that such ships would still be ships without a nationality.

69. Mr. GARCÍA AMADOR observed that the legal status of such ships was similar to that of persons possessing dual nationality, who enjoyed protection in both the States concerned, though not elsewhere.

70. Mr. AMADO said that up to a point Mr. García Amador's comparison was a cogent one. However, he was still in favour of the sanction imposed in the original version of article 9, although he had previously been disposed to support Mr. Sandström's amendment.

71. The CHAIRMAN put to the vote Mr. Krylov's amendment consisting in the deletion of the words "and shall be treated as though it were a ship without a nationality".

The amendment was rejected by 6 votes to 5 with 2 abstentions.

72. Sir Gerald FITZMAURICE considered that the English translation of the words *sera assimilé à* in the French text was rather too strong, and therefore proposed that the words "assimilated to" be substituted for the words "treated as though it were".

It was so agreed.

73. Mr. ZOUREK said that in the light of the foregoing discussion he must press for the insertion at the beginning of article 9 of the first sentence of his amendment, namely: "A ship cannot be validly registered in more than one State"; unless it included such a provision the Commission would have done little towards eliminating the possibility of dual flag and disputes arising therefrom.

Mr. Zourek's amendment was rejected by 4 votes to 4 with 5 abstentions.

74. The CHAIRMAN put to the vote the original text of article 9 (A/CN.4/79), as amended in the English version by Sir Gerald Fitzmaurice.

Article 9 as amended (in English only) was adopted by 8 votes to none, with 4 abstentions.

75. Mr. ZOUREK said that he had abstained from voting on the text because it implied that ships could possess several nationalities and would give rise to difficulties in practice.

76. Mr. SCELLE explained that he had voted for the text, but with a mental reservation that it would only serve a useful purpose if the right of approach and the right of verification of the flag were recognized.

77. Faris Bey el-Khouri said that he had voted for the text because he did not think it would entail any difficulties, since ships with two nationalities would use only one flag at a time.

Articles 13 and 15 [9]: Safety of shipping
(resumed from the 285th meeting)

78. Mr. FRANÇOIS (Special Rapporteur) submitted a new text to replace articles 13 and 15, which read:

> "States shall issue, for their ships, regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not

[10] *Ibid.*, seventh edition, p. 548.

be inconsistent with those fixed by international agreement and applying to the majority of sea-going vessels, if such inconsistency would jeopardize the safety of life at sea."

79. Members would note that, in accordance with the views expressed during the previous discussion on article 13,[11] he had substituted for the words "the majority of maritime States" the words "the majority of sea-going vessels".

80. Mr. SANDSTRÖM said he would prefer that the article referred to tonnages than to sea-going vessels.

81. Mr. SCELLE agreed with Mr. Sandström, and also considered that the word "majority" should be qualified by the word "substantial".

82. Mr. FRANÇOIS (Special Rapporteur) said that both amendments were acceptable to him.

83. Mr. ZOUREK doubted whether Mr. Sandström's amendment would be a change for the better, since the article dealt with the protection of safety of life at sea, and it was clearly for each vessel, whatever its size, to respect the regulations concerning signals and the prevention of collisions.

84. Mr. KRYLOV opposed Mr. Sandström's amendment because it would tend to obscure the real purpose of the provision.

85. Mr. SCELLE favoured Mr. Sandström's amendment because it brought out more clearly that it was the obligation of the flag State to ensure that the regulations were observed by its own vessels. If it failed to take steps against any infringement of the regulations it should be made answerable before an international tribunal.

86. Mr. ZOUREK said that where safety was concerned the size of the vessel was of no moment, since small ones could inflict as much damage as large ones.

87. The CHAIRMAN, speaking as a member of the Commission, observed that the majority envisaged in the article was not a strictly numerical one.

88. Mr. SCELLE said that he had already illustrated the nature of the majority referred to in article 13 by reference to the composition of the Governing Body of the International Labour Office. In the present instance safety regulations were the creation of the main maritime powers.

89. Mr. ZOUREK did not think that Mr. Scelle's illustration was particularly germane to the problem of the safety of the high seas.

90. The CHAIRMAN, speaking as a member of the Commission, wondered whether the Commission might not be well advised to revert to the original text which, after all, was the fruit of long and careful study by an expert in the domain.

91. Mr. LIANG (Secretary to the Commission) observed that the inclusion of the words "by international agreement" presupposed that the regulations would be accepted by the majority. However, that would not be so if the agreement in question was a hypothetical one, and so far as the French text was concerned he was uncertain whether the words "par la voie internationale" were equivalent to "par un accord international".

92. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Scelle's point was not clearly brought out in the text as it stood, since an international agreement might be concluded by only a small number of States.

93. Mr. SCELLE said that the regulations with which article 13 was concerned were a typical instance of the growth of customary rules in response to need. For example, the French Government followed, without there being any formal agreement between the two countries, the United Kingdom practice with regard to sea routes. He favoured that kind of natural development of international law as distinct from deliberate codification.

94. Mr. FRANÇOIS, Special Rapporteur, said that he had had in mind not only customary rules but also tacit acceptance, as opposed to formal conventions, of certain regulations; that was why he had used the phrase "by international agreement".

95. Mr. AMADO pointed out that the purpose of article 13 was to prevent the establishment of regulations by one State alone. It conferred on the majority the rights previously exercised by the principal maritime Powers.

96. Sir Gerald FITZMAURICE said that the words "fixed by international agreement" were misleading, because it was only in certain spheres of maritime law that definite agreements existed, such as the International Load Line Convention Signed at London, on 5 July 1930[12] and the conventions for the safety of life at sea signed at London, on 10 June 1948.[13] But in other fields certain rules had come to be generally accepted and applied. It might, therefore, be advisable to substitute such wording as "generally accepted internationally and applicable" for the words "fixed by international agreement and applying".

97. Mr. LIANG (Secretary to the Commission) considered that the notion of regulations established by the majority of maritime States was not adequately conveyed by the words "by international agreement"; moreover, the Special Rapporteur had made no mention of how, or by whom, such regulations had been evolved. The applicability of such regulations was an entirely separate issue.

98. Mr. KRYLOV supported Sir Gerald Fitzmaurice's suggested wording, which was both clear and simple. All States recognized existing regulations on signals and

[11] 285th meeting, paras. 18–43.

[12] League of Nations, *Treaty Series*, vol. CXXXV, p. 32.

[13] United Nations, *Treaty Series*, vol. 191, pp. 21–57.

collisions, and there was no need to distinguish between the majority and the minority.

99. In reply to a question by Mr. AMADO, Sir Gerald FITZMAURICE said that his wording might be rendered in French by the phrase: *règles qui ont reçu l'accord général international.*

100. Mr. FRANÇOIS (Special Rapporteur) pointed out that if the regulations had been generally accepted there would be no need for article 13.

101. Sir Gerald FITZMAURICE, agreeing with the Special Rapporteur, observed that the purpose of the article was to oblige States to conform to generally accepted rules which *ex hypothesi* were not necessarily accepted by all States. It was essential to ensure that States did not issue regulations inconsistent with those observed by the great majority.

102. Mr. SCELLE proposed that the question whether the words "by international agreement" should be referred to the Drafting Committee.

103. Sir Gerald FITZMAURICE felt that the question whether the article should refer to the majority of sea-going vessels or to the greater part of the tonnages should be referred to the drafting committee. In the meantime, the Commission should not vote on the principle until a revised text had been circulated.

104. Turning to the final words of the article, reading "if such inconsistency would jeopardize the safety of life at sea", he asked whether it was either necessary or desirable to introduce such a subjective element. Who, for instance, was to decide whether certain regulations would endanger the safety of life at sea? It could be argued that any regulations differing from those in general use must do so, since the essence of safety regulations was their universal application. However excellent *per se*, any deviation from the general regulations must in most cases be a danger, and he therefore proposed the deletion of those words.

105. Mr. SCELLE wholeheartedly supported that view. The phrase not only served no useful purpose, but was positively harmful.

106. The CHAIRMAN reminded the Commission that during the earlier discussion of article 13 he had proposed that the words "in respect of" be inserted before the words "safety of life at sea".[14]

107. Mr. LIANG (Secretary to the Commission), observing that he had raised the same point as the Chairman, considered that the problem would be overcome if the last phrase in the new text were replaced by some such wording as "any matters regarding safety of life at sea".

108. Mr. FRANÇOIS (Special Rapporteur) said that the purpose of the wording to which Sir Gerald Fitzmaurice objected was to attenuate the stringent character of the provision. In his view, some latitude should be given to States to issue, for instance, rules of minor importance which could not possibly jeopardize the safety of life at sea, or regulations for areas where there was practically no international navigation.

109. Sir Gerald FITZMAURICE appreciated the Special Rapporteur's motives, but considered that his preoccupation was covered by the words "Such regulations must not be inconsistent with..." The Chairman's earlier proposal for the final words in the article would be acceptable.

110. Mr. LIANG (Secretary to the Commission) said that if his suggested wording were acceptable, the Special Rapporteur's point would be met, since rules of minor importance obviously had nothing whatsoever to do with safety of life at sea.

111. Mr. SCELLE reaffirmed his conviction that the last phrase in the Special Rapporteur's new text should be deleted, since it was nothing more than a repetition which would undoubtedly impair the force of the article.

112. The CHAIRMAN put to the vote the proposal to substitute the words "in respect of safety of life at sea" for the words "if such inconsistency would jeopardize the safety of life at sea".

The proposal was adopted by 10 votes to 1, with 2 abstentions.

It was decided to refer the new text to replace articles 13 and 15, as amended, to the Drafting Committee.

Order of business

113. The CHAIRMAN drew attention to the fact that the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/CONF.10/6)[15] had now been circulated, and asked whether the Commission wished to take up the question of fisheries after it had disposed of Mr. Scelle's proposal concerning arbitration.

114. Mr. GARCÍA AMADOR considered that the report might be taken up after item 3, particularly as it was closely linked with the question of the territorial sea.

It was so agreed.

The meeting rose at 1.10 p.m.

[14] 285th meeting, para. 36.

[15] United Nations publication, Sales No.: 1955.II.B.2.

295th MEETING

Friday, 20 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79) (*resumed from the 294th meeting*)

DRAFT ARTICLES (A/CN.4/79, SECTION II) (*resumed from the 294th meeting*)

Proposed article 35: Arbitration
(resumed from the 291st meeting)

1. The CHAIRMAN invited the Commission to continue its consideration of the new article concerning arbitration proposed by Mr. Scelle.[1]

2. Mr. SCELLE said that the inclusion of such a provision in the draft articles on the high seas would be consistent with previous decisions taken by the Commission and would establish a procedure for the settlement of any disputes arising out of the rules it was in process of establishing. Since such disputes might be numerous, he considered that they should be submitted either to the Permanent Court of Arbitration or to a special arbitral tribunal, rather than to the International Court of Justice with its somewhat lengthy procedure, though that possibility was not excluded by his text, States being given the widest latitude to choose whichever method they preferred. He had been guided by the example of the nature and growth of social legislation in his own country, being convinced that in international matters some judicial instance was necessary to interpret and define conventional law.

3. Mr. GARCÍA AMADOR said that he could agree to the inclusion of such a provision. Although civil and penal international responsibilities were not clearly distinguished at the time of Anzilotti, present practice had established a distinction between the two. He considered that latitude should be left to the tribunal to which disputes were referred to decide whether or not responsibility should be confined to States, and therefore proposed that the reference to States in the first sentence be deleted.

4. Mr. EDMONDS believed that it was not a proper function of the Commission to incorporate in its draft articles a provision imposing on individuals obligations of the kind envisaged. It was not clear from the text whether it would be possible for an individual to sue a government for a violation of the rules.

5. However, he would not go further into the merits of the text because he wished to suggest that its consideration be deferred until the Commission had disposed of the question of fisheries.

6. Mr. HSU considered that it would be in the international interest to include a provision concerning the procedure to be followed for the settlement of disputes, and did not regard Mr. Edmonds' objections as very well founded.

7. As to the procedural question, perhaps such a general provision should be dealt with after item 3, since it related both to the high seas and to the territorial sea. Moreover, as the Commission had not yet reached agreement about the width of the latter, it would have to consider some procedure for reconciling conflicting claims on that issue.

8. In reply to a question by the CHAIRMAN, Mr. SCELLE said that he would have no objection to his proposal being taken up after the Commission had concluded its consideration of items 2 and 3. He had put forward his proposal because the draft under discussion was in the form of a series of pious wishes rather than precise obligations binding on governments. He therefore considered it necessary to add a clause on jurisdiction, which pre-supposed the possibility of sanctions.

9. Mr. SALAMANCA had understood the Commission to have decided at the previous meeting to take up the question of fisheries after item 3. He therefore con-

[1] 291st meeting, para. 79.

sidered that Mr. Scelle's proposal should be dealt with only when both those matters had been disposed of.

10. The CHAIRMAN suggested that the Commission take up Mr. Scelle's proposal so soon as it had completed its discussion of items 2 and 3.

It was so agreed.

11-12. Mr. GARCÍA AMADOR asked that it be understood that the Commission might provide two different systems of arbitration: one for the high seas and one for the territorial sea. It should not at the present stage commit itself to a single uniform system.

It was so agreed.

Composition of Drafting Committee

13. The CHAIRMAN proposed that the Drafting Committee should consist of Sir Gerald Fitzmaurice, Mr. François, Mr. García Amador and Mr. Scelle, with Mr. Krylov as Chairman.

It was so agreed.

14. Mr. ZOUREK asked that the Drafting Committee should take into account his proposed addition to article 2 on the régime of the high seas (A/CN.4/L.52).[2] In his view, such a provision was essential if the long-established principle of the freedom of the seas was to be protected. He noted that a proposal in the same sense had been made by Mr. Sandström.

15. Mr. FRANÇOIS (Special Rapporteur) observed that the proposals would be considered by the Drafting Committee, together with his own proposed new text for article 21 which he said at the 289th meeting that he would re-draft.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 4, A/CN.4/93, A/CN.4/L.54)

16. The CHAIRMAN opened the discussion on item 3 of the agenda: régime of the territorial sea.

17. Mr. LIANG (Secretary to the Commission) observed that the comments of the Governments of Egypt and Thailand (A/CN.4/90/Add.4) had arrived too late to be taken into account by the secretariat when preparing its working paper (A/CN.4/L.54).

18. Mr. FRANÇOIS, (Special Rapporteur) explained that he had not prepared a further report on the territorial sea. The provisional articles adopted by the Commission at its sixth session were to be found in its report to the ninth session of the General Assembly.[3]

19. In view of the limited response of governments in the past to the Commission's recommendations, he welcomed the fact that sixteen had submitted comments on the draft articles, including five of those represented on the Commission; viz, Brazil, the Netherlands, Sweden, the United Kingdom and the United States of America. Several of the comments had been extremely interesting and revealed that attention was being given to the Commission's work. He appealed, however, to those members of the Commission whose governments had not replied to urge them to do so in future. The comments of governments reproduced in documents A/CN.4/90 and Addenda 1 to 4 thereto had, with the exception of those of Egypt and Thailand, been summarized by the secretariat in its working paper. In the light of those comments, he had submitted certain amendments (A/CN.4/93) to the draft articles adopted at the previous session.

20. Generally speaking, the Commission's draft articles had been favourably received, and several governments had paid a tribute to the contribution it was making to the development of international law in respect of the territorial sea.

21. He suggested that the Commission take up the provisional articles one by one; that would enable him briefly to recapitulate the comments made by governments and to explain the reasons for such modifications as he had proposed.

It was so agreed.

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)

Article 1 [1]: Juridical status of the territorial sea; and article 2 [2]: Juridical status of the air space over the territorial sea and of its bed and subsoil

22. Mr. FRANÇOIS (Special Rapporteur) observed that there had been few observations on article 1, but it would call for modification if the Commission acted on the Netherlands Government's comment that the qualification laid down in paragraph 2 also applied to article 2. That point could be covered by making article 2 the second paragraph of article 1, paragraph 2 of which would then become article 2, a solution which had the virtue of making it unnecessary to renumber the remaining articles.

23. Mr. EDMONDS suggested that the Drafting Committee might, in the interests of consistency, consider substituting the word "articles" for the word "regulations" in paragraph 2 of article 1.

24. He saw no objection to the change suggested by the Special Rapporteur.

25. The CHAIRMAN considered that it would be preferable in the English text of paragraph 2 to use the word "rules" instead of "regulations".

The two foregoing observations were referred to the Drafting Committee.

26. Mr. ZOUREK observed that if the Commission accepted the Special Rapporteur's proposal that articles 1 and 2 be amalgamated, it would reverse the decision,

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[2] See 283rd meeting, footnote 13.

[3] "Report of the International Law Commission covering its sixth session" (A/2693), Ch. IV, in *Yearbook of the International Law Commission, 1954*, vol. II.

taken at the previous session after long discussion, that the Commission should uphold the difference, recognized in practice and theory, between the régime of the territorial sea and the juridical status of the air space above it. It meant that sovereignty over the air space would be subject to the same restrictions as sovereignty over the territorial sea, a proposal which he could not accept, since it would be at variance with the law as it stood. Such a change was hardly warranted by the comment of one government alone, and he noted that no other had raised a similar objection.

27. Mr. FRANÇOIS (Special Rapporteur) observed that if Mr. Zourek's last argument had any force there would be little point in considering any of the replies from governments, since they generally singled out different points. If Mr. Zourek thought it would be a fundamental change to make a separate article of paragraph 2 of article 1, he would be prepared to repeat the text in article 2 in precisely the same terms. At all events, the inclusion of the words "other rules of international law" should make it plain that the restriction on sovereignty imposed by paragraph 2 was not the same for the air space as for the territorial sea. Adoption of the modification he (Mr. François) had suggested would entail no change of principle.

28. Mr. SALAMANCA pointed out that the adoption of the Special Rapporteur's amendment would eliminate the title of article 2; that might meet Mr. Zourek's point.

29. Mr. ZOUREK could not accept the Special Rapporteur's contention that it would suffice to repeat in article 2 paragraph 2 of article 1. The point at issue was that, unlike the case of the territorial sea, no limitations existed on sovereignty so far as the air space was concerned. At any rate he personally knew of no such restrictions, and did not consider that the air space could be treated on the same footing as the territorial sea.

30. Mr. AMADO, pointing out that the sole reference in the provisional articles to the air space above the territorial sea was that to be found in article 2, said that he was inclined to sympathize with Mr. Zourek's point of view.

31. The CHAIRMAN, speaking as a member of the Commission, suggested that the Commission might be well advised to eschew change, particularly as there were advantages in allotting a separate article to the question of air space in a draft otherwise entirely devoted to the territorial sea.

32. Sir Gerald FITZMAURICE associated himself with the views expressed by Mr. Zourek and Mr. Amado, though he appreciated the reason why the Special Rapporteur had thought the embodiment of article 2 in article 1 appropriate. It would not in fact be so, because of the ambiguity created by the use of the words "these regulations" in paragraph 2 of article 1, when the air space was not dealt with elsewhere in the draft. Such rules as did exist on the matter derived almost entirely from different international conventions. He therefore believed that the text should be left unchanged.

33. Mr. SANDSTRÖM agreed with the previous speaker.

34. Mr. FRANÇOIS (Special Rapporteur) observed that aircraft were subject to the jurisdiction of the State of registration; accordingly, there was a limitation on the sovereignty exercised over the air space above the territorial sea. While he would not press his amendment, he could not agree that it was inappropriate to mention the restrictions on sovereignty over the air space above the territorial sea, since they did in fact exist.

Article 1 was adopted unchanged by 11 votes to none, with 2 abstentions.

Article 2 was adopted unanimously.

35. Mr. ZOUREK explained that he had abstained from voting on article 1 because he was opposed to the reference to "other rules of international law", believing that the draft articles should be comprehensive.

36. Mr. KRYLOV said that, though he had himself supported article 1, he fully understood the considerations which had prevented Mr. Zourek from doing so. In his (Mr. Krylov's) opinion the comment of each government should be taken into consideration.

37. Mr. ZOUREK observed that the Special Rapporteur had perhaps misunderstood him. All he had wished to convey was that the comment of one government alone hardly constituted decisive grounds for modifying a provision. He certainly agreed that if the draft was to gain general acceptance, due weight would have to be given to the comments of governments.

38. Mr. SCELLE said that, although he had not abstained on article 1, which, generally speaking, was acceptable to him, he regretted the inclusion of the words "and other rules of international law" in a draft which was meant to represent a step forward in codification.

39. Mr. KRYLOV apologized for having misunderstood, as had evidently the Special Rapporteur, the drift of Mr. Zourek's remarks.

40. He would point out to Mr. Scelle that a draft of the kind under discussion could not hope to be completely comprehensive.

41. Mr. LIANG (Secretary to the Commission) agreed with Mr. Scelle that codification should be, as far as possible, comprehensive, but pointed out that an attempt to enumerate was almost inevitably accompanied by a danger of omission. The expression "other rules of international law" embraced those which, though indirectly applicable, might not have a direct bearing on the régime of the territorial sea, and could not, therefore, be appropriately included.

42. Mr. SCELLE observed that the expression might encourage the persistence of doubts about the relative importance of certain rules, some of which apparently had been deemed to be unsuitable for codification.

43. The CHAIRMAN urged the Commission not to

embark upon a lengthy academic discussion about possible future repercussions of the text it had adopted.

Article 3 [3]: Breadth of the territorial sea

44. Mr. FRANÇOIS (Special Rapporteur) introducing the discussion on the crucial article concerning the breadth of the territorial sea, reminded the Commission that he had first proposed a limit of six miles, later a limit of twelve miles with certain restrictions, and finally a limit of three miles with possible extensions. The Commission, however, had been unable to agree on a uniform recommendation, and had submitted to governments for their consideration a choice of nine different systems.[4] Their replies revealed widely divergent views which members would find conveniently set out in the Secretariat's working paper.

45. Thus there seemed to be little ground for hope that agreement could be reached on a general limit acceptable to all States; but in studying the replies he had been struck by the fact that even the most determined champions of the three-mile limit, such as the United Kingdom Government, recognized that there was room for extension in special circumstances, provided it was not brought about unilaterally. He quite agreed that if States were allowed to fix the limit in an entirely arbitrary manner the freedom of the high seas would be doomed. Perhaps the only possible solution was that put forward in his new text for article 3. In that connexion he felt that due weight should be given to the views of countries possessing considerable tonnages.

46. It remained to decide what reasons could be admitted, in special cases, for extending the limit established. In his text, he had recognized the validity of historical or geographical reasons. It would be remembered that the first had been mentioned by the Scandinavian States, which also claimed an extension of the limit for geographical reasons, such as an unusually indented coastline. The Commission might wish to examine the thorny question of economic grounds, a claim which might be considered to have been reinforced by the judgment of the International Court of Justice in the Fisheries Case between the United Kingdom and Norway.[5] The United Kingdom Government, in its reply, had set out weighty arguments against such a claim, and he had accordingly not mentioned economic reasons explicitly, although as his enumeration was not limitative, they were not excluded.

47. The Commission would note that any extension of the limit would have to be approved by an international organ set up within the United Nations, in which respect he had followed article 3 of the draft articles on fisheries adopted by the Commission at its fifth session.[6]

48. In conclusion, he expressed the hope that such a compromise would be acceptable to the great majority of States.

49. Mr. SALAMANCA said that the problem of the breadth of the territorial sea was perhaps the most difficult one before the Commission, as was shown by the extraordinary variety of criteria adopted by the various countries in fixing it. Further evidence was provided by the fact that the Special Rapporteur had changed his proposals more than once.

50. If the Special Rapporteur's latest proposals were accepted by the Commission, there was no doubt that many States would not be satisfied with the three-mile limit. Nor was it practicable to contemplate an international conference on the question, because experience showed that at such international meetings governments assumed extreme positions—ordinarily for bargaining purposes—thus often leading to inconclusive results.

51. It was clear that the extensive claims to a territorial sea of much more than three miles in width which were being made by some States were largely inspired by a desire to protect their fishery interests. It was unlikely that the States concerned would change their attitude in deference to any decision taken by the Commission.

52. For those reasons, he urged the Commission to give serious consideration to the suggestion made by the Belgian Government in its comment on article 3. That suggestion represented a realistic and practical attempt to reconcile the different points of view on the breadth of the territorial sea, by admitting the possibility of extension up to twelve miles subject to adequate guarantees against unilateral measures; the necessary safeguards would be ensured by providing that the State concerned must reach agreement with the other States interested in the fishing zones which it was proposed should be restricted.

53. Mr. GARCÍA AMADOR suggested that further discussion on article 3 be postponed until the Commission had dealt with the two problems of contiguous zones and fisheries.

54. The proceedings at the 1930 Codification Conference and subsequent developments had shown that rigid adherence to the principle of a narrow territorial sea was displeasing to many States; yet it was equally clear that the majority of those States did not aim at acquiring full sovereignty or jurisdiction over the maritime zones they claimed. Their main purpose had been to assume control of certain maritime zones contiguous to the usually accepted territorial sea in order to conserve and develop the living resources of those zones.

55. He felt, and in that he was at one with Gidel, that if it were recognized that the coastal State possessed the necessary authority to take fishery conservation measures, it would not need to make any extensive claims to a wider territorial sea.

56. By adopting its provisional articles on the continental shelf, the Commission had recognized that the

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[4] A/2693, para. 68, in *Yearbook of the International Law Commission, 1954*, vol. II.

[5] *I.C.J. Reports 1951.*

[6] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

coastal State enjoyed certain rights over the soil and subsoil of the sea beyond the territorial sea.[7] States which had thus seen their legitimate interests in the soil and subsoil of the sea protected would no longer feel any urge to make excessive claims to the epicontinental sea.

57. If the rights and interests of coastal States in the matter of fisheries were protected as, to some extent, they had been in the matter of the continental shelf, certain States would no longer need to insist on a considerable extension of the breadth of the territorial sea: hence the usefulness of discussing fisheries before taking up the question of the breadth of the territorial sea.

58. Mr. FRANÇOIS (Special Rapporteur) feared that the Commission might become caught in a vicious circle. At the 294th meeting, at Mr. García Amador's request, it had decided to postpone discussion of fisheries. Now it was being asked to postpone discussion on the breadth of the territorial sea until fisheries had been dealt with. The two questions were obviously interdependent, and the Commission must decide which it would deal with first.

59. Mr. HSU thought the Commission might at that stage take a provisional decision on the breadth of the territorial sea.

60. The CHAIRMAN, in reply to a question by Mr. GARCÍA AMADOR, said that if a provisional decision were taken at that stage, it could be reviewed later in the light of the discussion on fisheries without a two-thirds majority being necessary.

61. Mr. GARCÍA AMADOR pointed out that the request he had made at a previous meeting that the discussion on fisheries be deferred had been prompted simply by the fact at that time the Commission had not yet received the report (A/CONF.10/6)[8] of the Rome Conference on the Conservation of the Living Resources of the Sea. He had taken part in the work of that Conference and felt that his fellow members would need to read and study the report before they could usefully discuss the question of fisheries.

62. Sir Gerald FITZMAURICE said that Mr. García Amador's suggestion merited very serious consideration. It was clear that a great many of the States which had claimed extensive bounds for the territorial sea had done so only for reasons principally connected with fisheries. In fact, some of those States had even gone so far as to disclaim any pretentions to jurisdiction in matters other than the control and regulation of fisheries. It would therefore appear that their real objective was not so much an extension of their territorial sea as something in the nature of a contiguous zone in which they could control fishing. They were simply applying to the subject of fisheries a concept similar to the special rights (outside the territorial sea properly so-called) already claimed by many States in sanitary, fiscal and other matters.

63. The discussion would be greatly simplified if Mr. García Amador's proposal were adopted. If the Commission succeeded in regulating the problem of fisheries in a manner satisfactory to certain States, that of the somewhat excessive claims being made by those States would become less urgent.

64. He therefore urged that the Commission defer further consideration of article 3 until it had completed its discussion on fisheries, although not necessarily until a vote had been taken on that question.

65. Mr. FRANÇOIS (Special Rapporteur) proposed that at its next meeting the Commission deal with the Report of the International Technical Conference on the Conservation of the Living Resources of the Sea.

66. Mr. SANDSTRÖM said that the report in question appeared to be mainly technical in character, and would probably not take up much of the Commission's time.

67. Mr. GARCÍA AMADOR said that, although it was true that the report was largely technical, its conclusions and recommendations to the International Law Commission were much broader in scope; they involved social and economic issues and might well bring about a change of attitude on the part of the Commission in the matter of fisheries.

68. He suggested that the Special Rapporteur should indicate which articles of his draft depended on the Commission's decision on the breadth of the territorial sea, in order to enable it to deal with the other articles forthwith.

It was unanimously agreed to postpone further discussion of article 3 and to discuss the Report of the International Technical Conference on the Conservation of the Living Resources of the Sea at the next meeting.[9]

Article 8 [8]: Ports

69. Mr. FRANÇOIS (Special Rapporteur) said that article 8 had given rise to only one criticism by a government. That was the suggestion made in its *note verbale* dated 1 February 1955 by the United Kingdom Government to the effect that certain installations, such as a pier seven miles long then under construction in the Persian Gulf, should be treated on the same basis as artificial installations on the continental shelf; such installations would thus be entitled to a relatively limited navigational safety zone rather than to a belt of territorial waters.

70. The case seemed too special to warrant the Commission's amending the general principle it had adopted. The United Kingdom Government seemed to fear an extension of the territorial sea, but the rule adopted by the Commission in draft article 8 would result in only a very limited extension of the territorial sea in the case of a narrow pier such as that described.

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[7] *Ibid.*, para. 62.

[8] United Nations publication, Sales No.: 1955.II.B.2.

[9] Discussion of article 3 was resumed at the 308th meeting.

71. Sir Gerald FITZMAURICE, emphasizing that he was not speaking on behalf of the United Kingdom Government, said his personal feeling was that the matter was of no great importance, and he would therefore not take it up formally. He wished, however, to explain the motive behind the United Kingdom Government's suggestion. The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf were more closely related to artificial constructions on the continental shelf, and it would be inadvisable to invoke them as grounds for an extension of the territorial sea; it would be more appropriate for the Commission to treat them in the manner in which it had dealt with oil derricks and artificial islands erected on the continental shelf. It had been acknowledged that such artificial installations had no territorial sea of their own.

72. In view of the fact that the United Kingdom Government's suggestion had not been formally taken up by a Member, the CHAIRMAN called for a vote on article 8 as proposed by the Special Rapporteur.

Article 8 was adopted unanimously.

Article 9 [9]: Roadsteads

73. Mr. FRANÇOIS (Special Rapporteur) said that his proposal for article 9 was, with two drafting changes suggested by the United Kingdom and Netherlands Governments, similar to the text adopted by the Commission at its sixth session except for the addition of a new paragraph which read:

> "Such an extension to the territorial sea shall not increase the area of inland waters."

That new paragraph had been added to meet the suggestion of the United Kingdom Government.

74. The only other important point was the suggestion by the Brazilian Government that the outer limits of roadsteads should be included in the base line from which the width of the territorial sea was to be measured. The effect of such a provision, if adopted, would be to turn the waters of roadsteads into inland waters, instead of territorial sea.

75. He recalled that at the 1930 Codification Conference a proposal similar to the present Brazilian suggestion had been made by the Netherlands Government.[10] It had, however, not met with the approval of the majority, and the Conference had adopted a text along the lines of his present proposal. He still favoured the inclusion of roadsteads in inland waters, but felt it was unlikely that the majority of the Commission would reverse its earlier decision which itself confirmed the provision adopted by the 1930 Conference.

76. Mr. AMADO said that the Brazilian Government's comments were based on the fact that there were a number of roadsteads along the Brazilian coast which virtually served as ports. Basis of Discussion No. 11, drawn up by the Preparatory Commission for The Hague Conference for the Codification of International Law,[11] had taken the view that the outer limit of such roadsteads should be included in the base line for measuring the breadth of the territorial sea, instead of having such roadsteads included in the territorial sea itself. The Hague Conference, in rejecting that view, had merely stated that the claim made on behalf of roadsteads was excessive, but had not adduced any real arguments in support of its rejection. The Commission, at its sixth session, had done likewise.

77. He did not feel very strongly about the suggestion, because the case of roadsteads was somewhat exceptional and its importance was likely to decrease as new ports were developed and old ones improved. Those ports would benefit from the provision of article 8, just adopted by the Commission, by which the waters of a port up to a line drawn between the outermost installations formed part of the inland waters of the coastal State. He urged, however, that serious consideration be given to the Brazilian Government's carefully considered views on the matter of roadsteads.

78. Mr. SCELLE said that the proposed new paragraph, which the Special Rapporteur had included following the United Kingdom Government's suggestion, appeared to be quite superfluous; moreover, its wording was somewhat confusing.

79. Sir Gerald FITZMAURICE said that the difficulty raised by the Brazilian Government's suggestion was not so much that of considering roadsteads as inland waters; it was rather that of the increased breadth of the territorial sea which would result from the use of the outer limit of the roadstead as part of the base line from which the breadth of the territorial sea was to be measured. That was the reason why the 1930 Conference had not taken up the Netherlands suggestion regarding roadsteads.

80. In connexion with the proposed new paragraph, he would not press for its formal consideration, and hoped that Mr. Amado also would be able to agree to article 9 as it stood, that was, to the text adopted by the Commission at its sixth session, with the two drafting changes proposed by the Special Rapporteur.

81. Mr. AMADO said that, as Sir Gerald Fitzmaurice had not urged the adoption of the proposed new paragraph, he in turn would not formally propose the adoption of the Brazilian Government's suggestion concerning roadsteads.

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[10] League of Nations publications, *V. Legal, 1929. V.2.* Conference for the Codification of International Law (Document C.74.M.39. 1929.V), p. 177.

[11] League of Nations, Conference for the Codification of International Law, *Territorial Waters, Bases of Discussion* (Document Conf. C.D.I., Commission Eaux territoriales/1).

Article 9 with the Special Rapporteur's new drafting changes but without the new paragraph was adopted by 12 votes to 1.

82. Mr. SCELLE said he had voted against article 9 because he could not approve any provision which would needlessly extend the territorial sea.

The meeting rose at 1.10 p.m.

296th MEETING

Monday, 23 May 1955, at 3 p.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Communication from the Director-General of the Food and Agriculture Organization of the United Nations

1. The CHAIRMAN asked the Commission to take note of a communication received from the Director-General of the Food and Agriculture Organization (FAO), dated 20 May 1955, to the effect that FAO was sending an observer to the present meeting in view of its interest in the technical aspects of fisheries conservation.

Communication from Mr. Padilla Nervo

2. At the request of the CHAIRMAN, Mr. GARCÍA AMADOR, Second Vice-Chairman, read out a cable from Mr. Padilla Nervo, dated 20 May 1955, in which he informed the Commission that he was arranging to take part in its work at the earliest possible moment.

Order of business

3. The CHAIRMAN said that when the Commission had finished its examination of the régime of the high seas and of the territorial sea, it would go on to examine either the laws of treaties or the question of diplomatic intercourse and immunities (items 4 and 5 of the agenda respectively). He proposed that Sir Gerald Fitzmaurice be appointed Rapporteur for item 4, in view of his special qualifications in the matter of the law of treaties, in place of his predecessor on the Commission, Mr. Lauterpacht.

It was so agreed.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6)

(resumed from the 295th meeting)

NEW DRAFT ARTICLES ON FISHERIES

4. Mr. FRANÇOIS (Special Rapporteur) recalled that for articles 30, 31 and 32, relating to fisheries, he had followed the text of the three articles on fisheries adopted by the International Law Commission at its fifth session, and commented on in the report covering its work at that session.[1] He had withdrawn those articles for the time being[2] because he wished the Commission to examine the proposals to be submitted by Mr. García Amador in the light of the report[3] (A/CONF.10/6) of the International Technical Conference on the Conservation of the Living Resources of the Sea, held recently at Rome.[4]

5. Mr. SALAMANCA considered that the problems of fisheries and of conservation could be dealt with separately; indeed, in the Special Rapporteur's draft, the latter was dealt with only incidentally. The sole common ground between the two was the international authority to be created within the framework of the United Nations. In that respect, the Special Rapporteur seemed to have been too optimistic in interpreting the silence of many governments on the three draft articles submitted to them by the Commission as tacit agreement to the proposal concerning the establishment of the international authority. What their silence really implied was, probably, indifference. The Rome Conference had done little more than recognize the bare necessity for conservation; it had given no indication of the way in which such conservation should and could be ensured. He would like the Special Rapporteur to give the Commission his views on the report of the Rome Conference, and also to state whether, in his opinion, the Commission could usefully examine the difficult problem of conservation at that stage.

6. Mr. FRANÇOIS (Special Rapporteur) thought that it would be better if he made known his views after Mr. García Amador had introduced his proposals relating to fisheries.

7. Mr. SCELLE recalled that, when he had requested the

[1] "Report of the International Law Commission covering the work of its fifth session" (A/2456), paras. 94–104, in *Yearbook of the International Law Commission, 1953*, vol. II.

[2] See *supra*, 291st meeting, para. 62.

[3] A/CONF.10/6 (United Nations publication, Sales No.: 1955. II.B.2).

[4] Hereinafter referred to as "the Rome Conference".

Commission to reconsider its articles on the continental shelf, his proposal had been rejected on the ground that the articles in question had already been submitted to the Sixth Committee of the General Assembly. It would seem that the same notion should apply in the case of fisheries, and that the Commission could not do better than abide by the three articles it had already adopted at its fifth session.

8. Mr. GARCÍA AMADOR said that, following the adoption by the General Assembly of resolution 899 (IX), it was open to Mr. Scelle to make any proposal he wished concerning reconsideration of the articles on the continental shelf before the Commission drafted its final report on the régime of the high seas, the régime of the territorial sea and all related problems. On the question of fisheries, however, the General Assembly had adopted a specific resolution—900 (IX)—paragraph 6 of which explicitly invited the International Law Commission to take into account the report of the Rome Conference, and to reconsider in its light the question of fisheries. The General Assembly had convoked the Rome Conference, not to satisfy scientific curiosity, but to provide the Commission with the necessary data to enable it to reconsider the three articles adopted in 1953.

9. Mr. SCELLE said that he had admitted that, once they had been submitted to the General Assembly, the Commission's drafts were no longer its own property. If, as he was now informed, that was not the case, he reserved the right to revert to the articles on the continental shelf. He had never suggested that Mr. García Amador should not be heard on the proposals he had drafted in the light of the Rome Conference.

10. Mr. SANDSTRÖM pointed out that, although there was a special General Assembly resolution inviting the Commission to re-examine the question of fisheries, no such decision had been taken in the case of articles on the continental shelf.

11. Mr. AMADO said that the matter was made quite clear by paragraph 102 of the Commission's report on its fifth session: the Commission had recommended that the General Assembly should adopt the draft articles and should consult with FAO with a view to the preparation of a draft convention incorporating the principles adopted by the Commission.

12. It would be a great advantage at that stage if the Commission could hear the views of Mr. García Amador, who had acted as Deputy Chairman of the Rome Conference.

13. The CHAIRMAN thought that the matter of the continental shelf could be left on one side for the time being.

14. The issue before the Commission was that of fisheries, and in that respect the position was quite clear; the Commission had to examine the report of the Rome Conference. It had also to hear Mr. García Amador's proposal for a set of articles to replace articles 1, 2 and 3 adopted by the Commission at its fifth session. In the light of the ensuing discussion, the Commission would have to decide whether it wished to amend its articles on fisheries, which it was the Commission's duty to re-examine, although it was not, of course, obliged to change them. Such was the meaning of paragraph 6 of General Assembly resolution 900 (IX), to which Mr. García Amador had specifically referred.

15. Sir Gerald FITZMAURICE said that the problem of fisheries on the high seas and that of the conservation of fisheries were in practice identical. So far as international law was concerned, the high seas were free for all to fish. It was therefore obvious that the problem of the conservation of the living resources of the sea in the interest of all mankind could only be taken up in conjunction with the regulation of fisheries on the high seas. Such conservation could only be effected by regulating fisheries.

16. Mr. GARCÍA AMADOR submitted the following draft articles on fisheries:

"Whereas:

"1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or exterminated;

"2. It is necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination;

"3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind;

"4. When formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas contiguous to its coast;

"5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international co-operation through the concerted action of all States concerned, and the study of the experience of the last fifty years and recognition of the great variety of have to be applied clearly indicate that these programmes conditions under which conservation programmes can be more effectively carried out for separate species or on a regional basis;

"*Article 1*

"If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe by agreement the necessary measures for the conservation of the living recources of the sea.

"*Article 2*

"If, subsequent to the adoption of the measures referred to in article 1, nationals of other States engage in fishing in the area and those States do not accept the measures so adopted, the question shall, at the request of one of the interested parties, be referred to the methods and procedures of settlement provided in articles 6 and 7.

"*Article 3*

"If a coastal State has a special interest in the maintenance of the productivity of the resources of the high seas contiguous to its coast, such State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area.

"*Article 4*

" Where the States concerned have not agreed as to the measures for conservation, and if the coastal State has a special interest of the productivity of the resources of the high seas contiguous to its coast, such State may adopt whatever measures of conservation are appropriate.

"*Article 5*

"The measures which the coastal State adopts under article 4 shall be valid as to other States only if the following requirements are fulfilled:

"(*a*) That scientific evidence shows that there is an imperative and urgent need for such measures.

"(*b*) That such measures are based on appropriate scientific findings.

"(*c*) That such measures do not discriminate against foreign fishermen.

"*Article 6*

"In case of differences between the coastal State and other States concerned, or between States which are parties to an international agreement and third States, either on the scientific and technical justification for the measures adopted, or on their nature or scope, such differences shall be settled according to the findings of suitably qualified and impartial experts chosen for the special case by the States concerned, as provided in article 7."

17. A draft article 7, which would cover the same ground as article 3 of the draft on fisheries adopted by the Commission at its fifth session, would be submitted at a later stage of the discussion.

18. He had represented Cuba at the Rome Conference, which has been attended by the representatives of no less than forty-five countries. He did not now pretend to speak on behalf of the Conference, a role which more properly belonged to its Rapporteur. However, in the draft he had just proposed he had drawn inspiration from the Conference's work, to which he would refer in the course of the discussion.

19. The purpose of the Commission's re-examination of its articles on fisheries and thus of his own draft was to make provision for the need for conserving the living resources of the sea, and to adapt to that purpose, so far as was necessary and practicable, the traditional principles of the international law of the sea. With that end in view, it was interesting to examine the objectives of fishery conservation as defined by the Rome Conference. On that crucial question, two tendencies had become manifest during the course of that Conference: one represented the view of States possessing an important fishing industry; the other represented the interests of the coastal State.

20. In laying down the objectives of fishery conservation, in chapter II of its report, the Rome Conference had emphasized the scientific and technical character of conservation problems, invoked by all the representatives of the large fishing States, stating in the first sentence of paragraph 3: "The principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products". But it had gone on to say, in the same paragraph, in deference to the second tendency: "When formulating conservation programs, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near its coast."

21. Examining in the light of those objectives of fishery conservation the articles adopted by the Commission in 1953, it was apparent that article 1, by establishing a system of international co-operation, tended to achieve the principal objective of conservation, while adding in the comment that "the system proposed by the Commission protects, in the first instance, the interest of the coastal State which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast". In fact, article 1 allowed a coastal State, in common with any other state, to regulate fisheries only in areas where its nationals alone were engaged in fishing. The special interests of the coastal State or States were acknowledged only by article 2, under which such States were entitled, in any area situated within 100 miles of the territorial sea, "to take part on an equal footing in any system of regulation even though their nationals do not carry on fishing in the area"; and the comment added that that provision was "considered to safeguard sufficiently the position of the coastal State".

22. The 100-mile criterion was not a satisfactory one for assessing the interest of the coastal State. The extent of that interest depended on the marine species concerned and on the area in which fishing took place. Moreover, there were cases where the coastal State had no interest at all in fisheries within the 100-mile zone, and any regulation of a right to participate in the regulation of fisheries in that zone might lead to its taking action with other purposes in view.

23. The interest of the coastal State was undeniable if its nationals were engaged in fishing in the area contiguous to the coast. But that interest also existed even if its nationals were not so engaged, in cases where its economic activities or the feeding of its population depended upon the maintenance of the productivity of the fishing preserve concerned.

24. It was necessary to substitute such equitable criteria for the arbitrary one-hundred-mile limit. In adopting these criteria, the Commission would also, as suggested in his article 3, obviate the danger of giving States not really interested in a fishery some influence over its regulation on the sole ground of its geographical proximity.

25. The Commission's draft articles were based on the thesis that all States were under an obligation to conclude an agreement on conservation regulations in areas where their nationals were engaged in fishing. But the only obligation thus implied was one to negotiate. The Commission could not lay an obligation upon States to agree. It would be enough for one interested State to refuse to sign a treaty agreed to by all other interested States, to frustrate the international regulation of fisheries with a view to conservation. The report on the Commission's work at its fifth session attempted to solve the problem by laying down, in article 3 of the draft articles on fisheries, that, in the event of agreement not being reached, the regulations would be issued "with binding effect, by the international authority envisaged in that article". In theory that solution would certainly be the best. But, unfortunately, in international relations the best solution was not always feasible. The idea of setting up an international authority of the type envisaged in article 3 of the Commission's 1953 draft had not been well received by States Members of the United Nations: some were not prepared to delegate their powers on fishery regulation to an international body; others were sincerely convinced that conservation problems, being regional and even local in character, called for an *ad hoc* system. But even were a majority of States Members to accept the proposal for an international authority with compulsory jurisdiction, the problem would still arise of how to enforce the decisions of such an authority on States which did not accept its jurisdiction. The Commission's draft provided no answer to that problem.

26. It was clear, therefore, that circumstances would necessarily arise, unless and until international agreement on conservation was reached, in which no effective international regulation existed, although conservation measures were necessary. It would clearly be most undesirable in such a case to allow unrestricted fishing in the high seas. Such an abuse of freedom of fishing on behalf of private commercial interests had already been referred to by the Commission in its fifth report, when it had stated that it was "contrary to the very principle of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of the freedom of the sea" (A/2456, para. 100).

27. That concept, outlined by the Commission, of preventing the abuse of a right conferred upon States by international law, was vital in the present circumstances. In past centuries, the abuse of the right to fish had been inconceivable; but with modern technical equipment, it was imperative to put a stop to the depletion of the living resources of the sea. And where the coastal State was vitally interested, for its economic existence or for feeding its population, in the fishery resource in question, it should be authorized to take unilateral measures.

28. A proposal for a recommendation to acknowledge that right to the coastal State had already been made by Mr. H. Rolin at The Hague Codification Conference in 1930.

29. Gidel himself went very far in the same direction in proposing unilateral action by the coastal State to the exclusion of any other form of regulation—his reason being that he did not expect international co-operation to lead to a practicable system.

30. In the Special Rapporteur's second report (A/CN.4/42, p. 37) the suggestion had been made that "Every coastal State shall be entitled to declare, in a zone 200 sea miles wide contiguous to its territorial waters, restrictions necessary to protect the resources of the sea against extermination and to prevent the pollution of those waters by fuel oil." Unfortunately, that realistic and appropriate proposal, when voted upon by the Commission at its fifth session, had been rejected as the result of equality in the number of votes cast for and against it.

31. The Rome Conference, when dealing with the objectives of conservation, had acknowledged the special interests of the coastal State (A/CONF.10/6, chapter II, para. 3). In the general conclusions to its report the Conference had stated: "The Conference notes with satisfaction conservation measures already carried out in certain regions and for certain species at the national and international level" (A/CONF.10/6, chapter VII, para. 1). It had thus acknowledged the role of conservation measures taken on a national plane by coastal States. Finally, the Rome Conference had, by a majority of only a single vote, disclaimed competence to examine a proposal, introduced jointly by the Cuban and Mexican delegations, to regulate the coastal State's right to adopt unilateral conservation measures.

32. The foregoing facts clearly showed that there were solid grounds for acknowledging the right of the coastal State to adopt unilateral measures. His draft articles aimed at laying down strict limits for that unilateral action, which in the present state of international relations was an inescapable reality.

33. The preamble to his draft articles recapitulated the facts, and made reference in paragraphs 3 and 4 to the results of the Rome Conference, while stressing, in paragraph 5, the necessity for conservation systems to be based on international co-operation.

34. His article 1 corresponded to the third sentence of article 1 of the Commission's 1953 draft, while his article 2 embodied the final portion of that same article. His article 3 aimed at providing, as a condition for action by the coastal State, the requirement that it should have a special interest in maintaining the productivity of the resource involved. His article 4 laid down a further condition, namely, the absence of agreement by the interested States. The coastal State's action was an interim action, subject, furthermore, to the strict conditions laid down in his article 5 (scientific evidence in support of the proposed measures and non-discrimination against foreign fishermen). Finally, his article 6 provided that all disputes between States (including the coastal State) be submitted to the compulsory jurisdiction of the authority to be specified in article 7 which he would put in concrete terms at a later stage of the discussion.

35. Mr. FRANÇOIS (Special Rapporteur) said there was a close connexion between the problem of fisheries conservation and claims to exclusive fishing rights. When claiming sovereign rights over a maritime zone, States were primarily concerned with conservation measures rather than with reserving exclusive fishing rights to their nationals. It was clear that if the coastal State's right to promulgate fishery conservation measures were acknowledged, that would permit the disclaimer of any right of the coastal State to proclaim exclusive fishing privileges.

36. He recalled that article 3 of the draft articles on the continental shelf adopted by the Commission read: "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas."

37. It was necessary, in view of that provision, to reassure States about their right to adopt conservation measures in those superjacent waters. Hence the proposed regulation in his second report, which acknowledged the right of every coastal State to declare, in a zone 200 miles wide contiguous to its territorial sea, the restrictions necessary to protect the living resources thereof. He and the other supporters of the coastal State's special position had found themselves in equal numbers with those members of the Commission who held a different view. The result had been the adoption of the three draft articles at the Commission's third session in 1951 (A/1858, annex). Few governments had commented on the draft articles, and at its fifth session the Commission had formally adopted them.

38. There were three good reasons why the Commission should reconsider the draft articles at the present session. First, General Assembly resolution 900 (IX) explicitly invited the Commission to make a reappraisal of the fisheries question. Secondly, when dealing with the problem of the territorial sea, a sharp divergence of views between States concerning its breadth had become apparent. Recognition of the coastal State's rights in the matter of conservation regulation would perhaps bring those diversing views on the territorial sea closer together. Finally, the results of the Rome Conference had shown that there was an equal division between the advocates of the special interest of the coastal State and their opponents. Clearly, therefore, the matter was a controversial one, and the Commission should ponder whether the decision it had adopted by such a small majority at its fifth session should not be reconsidered.

39. Mr. SCELLE said that it was impossible to make a fair appraisal of Mr. García Amador's draft on fisheries until he had submitted his article 7 in concrete terms. That article should describe accurately the "suitable qualified and impartial experts", lay down the limits of their jurisdiction and state whether their pronouncements were to be mere recommendations or binding decisions.

40. For him (Mr. Scelle) the crucial question was whether Mr. García Amador's article 7 would follow the same lines as the Commission's draft article 3, or whether it would depart from it and, if so, in what way.

41. Progress in international law could only be achieved by limiting the jurisdiction of individual States, just as all public law within States had been established by superseding the privileges emanating from the feudal system. International society was still in the feudal stage, and there were two courses open to the Commission: it could either acknowledge at every stage the sovereignty of States and codify international anarchy, or it could take action to encourage the development of international law by recognizing and expanding the role of international authorities. Those international authorities could be either of the judicial or of the administrative kind. The first was the case when the Commission provided for compulsory arbitration; the second was the case when the Commission recognized the right of an international authority within the framework of the United Nations to prescribe regulations applicable to all. The Commission had occasionally taken certain timid steps forward in those two directions; he strongly urged it to follow that path in the case of fisheries, and not the path of proclaiming freedom of unilateral action on the part of States, coastal or otherwise. Should the Commission follow that unfortunate course, there was no doubt that most, if not all, governments would approve of its work, because it would be suggested that they were free to do as they pleased. But the Commission would thereby be abandoning its duty to do constructive work in the field of international law.

42. Mr. EDMONDS said that the Commission was faced with a procedural problem. It seemed to him that in its resolution 900 (IX) the General Assembly had made it clear that certain topics closely connected with the régime of the high seas and with that of the territorial waters must be fully explored before the Commission presented its final drafts. Indeed, the Rome Conference had been deliberately convened early enough to enable it to report to the present session of the Commission, which must accordingly re-examine the question of fisheries in the light of the conclusions reached at Rome.

43. Mr. AMADO asked whether Mr. García Amador's text was intended to replace the three articles adopted by the Commission at its fifth session, or whether the two drafts were to be discussed concurrently. In the meantime he urged him to submit the text of article 7 as soon as possible, since in its absence the precise implications of his draft could not be known.

44. He had observed a tendency in the discussion to revert to the thesis upheld by Gidel and the Special Rapporteur at The Hague Codification Conference of 1930.

45. The CHAIRMAN suggested that the procedural issue might be left aside until the general discussion had been concluded.

46. Mr. GARCÍA AMADOR, referring to the procedural question, reminded the Commission that he had already indicated in his introductory statement that his draft articles were intended as an amendment to those adopted by the Commission, which must be regarded as the basic text to be reconsidered in the light of the conclusions reached by the Rome Conference. Although his preamble was admittedly new, it was not at variance with the essential elements of the Commission's own text.

47. Mr. SCELLE, referring to Mr. Amado's remarks, pointed out that at The Hague Codification Conference, Gidel had explained the theory of contiguous zones, as distinct from a single contiguous zone, for the protection of specific interests. It had been precisely on the question of a contiguous zone for fisheries that the Conference had failed to reach agreement. He urged that authorities should not be invoked in a general way without specifying precisely which of their theses substantiated a particular argument.

48. Mr. ZOUREK said that, after a somewhat rapid perusal of Mr. García Amador's text, he had reached the conclusion that it was superior to the articles already adopted. It was generally consistent with the recommendations adopted by the Rome Conference and showed a sense of reality by taking into account the views of States, which should not be overlooked in any work of codification, if the drafts were to have any chance of acceptance. Furthermore, he considered that the text was consistent with international law. Unlike Mr. Scelle, who had eloquently expounded his objections to certain decisions in the light of what he considered to be progress, he (Mr. Zourek) considered that article 3 adopted by the Commission at its fifth session would destroy the principle of the sovereignty of States, the corner-stone of international law.

49. He had resolutely opposed those articles at the time, and Mr. García Amador had effectively brought out their weakness, indicating that most members of the General Assembly had shown themselves hostile to the provision contained in article 3. As Mr. García Amador had argued, even if that article were accepted the problem would not be solved, since it would only be binding on signatory States.

50. For those reasons he was inclined to sympathize with Mr. García Amador's text, but before taking a final stand he must study article 7, which would presumably be framed in the sense of the recommendations adopted at Rome.

51. Mr. FRANÇOIS (Special Rapporteur) observed that he had withdrawn articles 30 to 32, concerning fisheries because the question had already been dealt with in the Commission's report to the eighth session of the General Assembly. Mr. García Amador's text was accordingly a new proposal, and could not be regarded as an amendment.

52. Mr. GARCÍA AMADOR remarked that in his opinion, that he was submitting an amendment to the three articles adopted by the Commission at its fifth session.

53. Mr. SCELLE drew the attention of Mr. Zourek to the opening words of article 3 already adopted by the Commission, which read: "States shall be under a duty to accept, as binding upon their nationals..." The only construction he could place upon such words was that the article was binding upon all States without exception; otherwise it would be meaningless, since it would refer only to States which had already shown themselves willing to accept a system of regulation of fisheries.

54. Mr. ZOUREK observed that article 3 was part of a draft submitted to the General Assembly, and even if approved by that body would not thereby be endowed with the binding force of a rule of international law. His arguments were therefore valid.

55. Sir Gerald FITZMAURICE said he must have time for further study of Mr. García Amador's text before commenting on it, but asked in the meantime for clarification of the position with regard to the three articles adopted by the Commission at its fifth session. He wished to know in particular whether the Commission was entitled to alter a text already submitted to the General Assembly and to substitute a new one for it.

56. The CHAIRMAN replied that when Mr. Scelle had asked whether the draft articles on the continental shelf could be modified, he (the Chairman) had indicated that as a general rule, and unless specifically asked to do so, the Commission could not reconsider texts which it had already placed before the General Assembly. However, the case of fisheries was a special one because the General Assembly in its resolution 900 (IX) had instructed the Commission to take into account the technical contribution made by the Rome Conference to its study of the régime of the high seas, the régime of the territorial waters and all related problems. He believed that that view was shared by several members of the Commission.

57. Mr. SCELLE observed that Mr. García Amador had already stated that the Commission might have to modify other articles, including those relating to the continental shelf, in the light of the recommendations of the Rome Conference.

58. Mr. LIANG (Secretary to the Commission) considered that General Assembly resolution 900 (IX) might be interpreted as meaning that the Commission should consider subjects other than those on which it had already submitted texts to the General Assembly, or that it could modify the latter after studying the report of the Rome Conference. But at all events, since the Commission was not bound by the rigid procedure of a judicial tribunal, it could in the present instance regard itself as free to reconsider texts already adopted.

59. Mr. SANDSTRÖM agreed with the Chairman that the Commission could reconsider its articles on fisheries in the light of the recommendations of the Rome Conference; moreover, the latter might not affect the draft very greatly, since they dealt mainly with technical measures for the conservation of the living resources of the sea. On the other hand, if the special case of fisheries were used as a pretext for reopening discussion on other articles, the Commission's authority might be impaired unless there were very cogent reasons for modifying texts already adopted.

60. With regard to the procedural question raised by Mr. Amado, he observed that the Commission now had two texts before it designed to serve the same purpose. After a general discussion had been held, it should be possible to decide which was the more satisfactory.

61. Mr. GARCÍA AMADOR expressed the view that, as the Commission had already adopted the three articles on fisheries, it was no longer open to the Special Rapporteur to withdraw them.

62. The CHAIRMAN said that, given the form in which Mr. García Amador had presented his draft articles, it might be difficult to consider them as an amendment under the terms of rule 92 of the General Assembly's rules of procedure. If the Commission decided that the draft articles constituted a separate proposal, the procedure to follow would be that laid down in rule 93. In the meantime, the most practical course would be to examine both texts from the point of view of the principles involved, and subsequently, if necessary, to request the Drafting Committee to prepare a new version.

63. Mr. LIANG (Secretary to the Commission) did not consider that the articles adopted by the Commission at its fifth session, and now before the General Assembly, could be treated on the same footing as Mr. García Amador's text. The General Assembly's rules of procedure in the present instance had little relevance. Perhaps the Commission might for the time being confine itself to an examination of Mr. García Amador's draft articles, which, if approved, would replace those already adopted. Alternatively, the Special Rapporteur and Mr. García Amador might later find it possible to submit a new text jointly.

64. The CHAIRMAN said he did not feel that there was any substantial divergence of view on the procedural issue. It was true that the articles adopted at the fifth session were before the General Assembly, but they could always be put forward by a member of the Commission as a counter-proposal to that of Mr. García Amador.

65. Mr. FRANÇOIS (Special Rapporteur) considered it essential that Mr. García Amador circulate the text of article 7 as quickly as possible, if the discussion was to be fruitful.

The meeting rose at 6 p.m.

297th MEETING

Tuesday, 24 May 1955, at 10 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

1. Mr. HSU agreed with the views expressed at the previous meeting both by Mr. García Amador and by Mr. Scelle. He considered that they were perfectly reconcilable, since Mr. Scelle, though pressing for the establishment of an international authority to regulate fishing activities, did not deny that more weight should be given to the views of coastal States, while Mr. García Amador admitted that the final word must lie with the international authority.

2. The draft articles submitted by Mr. García Amador represented a new proposal which was worthy of support, because, as in the case of the continental shelf, it recognized the interests of the coastal State. He was unable to see how those States which had put forward excessive claims for the width of their territorial sea could be induced to take a more moderate line unless the Commission was prepared to make some such concession, and surely everything possible ought to be done to protect the freedom of the high seas from encroachment.

3. He welcomed the fact that Mr. García Amador had based his provisions on the need to conserve the living resources of the sea rather than on the exercise of special rights in a contiguous zone.

4. Finally, he did not think the procedural question raised at the previous meeting[1] need cause any difficulty, since if the draft articles were found acceptable they could be treated as the basic text.

5. Mr. SANDSTRÖM, comparing Mr. García Amador's draft articles with those adopted by the Commission at its fifth session (A/2456), said that there was no difference between the two systems proposed, except in so far as the special interests of the coastal State were involved. According to the former, the coastal State would take part on an equal footing, even though its nationals did not carry on fishing in the area concerned, in any system of regulation, without reference to the distance of that area from its territorial sea. A further and more important difference was that when there was failure to reach agreement on measures for conservation, the coastal State, according to Mr. García Amador's draft, could adopt whatever measures were appropriate, provided certain conditions were fulfilled.

6. In emphasizing the special interests of the coastal State Mr. García Amador was not propounding a new theory, for the issue had been clearly brought out by the Commission in its comment on the articles adopted at the fifth session. He agreed, however, that due weight should be given to such special interests, particularly as some coastal States possessed only small fishing fleets. Perhaps Mr. García Amador's draft articles could be submitted for consideration to the General Assembly, which could then decide between them and the articles referred to it by the Commission in 1955, and still before it.

7. Sir Gerald FITZMAURICE agreed that Mr. García Amador had made an important contribution to the Commission's work on fisheries, by putting forward draft articles which, with certain modifications, might be regarded as a possible basis for the text to be submitted to the General Assembly. Should some of the observations he was about to make appear critical of certain aspects of those articles, he wished to make clear that that would be due not to the fact that the text was fundamentally unacceptable to him, but to his desire that the provisions should command as wide an area of acceptance as possible, particularly since the Commission was not at the moment engaged in codification, but, being in the field of *lege ferenda,* was breaking new ground.

8. As they stood, Mr. García Amador's draft articles might be considered to tilt the balance too heavily in one direction, by stressing almost exclusively the position of the coastal State. In paragraph 4 of the preamble, Mr. García Amador had come near to suggesting that the coastal State alone was in a special position. He himself believed that if such provisions were to find favour with a large number of States, account would have to be taken of other very real and important interests, though he recognized that within the framework of the present discussion there were reasons for giving particular prominence to the position of the coastal State, because of the close connexion between the question of fisheries and that of the territorial sea. It was certainly true that recent claims for a very broad territorial sea seemed to have been largely inspired by considerations arising out of fishing activities. In the circumstances, the vote on the draft articles should be deferred until the outcome of the Commission's discussions on the breadth of the territorial sea was known.

9. While fully recognizing the cogent reasons for the prominence given to the coastal State in Mr. García Amador's draft, he believed that, if the whole question was to be placed in its proper perspective, the need for safeguarding the position of the other States concerned must be emphasized. He reminded the Commission that there was a considerable number of countries which had for decades—or in some instances even centuries—been engaged in deep-sea fishing in distant waters where the coastal State had not been particularly interested in fishing, or had not exploited the resources of the sea to any appreciable extent. Such countries had thus acquired what might be regarded as a vested interest in continuing such fishing on a reasonable basis, because it had come to form part of an important industry which provided employment for considerable numbers of people, and contributed significantly to those countries' exports. Hence it was disconcerting for them when coastal States, which had never previously evinced any great interest in fisheries, abruptly announced their intention of imposing regulations which might, in effect, lead to the exclusion of foreign vessels from their traditional fishing grounds.

10. Another factor to be taken into account was that it sometimes happened that the coastal State, though large in area, had only a small population, whereas other States, though small in area, had large populations to support and were even more dependent than the coastal State on fish for food. On the other hand, there were States such as the Soviet Union, which, though of great size, had an exceptionally large population to feed, and where fish was an important item of diet. Thus Soviet Union vessels had for long been accustomed to fish in the North Atlantic and elsewhere. In his opinion, such efforts to increase the world supply of fish as a food were perfectly legitimate, and there was no justification for thinking that fishing by foreign vessels in certain waters deprived the coastal State of supplies. Indeed, were it not for the activity of foreign vessels the amount of fishing in certain areas would be inadequate: a situation which, perhaps, occurred more frequently than did over-fishing. In cases where the coastal State had legitimate grounds for complaint, conservation measures must, of course, be adopted by agreement.

11. The Commission should also take into account the position of those countries, or groups of countries, which

[1] 296th meeting, paras. 43 *et seq.*

had maintained the optimum sustainable yield in certain localities by means of experiment, research and self-restraint, and whose special interests had as much claim to protection as those of the coastal State itself.

12. In the light of those considerations, he wondered whether Mr. García Amador, in his draft articles, had not given too dominant a place to the coastal State. If articles 1 and 4 were read in conjunction, it would be seen that, unless agreement could be reached on the necessary measures for conservation, the coastal State was entitled to promulgate certain measures unilaterally. Apart from that intrinsic advantage, it was thereby placed in a particularly strong position in the negotiation of agreements. Moreover, the author said nothing about the crucially important time factor. At what point, for instance, could it be presumed that there had been failure to reach agreement? He was not suggesting that coastal States would necessarily take advantage of the latitude allowed them, but it was none the less open to them under article 4 to institute measures unilaterally in cases where, for example, no agreement had been mooted, or where negotiations had hardly begun. In his view, the coastal State should not be free to act unilaterally until it had sought to reach agreement with the other States concerned, and until a reasonable period for negotiation had elapsed.

13. Another point to which thought must be given was the extent of the area within which the coastal State would be entitled to enforce measures promulgated unilaterally. According to the text of article 4, which referred to "the high seas contiguous to its [the coastal State's] coast", there was no limitation, apart from the restrictions laid down in article 5 which might require further elaboration, on the area within which such measures would be operative.

14. He entirely agreed with the provision in article 6 that differences concerning the measures adopted should be settled by arbitration, but considered that the nature and functions of the arbitral commission or committee of experts should be defined. It would not be sufficient for the organ set up merely to pronounce on whether or not the measures were appropriate: if it found them wanting, it should, as was provided for in article 3 of the Commission's own text, state what were the correct measures to take, such finding to be binding upon all the States concerned.

15. The analysis he had outlined was based on the assumption that the scheme of the draft articles before the Commission would be retained. But an alternative arrangement was possible, whereby article 1 would provide that if the States engaged in fishing in any area of the high seas were unable to reach agreement on the necessary measures for the conservation of the living resources of that area, the case should immediately be referred to an arbitral commission or expert committee, whose decision would be binding. Time-limits for the submission of the difference and for delivery of the decision could be prescribed, and the whole process need not take more than two to three months. Articles 4, 5 and 6 would then become unnecessary. He was not suggesting such a change, but simply mentioned the possibility, in order to show how the interests of all the States concerned could be safeguarded without giving the coastal State an interim right to introduce unilateral measures.

16. Mr. EDMONDS had little to add to Sir Gerald Fitzmaurice's very comprehensive statement; he only wished to urge the need for ensuring that measures promulgated unilaterally should not come into effect before a reasonable period had elapsed, in order to enable possible objections to be lodged. In practice, the provisions suggested by Mr. García Amador might operate in that way, but it was conceivable that before the arbitral commission had pronounced on a dispute, States other than the coastal State might be debarred from certain operations. Perfectly genuine differences of opinion could arise, even between experts, in deciding whether the requirements of article 5 had been fulfilled; thus a time-lag was important, because it would prevent a coastal State from introducing a succession of unilateral measures, each of which in turn might be found deficient, but which would in the meantime preclude other States from exercising their fishing rights. The procedure he advocated would ensure that any measures promulgated had a sound foundation and deserved respect.

17. The CHAIRMAN considered that the Commission was moving towards agreement.

18. Mr. SCELLE expressed his keen interest in the statements made by Sir Gerald Fitzmaurice and Mr. Edmonds. The former had brought out in a particularly effective manner that there was a common interest involved as well as the special interests of the coastal State, which could, of course, be very important, as was demonstrated by the fact that many governments sought to assimilate fishing rights to the rights exercised over the continental shelf. That tendency was well illustrated by the efforts of the Australian Government to protect its pearl fisheries against Japanese competition. With all the good will in the world, it was very unlikely that a coastal State would not consider its own interests first and foremost, if not to the exclusion of all others. There again, the Australian-Japanese case was interesting in that it revealed the importance attached to considerations of national defence, as distinct from economic ones.

19. Mr. García Amador's text failed to make clear the scope of the measures which the coastal State was entitled to promulgate, and he feared that such States might exercise their rights concerning fisheries as a pretext for precluding other States from exploiting other resources of their continental shelf, such as petroleum deposits. Indeed, it was a moot point whether it would be possible to draw a distinction between the rights exercised over the various resources of the continental shelf.

20. No unilateral decision could ever be disinterested, and he was *a priori* opposed to conferring such a right upon States: it should be exercised only by an

impartial organ capable of giving due weight to all the interests involved and of sacrificing a particular interest to the common good. In that connexion, he pointed out that an arbitral tribunal and an expert committee were not one and the same. The former should certainly make use of expert advice, as was implicit in article 3 of the Commission's own text, but it was not for experts to take upon themselves the task of arbitrating. He hoped the Commission would ultimately reach agreement much on the lines of the provisions of article 3 as adopted at the fifth session.

21. Mr. SALAMANCA observed that States were sometimes impelled to take independent action to protect their own interests, as in the case of Peru, which had made certain claims relating to the territorial sea because guano, indispensable in a country where there was virtually no rainfall, was deposited on small islands by birds that fed mainly on anchovies occurring in an area some 150 miles from the islands.

22. He supported Mr. García Amador's draft articles because they reconciled the various interests involved, and considered that they could be regarded as an amendment to the general provisions on fisheries adopted by the Commission at its fifth session.

23. In conclusion, he considered that Mr. Sandström's interesting procedural suggestion merited consideration after the general discussion had been concluded.

24. Mr. GARCÍA AMADOR said that he would need time for reflection before replying to all the points raised during the discussion. In the meantime, he could briefly deal with a few.

25. He thought that Mr. Scelle had, perhaps, been guilty of exaggeration in asserting that unilateral measures must of their very nature be biased. There had been many instances in the past of the most reasonable measures being introduced by a single State, as was recognized in paragraph 1 of the general conclusions reached by the Rome Conference on the Conservation of the Living Resources of the Sea.

26. Generally speaking, and subject to further reflection, he admitted that the interests of other States should be recognized, as was done implicitly in paragraph 3 of his preamble, which set forth the primary objective of the conservation of the living resources of the sea. However, the question was so intricate that he had not sought to deal with it in his draft articles. Until such time as effective international co-operation became a reality, the coastal State should be allowed to take such steps as were necessary to protect its own interests, its rights being, however, limited in order to prevent arbitrary action.

27. He felt that the Commission was nearing agreement, since most of the discussion hinged upon matters of detail and not of substance, and was hopeful that an acceptable text could be prepared on the basis of an agreement on the prime purpose of conservation of the living resources of the sea.

28. He then introduced article 7 of his draft on fisheries, which entailed a minor drafting change to article 6 as introduced at the previous meeting. The two articles would then read:

"*Article 6*

"In case of differences between the coastal State and other States concerned or between States which are parties to an international agreement and third States, either on the scientific and technical justification for the measures adopted, or on their nature or scope, such differences shall be settled in accordance with the provisions of article 7.

"*Article 7*

[General directives for the formulation of this article.]

"*Obligation to accept Arbitration*

"In the resolution adopting this article, the General Assembly would invite States to conclude general or special agreements stipulating that the differences referred to in article 6 must be submitted to arbitration.

"*Composition of Technical Arbitration Boards*

"(*a*) A technical Arbitration Board composed of qualified experts on the subject would be set up.

"(b) On this Board the States concerned would have equitable, and where advisable, equal representation. (Rule similar to that laid down by the Charter with regard to the Trusteeship Council.)

"(*c*) The Chairman of the Board would be appointed by the Secretary-General of the United Nations in consultation with the Director-General of FAO, as would also the arbitrators when the parties have failed to appoint them within a reasonable time.

"*Procedure*

"The Boards shall take up its duties with the least possible delay, and shall lay down its own rules of procedure in consultation with the parties.

"*Competence*

"The Board shall be competent to deal with any difference relating to the questions referred to in earlier articles.

"*Validity of Findings*

"The findings of the Board shall be final and without appeal, and shall be binding on the States concerned, except where the said findings are in the nature of recommendations. Nevertheless, recommendations by the Board must receive the greatest possible consideration."

29. He stressed that he wished the article on arbitration to be the work of the Commission rather than his own,

and his proposals were accordingly intended to serve as a basis for discussion; hence the note below the title of article 7.

30. Article 6 laid down the obligation to settle disputes amicably, and was consonant with Article 2, paragraph 3, of the Charter of the United Nations. The manner in which that obligation was to be discharged was laid down in article 7, in formulating which he had proceeded on the assumption that the General Assembly would adopt a resolution on the regime of the high seas (including fisheries), rather than a draft convention.

31. It would have been premature to introduce a general compulsory arbitration clause in the matter of fisheries. Such a blank cheque would hardly have been endorsed by a majority of States Members of the United Nations. Therefore his article was based on the voluntary acceptance of arbitration by means of general or special conventions. That was the system laid down in Article 36 of the Statute of the International Court of Justice. It was one to which States were already accustomed, and was therefore more likely to be accepted than the provisions of article 3 of the Commission's 1953 draft.

32. In the paragraph dealing with the composition of the technical arbitration boards, he had specified, in sub-paragraph (*a*), that those boards should be composed of experts—a provision inspired by the findings of the Rome Conference (A/CONF.10/6, chapter VI).

33. Sub-paragraph (*b*) drew its inspiration from Article 86, paragraph 1, of the United Nations Charter, which laid down an equitable system of representation in the case of the Trusteeship Council. When ensuring such equitable representation on the technical arbitration boards, the case in which a coastal State found itself in conflict with a number of non-coastal States would have to be contemplated: hence sub-paragraph (*b*) did not lay down an absolute rule of equal representation; in the case under reference, the non-coastal States would not be entitled to a stronger representation than the coastal State.

34. Sub-paragraph (*c*), concerning the powers of the Secretary-General of the United Nations to appoint not only the chairman of the board but also the other members (or arbitrators) when the parties failed to appoint them, drew its inspiration from the provisions of the American Treaty on Pacific Settlement (Pact of Bogotá)[2] signed at the IXth International Conference of American States held at Bogotá in March and April 1948, at the same time as the Charter of the Organization of American States.

35. With regard to the competence of the boards, he stressed that, although the interpretation of article 5 would be their main concern, they would also have to decide such problems as those envisaged in article 2.

36. The paragraph on validity of findings empowered the boards to pronounce their findings in the form of recommendations in cases where the matter in dispute was not of a character warranting a binding decision. That situation was already occurring within existing organizations of commissions dealing with fisheries conservation, which often simply invited the responsible authorities to make a close study of a particular question, in cases where there was no need for a formal decision of a judicial character.

37. Mr. HSU said that it was necessary to make a more thorough study of the relationship between article 4 and article 7. He wished to know whether it was Mr. García Amador's intention that, if a coastal State refused to conclude the arbitration treaty envisaged in article 7, article 4 should still apply, thus enabling a recalcitrant State to adopt unilateral measures simply because it happened to be a coastal State.

38. Mr. GARCÍA AMADOR undertook to examine Mr. Hsu's valuable suggestion, and would endeavour to include in article 7 a provision to fill the gap in question.

39. The crux of the matter was that article 3 of the Commission's 1953 draft, which provided for the setting up of an international authority with compulsory jurisdiction under article 1, did not command the agreement of States: and so long as States did not agree, article 3, and with it the whole draft on fisheries, would remain a dead letter.

40. The Commission must face the issue. Where conservation became necessary because of the danger of depletion of stocks, someone would have to initiate those measures; it would be most unrealistic to expect a coastal State, which had a serious interest in preventing depletion, to wait until other States had agreed before taking the necessary measures. He wished to emphasize, however, that, under article 5, the coastal State would only be entitled to adopt such measures where the strict requirements of that article were satisfied, and, furthermore, where the coastal State in question could demonstrate that it had a genuine special interest in the productivity of the resources of the high seas contiguous to its coast.

41. Mr. SANDSTRÖM enquired whether it was Mr. García Amador's intention that the technical arbitration boards should be in the nature of tribunals.

42. Mr. GARCÍA AMADOR said the boards would be in the nature of mixed commissions with equitable representation of the opposing interests; that rule would apply also in the case where all the arbitrators were appointed by the Secretary-General of the United Nations under sub-paragraph (*c*).

43. Sir Gerald FITZMAURICE said that he was somewhat reassured by Mr. García Amador's agreement to take Mr. Hsu's suggestion into account in re-drafting article 7. There was, however, another serious point: under the terms of article 6, if the coastal State adopted unilateral measures to which another State had grounds for objecting, the second State would be entitled to have recourse to a technical arbitration board. But under

[2] Pan American Union, *Law and Treaty Series*, No. 24.

article 7, such a board could not be set up without the consent of the coastal State: it would therefore appear to be possible for a coastal State to adopt unilateral measures while at the same time withholding its consent to the setting up of an arbitration board with competence to adjudicate on the disputes to which its own action gave rise.

44. Mr. AMADO supported Sir Gerald Fitzmaurice's remarks on the undue latitude given to the coastal State. He felt, moreover, that article 4 went too far in authorizing a coastal State to adopt unilateral conservation measures at its discretion, even in cases where its nationals were not engaged in fishing in the area concerned. Such a provision would seem to authorize measures to exclude the more active nationals of other States by a State whose citizens had neglected to develop the resources near their coasts.

45. He stressed the importance of laying down a time-limit, as had been suggested by Sir Gerald Fitzmaurice, during which States should endeavour to reach agreement. If the matter were left open, the permission to take unilateral measures would become a blanket authority of indefinite duration.

46. A further limitation appeared to him essential: that of the maximum distance from the coast to which the powers of the coastal State would be restricted.

47. Mr. LIANG (Secretary to the Commission) wished to offer some remarks on Mr. García Amador's articles, as a contribution to the work of the Commission and Drafting Committee.

48. Although the text was, perhaps, not altogether clear on the point, Mr. García Amador's technical arbitration boards would appear to be in the nature of *ad hoc* arbitral tribunals, as provided for by The Hague Convention of 1907 for the Pacific Settlement of International Disputes,[3] by which the Permanent Court of Arbitration had been set up. The *ad hoc* element was essential to both, because the parties would be different in each case referred to them. In the draft articles on fisheries adopted in 1953, the Commission had envisaged a permanent international authority to be created within the framework of the United Nations. That authority would have had a continuous existence and presumably a stable composition; in short, it would have been more akin to the International Court of Justice.

49. Furthermore, article 7 raised wider issues. The heading of the first paragraph, "Obligation to accept Arbitration", was not part of the article; but it was intended to show the importance of the provision it contained. That provision, however, stated that the General Assembly should invite States to conclude general or special agreements providing for arbitration. It was clear, therefore, that States would be under no obligation to accept arbitration unless they entered into such agreements; it was thus a case of voluntary, not of compulsory, arbitration.

50. He recalled that many of the provisions of the Charter of the United Nations (article 2, paragraph 3, and article 33, for instance) imposed on States Members the obligation to settle their disputes by peaceful means. The parties to a dispute had the choice of several methods of pacific settlement: arbitration was only one such.

51. Perhaps some re-drafting of article 7 was called for to make clear the exact nature of the obligations of States in the matter of arbitration. He recalled that after the Commission had adopted, at its fourth session, its draft on arbitral procedure, some misgivings had been expressed in the Sixth Committee of the General Assembly: some speakers had misconstrued the draft, thinking it to be a proposal for an actual arbitration treaty, whereas in fact it had been no more than a draft code of arbitral procedure.

52. Finally, with regard to the competence of the technical arbitration board, it would be important to reconcile the text of article 6 with that of article 7. Article 6 specified that the board would be competent to give a ruling on the scientific and technical justification for the conservation measures adopted; article 7, on the other hand, empowered the Board to deal with any difference relating to the questions referred to in the earlier articles. That suggested a wider competence than was provided for in article 6.

53. When re-drafting articles 6 and 7 accordingly, it would be advisable also to make the technical arbitration board competent to deal with disputes arising out of a contention that a State had no right to make any conservation regulations whatsoever. As Mr. García Amador's draft stood, it was permissible to doubt whether such a dispute would be open to arbitration.

54. Mr. FRANÇOIS (Special Rapporteur) considered that Mr. García Amador's proposals regarding arbitration were too complicated. In his second report on the high seas (A/CN.4/42), submitted at the third session, he (the Special Rapporteur) had suggested that recognition of the right to establish protective zones should be made conditional upon acceptance of the jurisdiction of the International Court of Justice in such matters. If it were considered inadvisable to entrust the International Court with fishery conservation disputes, it was still possible to adopt either the procedure provided for by the 1907 Convention on the Pacific Settlement of Disputes, or the method laid down in the Commission's own draft code of arbitral procedure, which constituted a watertight arbitration system. Under either of those systems the parties to a dispute would be free to choose either fishery experts or jurists—or for that matter any other experts—as arbitrators.

55. The case of a dispute between the coastal State on the one hand and a number of non-coastal States on the other, did not require any special complicated provision. There were precedents: The Venezuelan Pre-

[3] J. B. Scott, *The Reports of The Hague Conferences of 1899 and 1907* (Oxford, 1917), p. 292.

ferential Claims Case, heard before the Permanent Court of Arbitration in 1904, had brought Venezuela into opposition with the three Powers which had undertaken the pacific bloackade of Venezuelan ports, namely, Germany, Great Britain and Italy, who had been joined be several other States. Venezuela's three opponents had jointly chosen their arbitrator, and had entered joint pleas with the Permanent Court of Arbitration.

56. He could not see his way to accepting article 7. The obligation to arbitrate should proceed direct from the articles to be adopted by the Commission, and not be made conditional upon the conclusion of a further, separate agreement.

57. The proposed technical arbitration board was a veritable arbitration tribunal: if, in accordance with subparagraph (*c*), the entire board were to be appointed by the Secretary-General of the United Nations, it was questionable whether it would be acceptable to States which, it had been claimed, were unlikely to be satisfied with a provision conferring jurisdiction on the International Court of Justice, or even one for arbitration by a tribunal chosen by the interested parties themselves.

58. The CHAIRMAN said that the Commission must bear in mind that the question of the special rights of the coastal State would become very much graver if no provision were made for compulsory arbitration.

59. Mr. KRYLOV said that the Permanent Court of Arbitration had done very useful work in the past, but was hardly suited to the task of arbitrating disputes over problems of fisheries conservation. Nor was the International Court of Justice equipped to deal with such problems, which were essentially of a technical nature. It was highly desirable that the technical arbitration boards be composed of specialists in fishery questions, capable of finding the correct practical solution to the problems that would be brought before them.

60. Mr. GARCÍA AMADOR, replying to the criticisms of article 4, said that a coastal State whose nationals were not engaged in fishing could still be vitally interested in fishery conservation. Such was the case with Peru, already mentioned by Mr. Salamanca; as late as the 1920s there had appeared to be no conceivable danger to the ecological process he had described. But more recent events had shown that, with the aid of modern technical equipment, over-fishing of anchovies had become possible and indeed probable, a situation which might have disastrous effects on Peru's food supplies and, indeed, on its whole economy.

61. As he had already emphasized, article 7 was only a basis for discussion, and he hoped to improve it in the light of all the suggestions made by members. On one point, however, he must stand firm: the International Court of Justice was certainly not fitted to deal with the disputes for the settlement of which he was suggesting that technical arbitration boards should be set up. Those disputes would concern such problems as the size of mesh of the nets, the size and weight of the fish it was permissible to catch, possible limitations of total catch by weight or number, limitations on the age of fish caught, and, in some cases, the problem of abstention from fishing a particular species in order to maintain an ecological balance. Mr. Krylov, himself a distinguished former member of the International Court of Justice, had emphasized that such problems were best dealt with by technical experts, not by jurists.

62. With regard to the compulsory character of arbitration, it had been shown by the reaction of States to the Commission's draft articles on fisheries, adopted in 1953, that the solution suggested therein, providing for the compulsory jurisdiction of an international authority, the decisions of which would be binding upon States, was not a feasible one. Given that situation, only two alternatives were possible. One would be to provide for compulsory arbitration without conferring binding force on the arbitral decisions: such a course would meet with general approval, but would be ineffectual, as there would be no possibility of enforcement. The other alternative—the only practicable one, which he had embodied in article 7—was to provide for voluntary acceptance of arbitration, while at the same time laying down that the decisions of the arbitration boards would be final and binding on the parties.

63. Finally, he urged those members who had made suggestions to formulate them in texts, so that they could be usefully discussed by the Commission.

64. The CHAIRMAN thought that the best course the Commission could adopt would be, after a further short general discussion, to go on to vote on certain leading principles on the basis of concrete suggestions by members. The Commission could thus decide in principle whether the arbitration tribunals should be of a technical character or not; whether arbitration should be voluntary or compulsory; whether an international authority to deal with fisheries conservation was required; and, finally, whether the special position of the coastal State should be explicitly recognized.

65. In the light of those votes, the Drafting Committee —or a special committee—could prepare a final draft on fisheries.

The meeting rose at 1.10 p.m.

298th MEETING

Wednesday, 25 May 1955, at 10 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

1. The CHAIRMAN called attention to the text proposed by the Special Rapporteur to replace articles 6 and 7 submitted by Mr. García Amador at the previous meeting:[1]

"1. Disputes between the coastal State and other States concerned relating to the rules laid down by the coastal State for the protection of the resources of the sea shall be submitted to the organ set up within the United Nations to deal with questions of that kind.

"2. Until that organ has been set up, such disputes shall, unless the parties agree on some other manner of peaceful settlement, be submitted to arbitration.

"3. The composition and procedure of the arbitral tribunal shall, unless otherwise agreed between the parties, be governed by the provisions adopted by the International Law Commission at its fifth session.

"4. The arbitral tribunal may decide that pending its award the provisions in dispute shall not be applied."

2. Mr. KRYLOV said the Commission should vote on Mr. García Amador's articles 1-5 before going on to discuss articles 6 and 7 and the amendments proposed thereto by the Special Rapporteur.

3. Mr. EDMONDS said that Mr. García Amador's articles could well supplement the draft articles on fisheries adopted by the Commission at its fifth session. If agreement could be reached on certain basic principles, it would be possible to combine the two texts.

4. International law gave equal rights to nationals of all States to fish in the high seas. But the problem had arisen of the need for conserving certain species; the right to fish would be illusory if there were no fish to catch. For that reason, it was desirable to recognize certain particular rights to States in respect of conservation measures.

5. There were three possible situations. First, there was the case in which nationals of a single State fished a particular area; it would be consistent with existing international law to lay down that such a State could regulate fisheries in the area. The second case was that in which nationals of more than one State fished a given area; regulation should then be by agreement between the States concerned; if no agreement were reached the case should be submitted to arbitration. Finally, there was the problem of the special interest of the coastal State, and it was there that Mr. García Amador's draft broke new ground by suggesting that, where no agreement was reached by the interested States, the coastal State would have the right to regulate fisheries unilaterally.

6. One important feature was, however, lacking in both drafts. It was the problem of whether regulations promulgated by one or more States and disputed by another or others should be recognized while arbitration was in progress. Years might elapse before a final award was made, and it would be extremely dangerous to suggest that, during what might well be a very long period, a regulation adopted unilaterally, and which might thereafter be declared invalid and unsound by the arbitral tribunal, should be enforceable.

7. Faris Bey el-KHOURI criticized the reference in the Special Rapporteur's substitute text for Mr. García Amador's articles 6 and 7 to the arbitration procedure adopted by the International Law Commission at its fifth session. The text then adopted by the Commission was only a draft convention, which had not yet been adopted by the General Assembly. It was still very far from being an arbitration treaty signed by States. It would be preferable merely to state that disputes should be submitted to arbitration, without specifying any particular procedure.

8. With regard to the composition of the technical arbitration board, it was undesirable that, suggested as in Mr. García Amador's draft, it should be composed of qualified experts. Governments were free to appoint any person of their choice, and they could be trusted to select persons who were properly qualified to adjudicate upon the particular points at issue. If it were suggested that a particular type of expert was needed, it might happen that a State would contest the qualifications of the arbitrator appointed by its opponent, and the question would then arise as to what higher authority would be competent to give a ruling on the expert's qualifications.

9. Finally, he expressed regret that the Special Rapporteur should have abandoned the proposal originally made in his second report concerning the compulsory jurisdiction of the International Court of Justice. It was not a valid argument to contend that fishery problems raised technical issues; all disputes submitted to the International Court of Justice did so. The Court examined the facts and applied the law to them. The crucial problems that would be submitted to the International Court of Justice would be matters of international law,

[1] 297th meeting, para. 28.

namely, the right to apply some particular regulation for the conservation of fisheries.

10. The CHAIRMAN, speaking as a member of the Commission, said it was undesirable that there should be any reference to arbitration procedure in the draft articles on fisheries. It would suffice to make provision for compulsory arbitration. The detailed regulation of the procedure to be adopted for such arbitration would require a special conference of States.

11. It was important to bear in mind the fact that an article 3 [2] of the draft articles on fisheries adopted by the Commission at its fifth session (A/2456) could not be set up merely by resolution of the General Assembly. That body could certainly draft a treaty on the subject; but the international authority would come into being only when that treaty had been ratified by the requisite number of States.

12. Mr. FRANÇOIS (Special Rapporteur) considered that the Commission should vote on articles 1-5 of Mr. García Amador's text before discussing the question of arbitration.

13. The CHAIRMAN pointed out that the issue of compulsory arbitration had a vital bearing on the acceptability of those articles. It would therefore be better to vote on the principle of compulsory arbitration first.

14. Mr. AMADO agreed with the Chairman. The problem of enforcement had to be decided first.

15. He would suggest that the article on arbitration be drafted along the following lines:

> "In case of differences between the coastal State and other States concerned, or between the States parties to an international agreement and other States, either on the scientific and technical justification for the measures adopted, or on their nature or scope, such differences shall be settled by arbitration.
>
> "States may at any time conclude general or special agreements stipulating the obligation to settle any such differences by arbitration."

16. Mr. SALAMANCA recalled that the principle of voluntary rather than compulsory jurisdiction had been accepted at San Francisco, where he had voted against it. It was clear therefore that compulsory jurisdiction was not part of international law at the present time.

17. The only really important substantive issue raised by Mr. García Amador's draft articles was recognition of the special position of the coastal State, which had not so far been clarified in international law.

18. Mr. SCELLE disagreed; Mr. García Amador's draft articles raised a number of vital questions of substance affecting the regime of the high seas. The most serious was whether the coastal State had the right to regulate fisheries on the high seas with respect to the nationals of other States; and if so, how far from the coast such right should extend.

19. Hitherto, under international law, the coastal State had had no right to issue any such regulations. At The Hague Codification Conference in 1930, proposals had been made that such a right should be acknowledged within twelve miles of the coast; later proposals, including those of the Special Rapporteur in his second report, had mentioned a distance of 200 miles and, in the Commission's draft articles on fisheries adopted in 1953, the distance specified was 100 miles. Mr. García Amador was now proposing that the distance be indeterminate.

20. The Commission must first settle such questions of substance; next came the problem of arbitration. It was first necessary to lay down rights and obligations; it would then be proper to discuss enforcement and procedure.

21. International arbitration was a comparative novelty. The freedom of the high seas had been the subject of international law for many centuries. Historically and logically, substance came before procedure.

22. Mr. SANDSTRÖM said that the question of compulsory arbitration conditioned the whole of Mr. García Amador's proposals. If compulsory arbitration were part of Mr. García Amador's scheme, articles 1-5 entailed no very grave concession to the coastal State, for the latter's competence to promulgate unilateral conservation measures would be in the nature merely of a provisional right. Should, however, compulsory arbitration not be an element of the scheme, recognition of the special position of the coastal State would confer an inherent right to adopt unilateral conservation measures.

23. Sir Gerald FITZMAURICE had no objection to discussing articles 1-5, but felt that not vote should be taken on them until a decision had been reached on the question of arbitration. Many members might be prepared to acknowledge the special position of the coastal State, provided it was made subject to control by means of a provision for compulsory arbitration.

24. Mr. ZOUREK recalled that at previous sessions the Commission had discussed its articles on the regime of the high seas and on that of the territorial sea before taking up the question of compulsory arbitration as it related to them, and leaving the discussion of the relevant articles to the end.

25. Sir Gerald FITZMAURICE said that there was a very important difference between the Commission's draft articles on the territorial and high seas on the one hand, and those on fisheries on the other. In the former case, the Commission had been almost exclusively concerned with *lex lata*. In the case of fisheries, however, the only extant rule of international law was that the high seas were free for all to fish, no State having the right to regulate fishing therein; it was now proposed that the Commission should legislate in the matter. At

[2] A/CN.4/79, article 32.

such a juncture, the question of arbitration ceased to be a matter of procedure and became one of substance. It was vital to provide for compulsory arbitration when laying down rules *de lege ferenda.*

26. Mr. GARCÍA AMADOR said that, in the matter of fisheries conservation, questions of substantive law were indissolubly linked with procedural issues; it was therefore not practicable in the present discussion to follow the usual course of dealing first with questions of substance exclusively, and then with procedural questions exclusively.

27. The only serious substantive issue was that of the right of the coastal State to promulgate regulations unilaterally, pending international agreement on conservation measures; but the Commission could not vote on that issue unless members knew in what manner the coastal State would exercise the right in question. For his part, he intended to recognize the right to unilateral action by the coastal State only on the conditions set out in articles 4 and 5 of his proposal, and subject to the particular procedure suggested in articles 6 and 7. He could, however, well understand that other members of the Commission might make their acceptance of article 4, for example, dependent upon the adoption of some other enforcement procedure.

28. He therefore proposed that members should be allowed to express their opinion on articles 1-5, while making it conditional on the adoption of the arbitration procedure advocated by each of them.

29. Mr. AMADO said that it would not be practicable to discuss and vote upon the articles in such conditional manner.

30. The CHAIRMAN called for a vote on the order in which Mr. García Amador's articles should be discussed.

It was decided by 6 votes to 4, with 3 abstentions, to discuss articles 1-5 before articles 6-7.

31. Mr. EDMONDS pointed out that article 1 corresponded to the second sentence of the draft adopted by the Commission in 1953.

32. Sir Gerald FITZMAURICE proposed that article 1 be completed by the addition of a phrase specifying more clearly the obligation of States to negotiate with a view to reaching agreement on conservation measures. The article would then read somewhat as follows:

> "If the nationals of two or more States are engaged in fishing in any area of the high seas the States concerned shall, at the request of any one of them, engage in negotiations to prescribe by agreement the necessary measures for the conservation of the living resources of the sea."

33. It would also be useful to lay down some procedure for the case in which States were unable to reach agreement. He suggested that it be provided that, where no agreement could be reached on the conservation measures to be adopted, the question should automatically be referred to arbitration.

34. Mr. SCELLE said that the scope of article 1 appeared to be limited to measures for the conservation of the living resources of the sea, whereas the Commission's draft articles on fisheries adopted in 1953 covered a wider field, in that they related to the regulation of fisheries as a whole on the high seas.

35. The CHAIRMAN said that Mr. García Amador's articles formed the basis for discussion. It was open to Mr. Scelle to move an amendment to article 1, with the object of reinstating the 1953 text.

36. Mr. GARCÍA AMADOR said that he had proceeded on the assumption that the articles on fisheries should lay down regulations for the conservation of the living resources of the sea—a purpose which had also been at the foundation of the 1953 articles.

37. Mr. LIANG (Secretary to the Commission) confirmed that the records of the proceedings at the fifth session showed that the Commission had adopted its three articles on fisheries principally with a view to conserving the living resources of the sea. Part II of Mr. François' fourth report (A/CN.4/60)[3] on the regime of the high seas had been entitled "Resources of the Sea".

38. Article 1 did not differ materially from the second sentence of article 1[4] of the 1953 draft, because the "necessary measures" mentioned in the latter were precisely those calculated to "regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination".

39. Article 2 of the 1953 draft contained a provision which did not appear in Mr. García Amador's draft, namely, the limitation to a distance of 100 miles from the coast of the right of the coastal State to participate on an equal footing in any system of regulation, even though its nationals did not carry on fishing in the area concerned.

40. The problem raised by Mr. Scelle, namely, that of the extent of the coastal State's jurisdiction in the matter of fisheries, must be settled in the light of the decisions that the Commission might adopt concerning the breadth of the territorial sea and of the contiguous zone. Only when those questions had been settled would it be possible to fix the distance up to which the coastal State would be entitled to enforce fishery measures on the high seas.

41. The suggestion that the Commission should revert to the 1953 text could not be regarded as an amendment to Mr. García Amador's article 1: the 1953 articles on fisheries had been formally adopted by the Commission. The Commission was discussing Mr. García Amador's proposals, and members would naturally draw upon the 1953 articles to support formulations different from those put forward by him.

42. The CHAIRMAN said that for practical reasons it

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[3] *Yearbook of the International Law Commission, 1953*, vol. II.

[4] A/CN.4/79, article 30.

was essential that the Commission should use a single text as a basis for discussion; at present, Mr. García Amador's draft articles served that purpose. Any proposal to revert to the 1953 text would therefore be in the nature of an amendment to those articles.

43. Mr. AMADO pointed out that Mr. García Amador's article 1 was one of several which were intended to replace article 1 of the 1953 draft on fisheries. It was therefore not possible to choose between the two, as Mr. García Amador's article 1 was necessarily more restricted in scope.

44. The central idea of the 1953 draft was that the State or States whose nationals were engaged in a particular ocean area should alone be concerned in the regulation of fisheries in that area. If, for example, Portuguese fishermen were engaged in fishing cod in a particular area, then Portugal was entitled to protect cod stocks against depletion and to enforce those measures against foreign fishermen.

45. Mr. García Amador's purpose was quite clear: he wished, in addition, to protect the coastal State against possible depletion of given fishery resources in the future, provided the coastal State had a genuine interest at stake, irrespective of whether at the present time the coastal State was actually engaged in fishing in the area. There was no doubt that for certain species of marine life the danger of depletion was very real. He recalled that, in his voyages from Brazil to Europe before the First World War, he had often seen whales in the North Atlantic where now there were none to be seen.

46. Mr. ZOUREK agreed with the Chairman that the Commission could not simultaneously discuss two texts, and therefore suggested that for the time being it confine itself to the draft articles submitted by Mr. García Amador and decide later what should be done with those adopted at the fifth session. If it had to reverse an earlier decision it would not be for the first time, and, moreover, in the present instance it had been expressly authorized by the General Assembly in resolution 900 (IX) to reconsider the question of fisheries in the light of the conclusions reached at the International Technical Conference on the Conservation of the Living Resources of the Sea.

47. The lengthy discussion which had developed on the two articles 1 was in his opinion largely unnecessary, since a careful perusal of the first sentence of article 1 of the 1953 text would reveal that there was no substantial difference between the two, the words "for the purpose of protecting fisheries against waste or extermination" making it plain that the scope of the former was restricted to the conservation of the living resources of the sea.

48. Mr. SCELLE could not agree with that interpretation of the Commission's text as a whole, though the words Mr. Zourek had quoted lent some colour to his thesis. It must be pointed out that article 3 of the 1953 text clearly referred to "any system of regulation of fisheries in any area of the high seas". Surely coastal States would envisage a system of regulation that embraced a great deal more than the protection of fishing resources pure and simple; indeed, it could not be otherwise in view of the numerous interests involved, particularly those associated with the exploitation of the continental shelf. If the provisions were to be restrictive in the sense suggested by Mr. Zourek, the arbitral tribunal contemplated in Mr. García Amador's draft would persistently reject any measures promulgated by the coastal State not strictly limited to conservation.

49. The CHAIRMAN said that he had learnt that there was a substantial body of opinion in the Commission in favour of referring the whole question of fisheries to a sub-committee with the same membership as the Drafting Committee. The sub-committee would be requested to submit a new compromise text in the light of the discussion which had taken place in plenary meeting. He suggested that that course be followed.[5]

It was so agreed.

50. Mr. SCELLE said that he would be unable to attend the meeting of the sub-committee that afternoon, a fact which he greatly regretted because he held very definite views and was fairly clear in his own mind as to the extent of the concessions he would have been prepared to make. However, in the circumstances the Commission should appoint a substitute for that meeting.

51. The CHAIRMAN invited Mr. Sandström to take Mr. Scelle's place at the meeting of the sub-committee that afternoon.

52. Mr. GARCÍA AMADOR suggested that in the meantime the Commission might continue its discussion, particularly on the controversial points, in order to clarify the situation a little further for the sub-committee.

53. Mr. SANDSTRÖM said that the sub-committee should consider whether Mr. García Amador's text would also cover the protection of whales, since it referred to "the living resources of the sea", whereas the Commission's own text had been restricted to the protection of fisheries.

54. Faris Bey el-KHOURI asked that the sub-committee make provision for any agreement reached on measures for conservation to be communicated to all States regardless of whether or not they were Members of the United Nations; otherwise the universal freedom to fish on the high seas might be prejudiced.

55. Mr. SCELLE maintained that the Commission must clearly define the scope it had intended to give to the provisions adopted at its fifth session. If they had one and the same objective as that of Mr. García Amador's draft articles—he himself. of course, held the opposite view—the two texts should be combined.

56. Mr. GARCÍA AMADOR said that, in view of his clear statement at the 296th meeting[6] concerning the

[5] See *infra*, 300th meeting, para. 1.

purpose of his draft, he had not thought it necessary to emphasize subsequently that it was designed exclusively to ensure the conservation of the living resources of the sea. However, in order to make the position perfectly plain, he would point out that conservation was mentioned in each paragraph of the preamble with the exception of the first, and, indeed, constituted the special feature of his draft. There could be no doubt that conservation had been precisely the problem which the Rome Conference had been convened to study.

57. Mr. FRANÇOIS (Special Rapporteur) disagreed with Mr. Scelle's interpretation, and did not consider that the words "for the purpose of protecting fisheries against waste or extermination" allowed of any possibility of doubt. In order further to substantiate his argument, he reminded Mr. Scelle that the three articles adopted by the Commission at its fifth session had originated in that part of his second report on the high seas (A/CN.4/42)[7] which had been devoted to the protection of the resources of the sea. From the outset, the whole issue had been considered from that angle.

58. Mr. HSU suggested that the Commission might proceed with the examination of the draft articles within the narrower framework proposed by Mr. García Amador. It could later consider whether the wider approach, of which Mr. Scelle was the exponent, was preferable.

59. Mr. SANDSTRÖM endorsed the Special Rapporteur's argument, which was further reinforced by the first sentence of paragraph 98 in the Commission's report on its fifth session.

60. Mr. SCELLE observed that, if the Commission decided that the two texts had precisely the same purpose, article 1 in Mr. García Amador's draft would have to be amplified to bring it into line with article 1 of the former.

61. Mr. SALAMANCA said that the fact that Mr. García Amador's text was an amendment to the articles adopted by the Commission was perhaps being overlooked. The sole important difference between the two was that the former took into account the special interests of the coastal State. In his opinion, it was the task of the sub-committee to combine the two texts to produce a single draft.

62. Mr. GARCÍA AMADOR pointed out that he had transposed the second sentence of article 1 in the Commission's text to make a separate article, because it enunciated a fundamental principle which was not at variance with international law. As the first sentence in the Commission's article 1 was somewhat indeterminate, and failed to define the meaning of conservation, he had, in the light of the conclusions reached by the Rome Conference, devoted the whole preamble to that definition. The remainder of his articles derived from the Commission's own draft.

63. Mr. ZOUREK said that the discussion had shown that most members of the Commission, including the Special Rapporteur, agreed with the restrictive interpretation of the articles adopted in 1953; the Commission would be well advised to reach a definite decision about the scope of the text to be adopted.

64. Mr. AMADO considered the discussion to have been useful in clearing the air, and did not think that any doubts would have arisen in Mr. Scelle's mind if he had read carefully the comment on the Commission's articles. Mr. García Amador had not gone any further in formulating principles which, it must be acknowledged, were new in international law except that he had mentioned the special interests of the coastal State.

65. Mr. SCELLE observed that he had in fact given very careful study to the comment, but had interpreted the word "regulations" in paragraph 98 of the 1953 Report of the Commission (A/2456) in its widest sense. Perhaps he had been mistaken, and he would therefore ask that the Commission formally decide that issue. If his conception was incorrect, then Mr. García Amador's draft articles did indeed constitute an amendment to those already adopted by the Commission and should be dealt with first. Their approval would extricate the Commission from the embarrassment of having to submit to the General Assembly two texts which conflicted on certain points.

66. Mr. SALAMANCA observed that the Commission might, in the light of modern developments, have to modify its earlier views about the procedure for the settlement of disputes and he wondered how that important question of substance could be decided by the sub-committee if it had no guidance from the Commission itself.

It was decided by 7 votes to none, with 5 abstentions, that Mr. Scelle's interpretation of the scope of the articles adopted at the fifth session (A/2456) was incorrect.

The meeting rose at 1 p.m.

299th MEETING

Thursday, 26 May 1955, at 10 a.m.

CONTENTS

[6] 296th meeting, para. 19.

[7] *Yearbook of the International Law Commission, 1951*, vol. II.

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. S. B. KRYLOV (First Vice-Chairman)
later: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 4, A/CN.4/93, A/CN.4/L.54) *(resumed from the 295th meeting)*

Mr. Krylov, First Vice-Chairman, took the Chair.

PROVISIONAL ARTICLES (A/2693, CHAPTER IV)

Chapter III: Rights of passage

1. The CHAIRMAN, after announcing that the sub-committee set up at the previous meeting[1] had not yet completed its work on the draft articles on fisheries, invited the Commission to consider chapter III of the provisional articles concerning the régime of the territorial sea.

2. Mr. FRANÇOIS (Special Rapporteur) stated that the United Kingdom Government had raised certain objections to the order of the articles in chapter III, on the grounds that some of the articles were general in scope and should be applicable to warships as well as to merchant vessels. He admitted that the grouping adopted by the Commission at its sixth session was not particularly felicitous, but did not find the proposed remedy fully satisfactory. It might, indeed, give rise to just as much confusion as the original text. In particular, he could not agree to the inclusion in a general article of the kind proposed by the United Kingdom Government[2] of the provision contained in sub-paragraph (7), which related solely to warships. Furthermore, if the United Kingdom Government's proposals were adopted it would no longer be clear that articles 22 and 23 applied to merchant vessels only.

[1] 298th meeting, para. 49.

[2] A/2934, annex, No. 16.

3. A simple solution would be to group together articles 18, 19, 20 and 21, which were of a general character, and to transpose the heading "Section A: Vessels other than warships" from its present position before article 18 to a similar position before article 22. Some further modifications would also be necessary, particularly in the case of articles 26 and 27. As the matter was one of presentation and not of substance, he believed it could be referred direct to the Drafting Committee.

4. The CHAIRMAN entirely agreed that the question could be dealt with by the Drafting Committee.

5. Sir Gerald FITZMAURICE observed that there was a great deal of justice in the Special Rapporteur's criticism of the form proposed by the United Kingdom Government. The original was clearly capable of improvement, but the United Kingdom amendment was not entirely successful.

It was agreed to refer the matter to the Drafting Committee.

6. Mr. SALAMANCA considered that, as articles 20 and 21 stated the exceptions to the right of innocent passage, the Drafting Committee should give all the attention it deserved to the United Kingdom Government's proposed sub-paragraph (6). That text was a positive affirmation of the right and was drafted in much more precise and lucid language than that used by the Commission.

7. Mr. FRANÇOIS (Special Rapporteur) pointed out that the right of innocent passage was recognized in a positive manner in article 18.

8. Mr. ZOUREK considered it appropriate to refer the question of the order of articles to the Drafting Committee, but could not agree with the Special Rapporteur that the transposition of the heading of section A was a mere drafting matter. That action would have grave legal consequences, owing to the fact that all the articles in chapter III were based on the drawing of a distinction between warships and other vessels. The right of innocent passage by warships had been discussed at great length at the previous session, when he had been in the minority. He still could not agree that article 18 was applicable to warships, since that would be contrary to existing rules of international law. If the Commission wished to propose such a change *de lege ferenda*, it must say so clearly.

9. In considering the order of the articles it should be borne in mind that they flowed from State sovereignty. The rights and duties of the coastal State were in the present instance subject to the right of innocent passage in the interests of freedom of navigation. The relative importance of the principles involved must be reflected in the structure of the draft.

10. Mr. FRANÇOIS (Special Rapporteur) explained that he had not proposed that the distinction between warships and other vessels should be abandoned; it would be preserved if section A were to begin at

article 22 and if certain provisions were transposed to form part of the general provisions.

11. Mr. Zourek's other observations would, of course, be taken into account by the Drafting Committee, which he hoped would not feel impelled to make any great change in the order adopted at the previous session.

12. The CHAIRMAN then invited the Commission to discuss chapter III article by article.

Article 17 [16]: Meaning of the right of passage

13. Mr. FRANÇOIS (Special Rapporteur) said that some governments considered that it should be made clear that the provisions of chapter III applied in time of peace. Though it was perhaps superfluous to make an explicit reference of that kind, he had in his amendments proposed that the heading of the chapter be changed to read "Right of innocent passage in time of peace", so as to avoid all possibility of misunderstanding.

14. Mr. AMADO considered the original title to be perfectly adquate, and was disturbed by the restrictive implications of the Special Rapporteur's amendment. Moreover, he could not admit that there could be any right of passage which was not innocent.

15. Mr. FRANÇOIS (Special Rapporteur) pointed out that in time of war the right of passage for merchant ships through the territorial sea of another State was subject to rules other than those obtaining in time of peace.

16. The CHAIRMAN, speaking as a member of the Commission, favoured the Special Rapporteur's amendment, which made clear the scope of chapter III.

17. Sir Gerald FITZMAURICE, though he did not wish to make an issue of the point, asked whether the Special Rapporteur's amendment might not be construed as meaning that certain other parts of the draft were of general application both in time of peace and in time of war. If, in fact, the Commission was legislating for peace time, it would be wrong to make specific mention of that fact in one chapter alone.

18. Mr. FRANÇOIS (Special Rapporteur) did not share Sir Gerald's concern, because he considered that other articles in the draft had a general application not limited to time of peace. The distinction only arose in the case of the right of innocent passage. The matter could, however, be elucidated in the comment.

19. Mr. AMADO said he had not been convinced by the Special Rapporteur's arguments, and would insist on a vote if the amendment were maintained.

20. Sir Gerald FITZMAURICE could not entirely agree with the Special Rapporteur. For instance, even with regard to the limits of the territorial sea the claims made by States were not necessarily the same during a war as in time of peace, as was illustrated by the case of the Scandinavian States. The Commission might also find it necessary to provide for the eventuality of the articles on fisheries not necessarily being equally applicable in times of war. That being so, there was a case of indicating, perhaps in the comment, that the régime of the territorial sea would apply only in time of peace.

21. Mr. HSU thought that, in view of the difficulty of definition, a change of the kind proposed by the Special Rapporteur was inadvisable, as it might require the inclusion of a further article to explain what was meant by "time of peace".

22. Mr. SCELLE also felt that the Special Rapporteur's amendment might be positively harmful. Most rules of international law applied only in time of peace, and it would be a great mistake for the Commission to make any reference of the kind proposed by the Special Rapporteur.

23. Mr. FRANÇOIS (Special Rapporteur) withdrawing his amendment, emphasized that it was extremely dangerous to argue that the limit of the territorial sea was only applicable in peacetime.

24. Mr. AMADO observed that in the modern world it was difficult to determine when a state of war existed.

25. Mr. FRANÇOIS (Special Rapporteur), turning to paragraph 2 of article 17, recalled that the concluding words "any act prejudicial to the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect" had been adopted at the sixth session at the suggestion of Mr. Scelle and after prolonged discussion. They had been strongly opposed by Mr. Lauterpacht, who had entered an express reservation stating that he could not accept such wording. The United Kingdom Government had noted that such wording, which favoured the coastal State, might be open to abuse, and the Netherlands Government, moved by the same preoccupation, had proposed that the paragraph be amended to read: "Passage is innocent so long as the vessel uses the territorial sea without committing any act contrary to the laws and provisions enacted by the coastal State in conformity with these regulations and with other rules of international law." He submitted that text for the Commission's consideration.

26. Mr. SANDSTRÖM preferred the Netherlands amendment (A/2934, annex, No. 10), which defined the right of passage in more positive terms than did the original text. However, the question at issue was really one of form.

27. Sir Gerald FITZMAURICE said that he would be satisfied by the Netherlands amendment.

28. Mr. ZOUREK expressed a strong preference for the original text, which could be slightly recast to meet Mr. Sandström's wishes. The Netherlands amendment had reversed the proper order of things by indirectly defining innocent passage as passage which did not violate the laws of the coastal State, whereas it was the latter which must be the judge of whether its security,

fiscal, sanitary, migration and other interests were being respected. By the terms of the Netherlands amendment, if the coastal State had made no specific laws and regulations for the protection of its interests, the passage of a foreign vessel through its territorial waters must always be held to be innocent whatever its actions. Such wording would accordingly vitiate the fundamental principle stated in article 1.

29. Mr. FRANÇOIS (Special Rapporteur) considered that Mr. Zourek's objections were to a great extent well-founded. Perhaps the Drafting Committee might be requested to prepare a compromise text.

30. Mr. SCELLE did not consider that the difference between the two texts was very significant. Paragraph 2, however, did call for some further thought by the Drafting Committee, particularly with the object of improving the somewhat clumsy expression "or to such other of its interests as the territorial sea is intended to protect".

31. Sir Gerald FITZMAURICE had no objection to paragraph 2 being referred to the Drafting Committee, though he considered that a serious point of substance, which had already been discussed at length at the previous session, was involved. The virtue of the Netherlands amendment was that it contained no reference to "public policy", on which point previous discussion had largely turned. He himself shared Mr. Lauterpacht's view that those words went very far towards qualifying the right of innocent passage, and would allow the coastal State, on some plausible pretext, to declare that a passage was not innocent. In his opinion, therefore, if the provision was to be effective, the reference to public policy must be deleted from both article 17 and article 20.

32. Mr. SANDSTRÖM pointed out that, unlike the original text, the Netherlands amendment did not take intention into account.

33. The CHAIRMAN suggested that paragraph 2 be referred to the Drafting Committee on the understanding that it would probably require further discussion in plenary meeting.

It was so agreed.

Article 18: Rights of innocent passage through the territorial sea

34. Mr. FRANÇOIS (Special Rapporteur) said that the Netherlands and United Kingdom comments (A/2934, annex, Nos. 10 and 16) on article 18 could be discussed as soon as the Drafting Committee had submitted a new text for article 17.

35. Sir Gerald FITZMAURICE, taking up Mr. Salamanca's point raised during the general discussion, when he had expressed support[3] for the United Kingdom's proposed sub-paragraph (6), because there was no clear and positive affirmation of the right of innocent passage in the Commission's text, said that the Special Rapporteur had not disposed of that point by referring to article 18, since that article qualified the right by making it subject to the "provisions of these regulations".

36. The CHAIRMAN observed that if the Special Rapporteur's proposal to transpose the heading of section A were adopted, the provisions of article 18 would apply to warships also.

37. Mr. SALAMANCA considered that a substantive issue was at stake, and was uncertain whether the Drafting Committee would be capable of reaching a decision as to whether the right of passage should be stated in positive or in negative terms.

38. At the previous session he had been in agreement with Mr. Lauterpacht about the danger of allowing the coastal State to be the sole judge of whether or not an act was prejudicial to its public policy, since such a provision was open to the widest possible interpretation. In face of the marked tendency to extend the rights of coastal States every effort must be made to ensure that the right of innocent passage was not endangered. That was why she favoured the unequivocal wording proposed by the United Kingdom Government in its sub-paragraph (6).

39. Mr. FRANÇOIS (Special Rapporteur) repeated that all those considerations could be discussed once the Drafting Committee had prepared a new text for article 17: in doing so it would, of course, take full account of the United Kingdom's comments.

It was so agreed.

Article 19 [17]: Duties of the coastal State

40. Mr. FRANÇOIS (Special Rapporteur) said that the Netherlands comment (A/2934, annex, No. 10) had not convinced him that article 19 required modification, since it was self-evident that the coastal State must itself respect the principle of freedom of passage. The need to exclude any interpretation implying that coastal States had a specific responsibility for the presence of obstacles not of their own making in their territorial waters was already adequately met.

41. Sir Gerald FITZMAURICE suggested that the Netherlands Government had been prompted by the view that a threat to freedom of communication in the territorial sea could normally emanate only from the coastal State. The form of article 19, therefore, was somewhat odd; it should have been more direct. He disagreed with the Special Rapporteur that the Netherlands Government's point, which had also been taken up by the United Kingdom Government, had been met, for there was no clear affirmation in the present text that it was the duty of the coastal State to allow innocent passage. There was altogether something a little evasive about articles 18, 19 and 20, for they created exceptions to a rule which had nowhere been expressly laid down.

[3] See *supra*, para. 6.

42. Mr. AMADO said that the Drafting Committee should consider whether the expression "the means at its disposal" was appropriate, since the main object in view was that the coastal State should take effective means to ensure respect for the principle of the freedom of communication.

43. Mr. SANDSTRÖM considered that the Netherlands Government's comment could be taken into account by the Drafting Committee.

44. Mr. ZOUREK believed that the Netherlands comment deserved attention. Paragraph 1, which went far beyond existing rules of international law concerning the obligations of the coastal State, required re-drafting.

45. Mr. FRANÇOIS (Special Rapporteur) explained that paragraph 1 contained a provision which had been recognized as a rule of international law in the judgement given by the International Court of Justice in the Corfu Channel case.[4] He considered that the article could now be referred to the Drafting Committee.

It was so agreed.

Article 20 [18]: Right of protection of the coastal State

46. Mr. FRANÇOIS (Special Rapporteur) stated that the Netherlands Government had proposed the substitution of the words "such other of its interests as it is authorized to protect under these regulations and other rules of international law" for the words "such other of its interests as the territorial sea is intended to protect" in paragraph 1. It had also proposed the addition of the following paragraph: "There must be no interference with the passage of foreign vessels through straits used for international navigation between two parts of the high seas."

47. Mr. SALAMANCA said that, as at present worded, the Spanish and English texts seemed to hold somewhat obscure implications as to the nature of the territorial sea.

48. Mr. LIANG (Secretary to the Commission) reverting to Sir Gerald Fitzmaurice's observations concerning "public policy", observed that the views on that term expressed by Mr. Lauterpacht at the previous session had not been shared by some members of the Commission, or by himself. He noted that the United Kingdom Government, in its observations on that article, had not made a specific issue of the point, but had confined itself to putting forward an amended text which omitted the term.

49. In their present context, the words "public policy" were used in the technical meaning ascribed to them in private international law, and did not bear the wider connotation of the word "policy" as such. He did not therefore consider that there were grounds for weighty objection to them.

50. Mr. SCELLE said that the divergence of view between him and Mr. Lauterpacht at the previous session had perhaps been caused by a linguistic difficulty. The words *ordre public* in French law could not possibly be interpreted as meaning the general policy of a government.

51. Turning to another question, he said that the articles under discussion were drafted in such a way as to tend to increase the rights of coastal States, a tendency which he deplored and strongly opposed. Though he recognized that the territorial sea was subject to a special régime, it was nevertheless an inseparable part of the sea. He considered, therefore, that the draft, which at present gave pride of place to the coastal State, should be reviewed in the light of the consideration that there could be no freedom of the high seas without the right of innocent passage, subject of course to the requirements of "public order" in his sense of the term.

52. Mr. AMADO feared that the use of the expression *ordre public* would always create confusion and difficulties, and hoped that the articles under discussion, which were already somewhat wordy, might be pruned.

Mr. Spiropoulos resumed the Chair.

53. Mr. SALAMANCA said that the reference in paragraph 1 to "the security or public policy of that State or to such other of its interests as the territorial sea is intended to protect" was vague, and accordingly unsatisfactory. The "other interests" might, perhaps, be those specified in article 21, or the reference might be to such interests as customs and sanitary control. He suggested that that imprecise term be replaced by a clear definition of the interests which could justify interference with the right of innocent passage; to that end, paragraph 1 could be amended along the lines of the Netherlands Government's observations on article 17, paragraph 2 (A/2934, annex, No. 10)

54. Sir Gerald FITZMAURICE said that when Mr. Lauterpacht had objected at the sixth session to the use of the term "public policy", is was certain that he had not been under the impression that it implied that political grounds constituted sufficient justification for interference with the right of passage. It was, however, unfortunately true that the words "public policy" in English were wide enough to warrant possibly quite unjustified limitations of the right of passage. To quote a not impossible instance, a State might conceivably refuse passage to oil-burning ships on the grounds that the prevention of oil pollution was an important element of its public policy.

55. With regard to the words "such other of its interests as the territorial sea is intended to protect", he agreed with Mr. Salamanca that they were dangerously vague and introduced a subjective element which would serve neither a useful nor a desirable purpose. States held widely different views about the interests to be protected by the régime of the territorial sea. It was therefore necessary to replace the phrase in question by a more precise indication of the interests it was intended to cover.

56. He agreed with Mr. Scelle that the right of innocent passage must be construed not as a mere derogation of

[4] *I.C.J. Reports 1949*, p. 4.

the sovereign rights of the coastal State in the territorial sea, but rather as an independent right, which must be given such status, and not an inferior or subordinate position, in the process of codification.

57. Right of passage through the territorial sea was a necessary logical concomitant of the freedom of navigation on the high seas. The object of a voyage was to go from one port to another, usually in some other country. If the right of passage through the territorial sea were not free, voyages would become liable to frustration.

58. It was necessary to strike a balance between two legal principles of equal importance: the right of innocent passage and the prerogatives of the coastal State in the territorial sea.

59. Mr. SANDSTRÖM said that the Drafting Committee might draw inspiration from the terms of article 21, when trying to clarify the vague terminology of article 20.

60. Mr. ZOUREK said that article 20 was not absolutely indispensable. The right of protection of the coastal State, as defined in that article, was a necessary corollary of the sovereignty of the coastal State over the territorial sea enunciated in article 1. The basic principle of the Commission's work on the régime of the territorial sea was that that sea formed part of the territory of the coastal State, with the consequence that the latter exercised therein its fullest sovereign prerogatives, with the proviso—or exception—that the right of innocent passage of foreign ships be respected.

61. The various rights and prerogatives of the coastal State were not dependent on the Commission's draft articles. They would exist by virtue of State sovereignty, even were the Commission not to adopt such an article as article 20.

62. He recalled that he had been in favour—as indeed he still was—of the rule that the coastal State was entitled to stop innocent passage in certain areas in the interests of the maintenance of public order and security, provided recognized sea lanes essential to international navigation were left clear. In paragraph 2 of article 20, the Commission had only provided for the temporary suspension of the exercise of the right of innocent passage on such grounds.

63. The Norwegian Government had pointed out in its comments (A/2934, annex, No. 11) that article 6, paragraph 5, of the draft articles on the continental shelf adopted by the Commission at its fifth session laid down that safety zones around installations on the continental shelf could not be established in narrow channels or on recognized sea lanes essential to international navigation.

64. The position under those draft articles was that installations—such as an oil derrick—on the continental shelf, which rose above the surface of the high seas could have a safety zone around them at a reasonable distance provided the safety zone did not interfere with international navigation. If that applied on the high seas—the superjacent waters of the continental shelf—there could be no doubt that it applied equally in the case of the territorial sea, over which the coastal State exercised full sovereign rights. If an oil derrick were erected on the continental shelf covered by the territorial sea, it would be absurd to deny to it the safety zone that was permissible in the case of a derrick erected on the continental shelf covered by the high seas.

65. Mr. AMADO doubted whether article 20 should be retained at all.

66. Mr. FRANÇOIS (Special Rapporteur) suggested that article 20 be amended by replacing the words "such other of its interests as the territorial sea is intended to protect" by the more precise formula suggested by the Netherlands Government.

67. He further proposed that the words "public policy" be deleted. As thus re-drafted, the last part of paragraph 1 of article 20 would read "... any act prejudicial to the security of that State or contrary to the laws and provisions enacted by the coastal State in conformity with these regulations and with other rules of international law". Such a formula would cover all legitimate grounds for interfering with innocent passage.

68. Mr. KRYLOV said that article 20 should not be dropped, as tentatively suggested by Mr. Amado. He agreed, however, that the controversial term "public policy" should be deleted.

69. Mr. SCELLE said that the Drafting Committee should be authorized to re-draft articles 17, 19, 20 and 21, which ought to form a harmonious whole. In carrying out that task, the Committee should bear in mind the necessity for maintaining an equitable balance between the right of innocent passage and the prerogatives of the coastal State, so as to prevent the latter from treating international navigation with too heavy a hand.

70. Mr. GARCÍA AMADOR said that the question of the territorial sea was very different from that of the high seas. The régime of the high seas was dominated by the principle of the freedom of the seas; any interference with that freedom, such as the right of pursuit, was a limitation of that general principle, and could only be construed restrictively.

71. The régime of the territorial sea, on the other hand, was dominated by the principle of the sovereignty of the coastal State. In that context the right of innocent passage was a limitation of the basic principle. It followed from the contrasting legal status of the two sea areas concerned that freedom of navigation in the territorial sea was not identical with the freedom of navigation on the high seas. Article 20, by recognizing the right of protection of the coastal State in the territorial sea, laid due emphasis on the coastal State's sovereign rights. Such recognition entailed no serious danger, because articles 23 *et seq.* contained detailed

provisions qualifying and limiting the exercise of the right of protection.

72. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would endeavour to recast article 20 in a form acceptable to all members. The fact that there were divergencies of opinion about the basic principles underlying the article had not prevented the drafting of an agreed text in the past, and he hoped that would hold true for the present discussion.

73. Finally, he proposed that a third paragraph be added to article 20, reading:

"3. There must be no interference with the innocent passage of foreign vessels through straits used for international navigation between two parts of the high seas."

74. That proposal was based on the suggestion made by the Netherlands Government in its comment on article 20, which had been prompted by the consideration that the Commission had laid down in article 26, paragraph 4, that there should be no interference with the passage of warships through straits used for international navigation between two parts of the high seas. It had seemed strange to the Netherlands Government that no corresponding provision should have been made in the case of merchant ships.

75. The reason for that omission was that article 26, paragraph 4, was based on the judgement of the International Court of Justice in the Corfu Channel case which concerned warships.[5] It was clear, however, that a similar right must be acknowledged in the provisions relating to merchant vessels.

76. Mr. SALAMANCA said that article 20 had not been thoroughly thought out, and its defects had provoked a great many comments by governments.

77. The right of innocent passage in the territorial sea had an independent, and not a subordinate status. The Commission had to correlate it with the rights of the coastal State. As adopted at the sixth session, paragraph 1 referred to some ill-defined interests or rights of the coastal State, which appeared to constitute a set of exceptions to the right of passage. Paragraph 2, on the other hand, laid down a general right to suspend the exercise of right of passage—a general right which upset the balance which ought to exist between the concepts of the right of innocent passage and of the sovereignty of the coastal State.

78. He repeated his proposal that the passage "such other of its interests... intended to protect" be replaced by the more satisfactory wording suggested by the Netherlands Government.

79. If the Commission adopted his proposal, which was identical with that of the Special Rapporteur, paragraph 2 would become redundant and could be deleted.

80. Mr. AMADO said that the right of innocent passage of merchant ships through straits used for international navigation between two parts of the high seas had always been universally recognized. If the Commission were to lay down a rule to that effect, that would be tantamount to casting doubts on the validity of the principle. The Commission had felt it proper to refer in article 26, paragraph 4, to such right of passage in the case of warships, in order to dispel any doubts on the matter; but no such doubts could exist in the case of merchant ships.

81. Mr. FRANÇOIS (Special Rapporteur) considered that it was none the less necessary to make explicit reference to innocent passage of merchant vessels in the specific case in point.

82. Mr. SALAMANCA said that the United Kingdom Government's (A/2934, annex, No. 16) proposed sub-paragraph (6) constituted—as did also the Netherlands Government's (A/2934, annex, No. 10) suggested text for article 17—a great improvement on the Commission's draft of article 20. He urged the Commission to take advantage of the constructive suggestions made by those two governments.

83. Mr. SCELLE said that, from the point of view of drafting, it might be preferable, instead of adding the proposed new paragraph 3 to article 20, to introduce the words "and particularly in straits" at the point where the right of innocent passage was stated.

Article 20 was approved in principle and referred to the Drafting Committee.

Article 21 [19]: Duties of foreign vessels during their passage

84. Mr. FRANÇOIS (Special Rapporteur) proposed that a new sub-paragraph be added to article 21, reading:

"(*e*) Any hydrographical survey".

That proposal followed a suggestion made by the Netherlands Government, the purpose of which was to reserve to the ships of a coastal State the right to carry out hydrographic surveys in its territorial waters.

The Special Rapporteur's amendment was adopted.

Article 21 was adopted as amended.

Additional article on freedom of innocent passage

85. Sir Gerald FITZMAURICE recalled that at the sixth session Mr. Lauterpacht had introduced a proposal concerning the right of passage in internal waters; a proposal which he had subsequently withdrawn while reserving the right to re-introduce it. He (Sir Gerald Fitzmaurice) now wished to propose the insertion of a similar article, which could well find its place after article 21, and which would read as follows:

"The principle of the freedom of innocent passage governing the territorial sea shall also apply to areas enclosed between the coastline and the straight base lines drawn in accordance with article 5."

86. The judgement of the International Court of Justice rendered on 10 December 1951 in the Fisheries

[5] *I.C.J. Reports 1949*, p. 28.

Case between the United Kingdom and Norway had recognized the right of a country such as Norway, the coast of which was deeply indented or cut into, to measure the breadth of its territorial sea from straight base lines drawn from headland to headland, or from headland to island under certain conditions.[6]

87. That judgement had been concerned only with the method of measuring the breadth of the territorial sea and its effect on the extent thereof. It had, however, had a secondary effect which the International Court had not contemplated, and, indeed, had been under no compulsion to consider, in delivering its judgement on the fisheries issues. That effect was that the waters between the straight base lines and the coast acquired a new legal status: instead of territorial waters, they were now internal waters. Until that time, internal waters—where no right of passage existed—had covered only rivers, lakes, estuaries and certain deep bays, that was, waters almost exclusively behind the coastline. The new internal waters were on the seaward side of the coast, and were now to be excluded from the régime of the territorial sea. Hence his proposal concerning the recognition of the right of innocent passage in those waters which, upon straight base lines being drawn in front of them, had ceased to be part of the territorial sea and had technically become internal waters.

88. The waters which were thus now technically known as internal waters were geographically part of the sea and necessary to navigation. The right of innocent passage therein must therefore be protected, at least in cases where the waters concerned had always been used by international shipping.

89. When the subject had been discussed at the sixth session, the Special Rapporteur had pointed out that most of the waters enclosed within the Norwegian base lines were in any event too dangerous to be navigated, so that the question of the right of passage therein would not arise in practice. That was not always the case: the Norwegian base lines enclosed, and had thus transformed into internal waters, the important traditional shipping lane between the islands and the Norwegian coast known as the Indreleia. Moreover, the concept of base lines resulting from the International Court of Justice's judgement in the Norwegian Fisheries Case could well be applied by States other than Norway. It was true that so far only Iceland, and Denmark with regard to Greenland, appeared to have done so, but it was always open to any State with a rugged coastline to invoke the principle in question. It was therefore extremely important that the Commission should lay it down as a general principle that where territorial waters were thus abruptly transformed into internal waters, following the drawing of straight base lines, the right of innocent passage in such waters should persist, to allow international shipping to continue to use them without let or hindrance.

90. Mr. FRANÇOIS (Special Rapporteur) said that Sir Gerald Fitzmaurice's proposal could best be examined when the Commission came to discuss article 5, which dealt with straight base lines.

It was so agreed.

The meeting rose at 1 p.m.

[6] *I.C.J. Reports 1951*, pp. 129–130.

300th MEETING

Friday, 27 May 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*resumed from the 298th meeting*)

NEW DRAFT ARTICLES ON FISHERIES (*resumed from the 298th meeting*)

1. Mr. FRANÇOIS (Special Rapporteur) said that the sub-committee[1] had unanimously agreed on the following text for the articles on fisheries:

"*Article 1*

"A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing acti-

[1] Set up at the 298th meeting. See *supra*, 298th meeting, para. 49.

vities in such areas for the purpose of the conservation of the living resources of the sea.

"*Article 2*

"If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall, on request of any of them, enter into negotiations in order to prescribe by agreement the necessary measures for the conservation of the living resources of the sea.

"*Article 3*

"If, subsequent to the adoption of the measures referred to in articles 1 and 2, nationals of other States engage in fishing in the area and those States do not accept the measures so adopted, the question shall, at the request of any one of the parties concerned, be referred to the method of settlement provided for in articles 7-10.

"*Article 4*

"If a coastal State has a special interest in the maintenance of the productivity of the resources of the high seas contiguous to its coast, such State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area.

"*Article 5*

"Where there is no agreement among the States concerned as to the measures for conservation and provided that the coastal State had engaged in negotiations for that purpose, and that no agreement has been reached within a reasonable period of time, the coastal State may, if it has a special interest in the productivity of the resources of the high seas contiguous to its coast, adopt whatever measures of conservation are appropriate.

"*Article 6*

"1. The measures which the coastal State adopts under article 5 shall be valid as to other States only if the following requirements are fulfilled:

"(*a*) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

"(*b*) That the measures adopted are based on appropriate scientific findings;

"(*c*) That such measures do not discriminate against foreign fishermen.

"2. In case of disagreement with the measures adopted by the coastal State, the matter shall, at the request of any of the States concerned, be referred to the method of settlement provided for in articles 7-10.

"*Article 7*

"The differences between States envisaged in articles 3 and 6, as well as in other cases where States, after engaging in negotiations according to article 2, have not been able to reach agreement, shall be settled by arbitration as provided for in article 8 unless the parties agree on another manner of peaceful settlement.

"*Article 8*

"1. The method of settlement referred to in the preceding articles shall be by reference to a Board of qualified experts, to be chosen by agreement between the parties. Failing such agreement within the period of three months from the date of the original request, the Board of Experts shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The President of the Board shall equally be appointed by the Secretary-General of the United Nations.

"2. The Board shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time limit.

"*Article 9*

"The Board may decide that pending its award the measures in dispute shall not be applied.

"*Article 10*

"The decisions of the Board shall be final and without appeal and shall be binding on the States concerned. Any recommendations of the Board shall receive the greatest possible consideration."

2. The first three articles drew their inspiration from the provisions of article 1 of the draft articles on fisheries adopted by the Commission at its fifth session, in 1953 (A/2456, para. 94).[2] Article 4 corresponded to article 2 of the 1953 draft, but did not limit the coastal State's right to an area situated within 100 miles from the territorial sea.

3. Article 5 introduced a new principle by providing that the coastal State should be free to adopt conservation measures unilaterally if it failed to reach agreement in its negotiations with other States within a reasonable period of time. Article 6 made that right conditional upon certain specific requirements and also subject to the right of any State concerned that disagreed with the unilateral measures thus taken to refer the matter to the method of settlement provided for in articles 7-10.

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

4. The CHAIRMAN invited general comments on the draft articles just introduced by the Special Rapporteur.

5. Mr. SCELLE said that it was necessary to define the precise limits of the coastal State's special rights. The Commission must decide whether that right extended indefinitely, or only to a given distance from the territorial sea. If no exact distance were specified, it would be essential to determine whether the question of limitation of the extent of the right was one which could and should be submitted to arbitration.

6. It seemed to him that articles 7 to 9 did not provide for genuine arbitration. In any event, he considered it inadvisable to saddle the Secretary-General of the United Nations with responsibility for appointing the experts to the Board of Arbitration.

7. Faris Bey el-KHOURI said that the articles on fisheries were presented as a sub-section of the Commission's draft articles on the régime of the high seas. The impression was thus being created that that sub-section comprised a set of articles regulating fisheries. But the articles drafted by the sub-committee made no mention of the one basic principle of international law in the matter, namely, that the high seas were free for all nations to fish. If the intention was to regulate fisheries on the high seas, it was not sufficient, as the Commission was doing, to draft articles dealing with conservation measures and with the competence of States in the matter. It was essential to include a provision to the effect that the Commission's draft articles in no way affected the right of nationals of all States to fish in the high seas.

8. Mr. ZOUREK said that it was desirable that the vote on the draft articles proposed by the sub-committee should be deferred until the following meeting, to give members time to study the articles more closely, and particularly the French text, which had not yet been circulated.

9. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Scelle's observations on spatial limitation could best be discussed when the Commission took up article 4 in detail.

10. He agreed with Faris Bey el-KHOURI's remarks, and felt that the draft articles would be better described by some such title as "Articles on the conservation of the living resources of the sea". The freedom of the high seas had been recognized in general terms in article 2 of the draft articles on the high seas, as adopted by the Commission at its 293rd meeting.[3] Perhaps a specific reference to the freedom to fish in the high seas would be appropriate.

11. Mr. EDMONDS proposed that the Commission's decision on the draft articles on fisheries be considered as provisional, pending its vote on the breadth of the territorial sea which would clearly affect the question of fisheries.

12. Mr. HSU said that, while there would be no harm in postponing the final decision on fisheries until the Commission had voted upon related questions, he did not consider that the problem of fisheries conservation —with which alone the Commission was at that stage concerned—was very closely linked with that of the breadth of the territorial sea. The extent of the territorial sea over which it had exclusive jurisdiction was a vital matter to the coastal State in many connexions, but it seemed unlikely that the coastal State would be able to assert such jurisdiction beyond a limit of 12 nautical miles. In the matter of fisheries conservation, however, which was another vital concern of the coastal State, claims to special interest had been made in respect of distances of up to 200 miles from the coast.

13. Mr. GARCÍA AMADOR said that, when drafting the articles on fisheries, the sub-committee had had in mind that the Commission would not be in a position at that stage to take a definite vote on the precise terms of each article. Quite apart from the fact that the final drafting would be left to the Drafting Committee, any vote by the Commission on the proposed articles on fisheries would necessarily be provisional, because of the close relation between that subject and the questions of the territorial sea and the contiguous zones.

14. Mr. ZOUREK recalled that at the 295th meeting the Commission had decided to take up the question of fisheries before that of the breadth of the territorial sea, in the belief that such an arrangement would expedite its work.[4]

15. If the Commission were now to take the view that it could not vote on the articles on fisheries until the breadth of the territorial sea had been determined, he feared it would become caught in a vicious circle.

16. The CHAIRMAN proposed that the vote on the new draft articles on fisheries should be provisional, since that seemed to be the general feeling.

It was so agreed.

17. Mr. SCELLE said that the subject of fisheries raised two further issues which, as he understood, had already been decided by the Commission at the previous meeting.

18. First, the Commission had abandoned the draft articles on fisheries adopted at the fifth session, and their place had been taken by the articles at present under discussion.

19. The second issue was that of the fundamental principle of existing international law in the matter of fisheries, namely, the freedom of the high seas for all to fish. It was in his view desirable that the Commission should state explicitly that the articles on fisheries were subordinate to respect for that freedom, and in no way abrogated that fundamental rule of traditional law.

[3] 293rd meeting, para. 68.

[4] 295th meeting, paras. 53–68.

20. Sir Gerald FITZMAURICE supported Faris Bey el-Khouri's views about the necessity of explicitly safeguarding the principle of the freedom to fish in the high seas. Such a provision would make the Commission's draft articles acceptable to the largest number of States; it would also mean that they would be adopted by the largest majority in the Commission.

21. The Special Rapporteur had drawn attention to the provisions of article 2 of the draft articles on the régime of the high seas, as adopted in principle by the Commission at the 293rd meeting; that article proclaimed the freedom of the high seas in general terms, and implicitly covered such specific freedoms as the freedom to fish—except in so far as derogations from those freedoms were provided for in other articles adopted by the Commission.

22. He (Sir Gerald Fitzmaurice) felt that the matter of fisheries stood apart in two respects. First, the Commission's draft articles on fisheries were *de lege ferenda,* and so differed from the other provisions on the high seas, which represented a codification of existing international law. Secondly, they formed a self-contained part of the Commission's code, and had their own special provisions relating to arbitration. In the light of those two considerations, the position would be greatly clarified if the Commission were to cap those articles with the enunciation of one or two fundamental principles on the entire question of fisheries, particularly that of the freedom of the nationals of all States to fish in the high seas.

23. Mr. GARCÍA AMADOR explained that the new draft articles in no way implied the sacrifice of the basic principle of the freedom to fish in the high seas: their purpose was to regulate the exercise of that freedom in order to prevent abuse. Such regulation had become imperative, because technical progress was endangering more and more the existence of certain marine species. The position was no different from that which obtained in the case of freedom of navigation; there, too, the Commission had made provision for those cases in which interference with that freedom was legitimate, and, indeed, necessary to the policing of the high seas. The point raised by Mr. Scelle, Faris Bey el-Khouri and Sir Gerald Fitzmaurice had been met by the third paragraph of the preamble to the draft articles he had submitted at the 296th meeting,[6] in which he had specified that the primary objective of conservation measures must be to obtain the optimum sustainable yield in the interests of all mankind. A similar preamble could be added to the draft articles now under discussion, in which it could be made clear that the regulations embodied in the draft articles were to be construed within the framework of the freedom of the high seas, that was, in the same general interest.

24. Alternatively, the Commission could include in its draft articles on fisheries a definition of conservation. That would make clear the exact purpose of the articles, and show that no derogation from the freedom of fishing was intended, other than what was indispensable in the interests of mankind for the safeguarding of species from extermination.

25. Mr. Scelle's suggestion could also be met by including in article 2 of the draft articles on the régime of the high seas an enumeration of the four basic freedoms involved: freedom of navigation, freedom to fish, freedom to lay submarine cables and freedom to fly in the air space over the high seas.

26. Mr. SCELLE said that the best course would perhaps be to state in a preamble that, in order to guarantee the freedom to fish in the high seas, that freedom must be regulated in the general interest, to make sure that the living resources of the high seas were not depleted and that their yield could be maintained in the interests of mankind. He fully concurred with Mr. García Amador's view that freedom was inseparable from regulation: that was the classical distinction between freedom and licence.

27. Mr. LIANG (Secretary to the Commission) said that to describe the articles under discussion as articles on fisheries was to misname them. Section III of chapter III (Régime of the High Seas) of the Commission's report covering the work of its fifth session (A/2456)[7] had been entitled "Fisheries". In many other documents issued by the Commission the same laconic style had been used, thus unfortunately creating the impression that the Commission was engaged on drafting an international code for the regulation of fisheries. Such titles did not accurately describe the content of the articles concerned. It was clear that the purpose of the articles the Commission was at present engaged in drafting was to regulate the conservation of the living resources of the sea.

28. It was difficult to see how a preamble could be fitted into a draft of the kind under discussion. The articles on fisheries conservation were to be included within the general framework of the draft articles on the régime of the high seas, and it would be most unusual to have a separate preamble to a sub-section. Perhaps the best course would be to insert an article at the beginning of the sub-section, enunciating the general principle that all States had the duty to co-operate in conservation measures.

29. It would not be wise for the Commission to go beyond the topic before it—which was the problem of conservation—and embark upon a general discussion of the whole field of the regulation of fisheries. Such an excursion would bring the Commission face to face with the need for defining what constituted the high seas for the purposes of fisheries regulation.

30. The Commission had never pretended to engage in the regulation of fisheries in general. The basic rule of international law in the matter was the equal right of

[5] 293rd meeting, para. 68.

[6] 296th meeting, para. 16.

[7] *Yearbook of the International Law Commission, 1953,* vol. II.

all nationals to fish in the high seas, and the Commission's articles on the conservation of the living resources of the sea clearly would not derogate from that principle.

31. Mr. AMADO said that freedom of fishing was an inherent right. The fact that the Commission was laying down certain rights relating to the conservation of the living resources of the sea for the purpose of ensuring the optimum sustainable yield could not possibly affect that basic principle of international law. It was therefore unnecessary to refer to the freedom to fish.

32. The CHAIRMAN agreed with the Secretary that it would hardly be practicable to introduce a preamble to cap the articles on fisheries, which constituted only one section of the draft on the high seas.

33. The best course would be to refer specifically in article 2 to the freedom of the nationals of all States to fish in the high seas.

34. Mr. SCELLE thought that it would be better to express the freedom to fish in a preamble, because a preamble dominated the articles it capped. It would thus be made clear that the articles on fisheries conservation were not a derogation from the general principle of freedom, but rather sought to regulate the exercise of that freedom, that was, its application.

35. He had no absolute preference, however, for the preambular form, and he would accept any other form of reference to the fundamental principle of freedom to fish in the high seas. The important thing was to express that principle somewhere and clearly.

36. Finally, to the question of what constituted the high seas, he would reply that they were constituted by the maritime zones outside the territorial sea. The contiguous zones and the superjacent waters of the continental shelf, in spite of their peculiarities, were part and parcel of the high seas. The great distinction in international law was between the high seas, governed by the principle of freedom for all nations, and the territorial sea, with its special régime dominated by the interests of the coastal State.

37. Mr. ZOUREK recalled that, in the course of the discussion on article 2, he had proposed that it be made more explicit by the inclusion of a clear enumeration of the specific rights and freedoms to be recognized in the high seas;[8] among those rights he had mentioned the freedom for all to fish and to hunt in the high seas. As he had understood the decision taken at that meeting on article 2, the Drafting Committee had been instructed to include that enumeration in the final draft of the article.[9] Such was the understanding on which, to his mind, article 2 had been adopted.

38. The CHAIRMAN said that, in view of the doubts that seemed to persist in some members' minds on the point, it would perhaps be better to reiterate the decision that in article 2 specific reference be made to the right to fish.

It was so agreed.

39. Mr. SANDSTRÖM suggested that the title of the section be amended to read: "Conservation of the living resources of the sea".

40. Mr. GARCÍA AMADOR thought that the present discussion was, perhaps, somewhat premature. The articles on fisheries had indeed in the first place been conceived as part of the Commission's general articles on the régime of the high seas but the General Assembly, in its resolution 900 (IX) had detached the problem of fisheries from its previous context and laid down a new procedure for its study. It was therefore open to the Commission to present the draft articles on fisheries conservation in a different way. It could, for instance, prepare a specific draft on fisheries which would include a preamble in which the freedom of the seas in respect of fisheries was expressed, and in which conservation was defined and its objectives set out in order to make clear that the articles on fisheries constituted a necessary regulation of the fundamental freedom to fish in the high seas.

41. It was not, however, necessary for the Commission to take a decision on the question of presentation at that stage; it could do so when it came to draft its final report on the régime of the high seas, the régime of the territorial sea and all related problems, in compliance with the terms of General Assembly resolution 899 (IX).

42. The CHAIRMAN invited the Commission to consider the draft articles one by one.

Article 1 [1]

43. Mr. SCELLE said that it would be desirable to specify in article 1 that the measures adopted by the State concerned were only applicable to the nationals of that State.

44. Mr. GARCÍA AMADOR agreed to that suggestion.

45. Mr. EDMONDS pointed out that article 1 provided that a State "*may* adopt measures..." whereas article 2, which referred to the case where the nationals of two or more States were engaged in fishing in a given area, used the term "*shall*". If it were intended that an obligation should exist in all cases it would perhaps be better to use the term "shall" throughout.

46. Mr. GARCÍA AMADOR said that such a course would be dangerous in the case of article 4 or article 5, which gave expression to certain rights of the coastal State but did not actually impose upon it the duty to adopt the measures concerned. So far as those two articles, at least, were concerned, it was probable that the retention of the term "may", which implied a right rather than a duty, would make them more acceptable.

47. Faris Bey el-KHOURI said that it would be desirable to make some reference to the minimum amount of fishing required on the part of the nationals

[8] 293rd meeting, para. 43.

[9] *Ibid.*, paras. 60 and 68.

of a State to bring them within the scope of the description: "engaged in fishing in any area".

48. Mr. EDMONDS thought that the wording "engaged in commercial fishing" might cover the point.

49. The CHAIRMAN said that it would be undesirable to amend the text itself of the article. The question was one of interpretation of the term "engaged in fishing", and it could be left to the Drafting Committee to decide whether some reference in the comment might not be helpful in that interpretation.

It was so agreed.

50. Mr. SANDSTRÖM, referring to Mr. Scelle's remark, said that the language of article 3 left no doubt that any measures adopted under article 1 would apply only to the nationals of the State adopting them.

51. The CHAIRMAN suggested that the matter be left to the Drafting Committee.

It was so agreed.

52. Mr. SCELLE agreed with Mr. Edmonds' remark concerning the use of the term "may" in article 1, and formally proposed that it be replaced by the word "shall". Clearly it was not merely the right of a State to adopt conservation measures in an area where its nationals alone fished; it was a duty of the State towards the international community, which was interested in the conservation of the living resources of the sea. If it failed to adopt appropriate conservation measures, its fishermen might deplete the stock of fish in that area. It was the duty of every State to fill gaps in international regulation. Policing of the high seas for purposes of conservation was just as necessary as was the policing of the high seas by the warships of each State for the protection of merchant vessels flying its flag.

53. Mr. AMADO congratulated the sub-committee on an eminently practical text, which was the outcome of long and careful discussion. He had himself devoted a great deal of time to the study of maritime law, and believed that the proposed text represented the best solution. He urged members not to expatiate at length on articles 1 and 2 which seemed to have been conceived in a logical manner and whose substance had already been discussed in plenary meeting. Surely it would be better now to concentrate on those articles which had divided the Commission; in other words, on those dealing with the settlement of disputes and without which the whole draft would remain ineffective.

54. Mr. ZOUREK considered that Mr. Scelle's point deserved careful thought. If the Commission started from the notion that conservation of the living resources of the sea was in the interests of the world as a whole, then a State could not stand aside and allow those resources to be endangered by fishing activities, even if they were being undertaken by its own nationals. The present disparity between articles 1 and 2 should be removed.

55. Faris Bey el-KHOURI noted that the request he had made at the 298th meeting,[10] that measures promulgated for regulating and controlling fishing activities be given the widest possible publicity to bring them to the notice of all States, had not been taken into account by the sub-committee. He hoped that omission would be made good before the final draft was approved.

56. Mr. SCELLE, repeating his objection to article 1 being optional and article 2 mandatory, said that he was prepared to supplement his amendment to the former by inserting the words "if necessary" after the word "shall".

57. Mr. AMADO wondered whether there was any sanction that could be enforced against States that failed to comply with the provisions of article 1.

58. Mr. GARCÍA AMADOR said that the difference between articles 1 and 2 resided in the simple fact that the first enunciated a right and the second a duty; hence it would not be feasible to cast them in identical form. But he was prepared to consider the insertion of the words "if necessary" in article 1.

59. Mr. HSU observed that Mr. García Amador had made an important concession. Certainly, if the question was approached from the point of view of conservation, there was much force in Mr. Scelle's argument, but he was doubtful whether it would be advisable to impose such an obligation on States.

60. Mr. SALAMANCA said that Mr. Scelle's point was well illustrated by the case of Peru, which had been forced to take steps for the regulation of fisheries in order to protect certain of its vital economic interests. Regulation in such cases was imperative, and he considered the solution offered in the sub-committee's draft to be acceptable. Mr. Scelle, who believed that the draft went too far in conferring certain rights on States, should note that it had successfully reconciled the need for preserving the freedom to fish in the high seas with the universal interest in the conservation of resources.

61. Sir Gerald FITZMAURICE said that, without going into the merits of the difference between articles 1 and 2, he wished to point out the reasons for it. The obligation imposed on States in article 2 was not absolute, but conditional on a request by any one of them. The situation which article 1 was designed to cover was different since, generally speaking—and he spoke subject to correction—fishing by nationals of one State alone was unlikely to lead to over-fishing in the area concerned; and even if it did, that State would be the first to feel the effects and would, presumably, adopt in its own interests the necessary measures for conservation. If the reasons for the difference between the two articles were sound, they might be accepted as they stood.

62. The CHAIRMAN, speaking as a member of the Commission, considered that the effect of both articles would in fact be the same.

[10] 298th meeting, para. 54.

63. Sir Gerald FITZMAURICE did not think that Mr. Scelle's amendment would substantially alter the text, since the words " shall if necessary " meant much the same as " may ".

64. Mr. SCELLE disagreed, because the inclusion of the words " if necessary " would make it possible to call in question the failure of a State to promulgate conservation measures.

65. Sir Gerald FITZMAURICE pointed out that in the case covered by article 1 it rested with the State concerned to decide whether conservation measures were necessary or not, which was why Mr. Scelle's amendment would not bring about any modification of substance.

66. Mr. HSU considered that if the word " shall " were substituted for the word " may " another State would be able to challenge the State whose nationals were engaged in fishing in any area, on the ground that it was not protecting resources in the interests of the international community as a whole.

67. Faris Bey el-KHOURI asked that Mr. Scelle's amendment be put to the vote in two parts, since he could not support the insertion of the words " if necessary ".

68. Mr. AMADO believed that Mr. Scelle's concern was misplaced, since he agreed with Sir Gerald Fitzmaurice that the nationals of one State were unlikely to exhaust the resources of an area in the high seas which they alone were exploiting.

69. The CHAIRMAN put to the vote Mr. Scelle's amendment that the word " shall " be substituted for the word " may ".

The amendment was rejected by 9 votes to 4.

70. Sir Gerald FITZMAURICE, referring to the second part of Mr. Scelle's amendment, asked where the right would lay to determine whether or not conservation measures were necessary. Would the decision lie solely with the State concerned, or was Mr. Scelle contemplating that another State not engaged in fishing in that area of the high seas could pronounce on the question ?

71. Mr. SCELLE argued in favour of the second hypothesis. It was open to the coastal State or any other to ask that fisheries be regulated : if such a request gave rise to a difference of opinion it would be submitted to arbitration. In his view, the right to fish in the high seas must be coupled with the duty to conserve resources.

72. Sir Gerald FITZMAURICE thought that article 4 was intended to cover the case of the coastal State.

73. Mr. SCELLE, pointing out that all States possessed equal rights on the high seas, said that it was not only the coastal State that was involved, but any other ; for example, a State which wished to begin fishing in a certain area hitherto only fished by the nationals of one State.

74. Mr. FRANÇOIS (Special Rapporteur) contended that if Mr. Scelle's argument were followed to its logical conclusion, any State would be entitled to intervene on the ground that resources were being exterminated, and that would be entirely contrary to the whole purpose of the draft. As to the coastal State, its interests were already protected in article 4.

75. Mr. AMADO appealed to Mr. Scelle to abandon his search for the ideal in order to enable agreement to be reached on a text which might have some chance of general acceptance.

76. Mr. SCELLE maintained that the interests of any State might be threatened if proper steps were not taken to control fishing activities, and saw no reason why the right to insist on such control should be confined solely to the coastal State. He was not seeking to impose his own concept, but to protect a basic principle of international law — that of the equality of States.

77. The CHAIRMAN put to the vote Mr. Scelle's amendment that the words " if necessary " be inserted before the words " adopt measures ".

The amendment was rejected by 7 votes to 5, with 1 abstention.

Article 1 was adopted by 9 votes to 1, with 3 abstentions.

Article 2 [2]

Article 2 was adopted without comment, by 12 votes to none, with 1 abstention.

Article 3 [3]

Article 3 was adopted without comment, by 12 votes to none, with 1 abstention.

Article 4 [4]

78. Mr. ZOUREK asked for an explanation of the precise meaning of the words " contiguous to its coast ", and wondered whether they implied an absence of any spatial limitation.

79. Mr. SCELLE said that if there were no spatial limitation he would be unable to support the article.

80. Mr. GARCÍA AMADOR said that the issue was one which had caused him the greatest concern in preparing his original draft, and he would like to take the present opportunity of making it perfectly clear that there was a very definite limitation, based on the criterion of the special interest of the coastal State. The sub-committee had abandoned the limit of 100 miles adopted by the Commission at its fifth session, because in some cases it was inadequate and in others excessive, thereby gratuitously conferring certain rights on States. He believed that criterion to be the only possible one. It had been accepted by the International Technical Conference on the Conservation of the Living Resources of the Sea. Any difference to which the criterion gave rise could be submitted to arbitration.

81. Mr. SCELLE said that, following Mr. García Amador's explanation, he would be prepared to support article 4, provided it was subject to the provisions of articles 7 to 10.

82. Mr. ZOUREK said that the special interest of the coastal State was an acceptable criterion, but might give rise to drafting difficulties. He therefore believed that it should be defined as precisely as possible in the comment, in order to preclude the possibility of exorbitant claims. For example, the movements of migrant species of fish could lead to interminable international disputes. Perhaps the Drafting Committee might consider using some other word than " contiguous " which already bore a certain connotation in international maritime law.

83. Mr. SANDSTRÖM suggested that the Committee might consider some such wording as " in a certain zone ".

84. Mr. SCELLE considered that if a State other than a coastal State had an equal interest in the preservation of the living resources of the sea in a certain area, it should enjoy the same privileges as the coastal State. It was conceivable, for example, that States wishing to engage in pearl fishing might be as interested in its regulation and control as the Australian Government.

85. Sir Gerald FITZMAURICE said that, as he sympathized with many of the ideas underlying Mr. Scelle's thesis, he wished to explain why he could not associate himself with it. To give any State a special position was a derogation from the vitally important principle of freedom of the high seas and freedom to fish therein, and if it had been found necessary for special reasons to do so in the case of the coastal State, that was no justification for further derogating from the principle by giving other States similar rights. Any State which began to fish in an area immediately acquired the rights enunciated in the articles under discussion, and he did not consider that a State which had never engaged in fishing and did not intend to do so should be entitled to lay claim to such rights. But he would make an exception for the latent interest of the coastal State, which he did recognize—albeit with some reluctance.

86. Mr. SANDSTRÖM sympathized with Mr. Scelle's views because some States might have a certain interest in the regulation of fisheries in remote areas. He mentioned the case of eels, which left the normal fishing grounds and crossed the Atlantic to breed in the Sargasso Sea.

87. Mr. SCELLE explained that since the world had not yet achieved that utopian state of affairs when the high seas would be regulated by the international community acting as one, he wished every State to have an equal right in ensuring that fishing activities were controlled. Despite all the arguments adduced to the contrary, he was still unable to understand why, when a general interest was involved, the coastal State should be the only one allowed to intervene, though he was prepared to admit that, as its interest might be more closely affected than those of others, it was more likely to take the necessary steps. He therefore proposed that article 4 be amplified by the addition of some such wording as : *Si un Etat autre que l'Etat riverain peut justifier d'un intérêt analogue, il jouira des mêmes prérogatives.*

88. Mr. GARCÍA AMADOR said that article 4 had been unanimously accepted by the sub-committee after exhaustive discussion. He did not consider that the Commission would be able to take a decision immediately on Mr. Scelle's entirely new proposal, and therefore urged that its consideration be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

301st MEETING

Tuesday, 31 May 1955, at 3 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman
later : Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

Article 4 [*4*] (continued)

Mr. Krylov, First Vice-Chairman, took the Chair.

1. The CHAIRMAN invited the Commission to continue its examination of article 4 of the new draft

articles on fisheries submitted by the Sub-Committee.[1]

2. Mr. GARCÍA AMADOR asked Mr. Scelle to explain the amendment he had proposed at the end of the previous meeting.

3. Mr. SCELLE commended Mr. García Amador on the excellent way in which he had brought out in his preamble,[2] which he (Mr. Scelle) hoped would be adopted as an introduction to the draft articles, the principle of the paramount importance of the general interest over special interests.

4. He had recently received from a representative of one of the governments which had taken part in the work of the Rome Conference on the Conservation of the Living Resources of the Sea a letter stating that at the Conference, under cover of a scientific discussion, a political conflict had arisen between the countries with large fishing industries and those with little or none. All the countries of western Europe had stood firm in resisting the claims of the Latin-American and certain Asian countries, and had rejected a joint Cuban-Mexican proposal which would have conferred on coastal States the right to regulate unilaterally fisheries in adjacent waters. The writer had gone on to say that representatives of the Soviet Union, the United Kingdom and the United States of America had demonstrated the impossibility of framing reasonable regulations on an ecological basis, and the French representative had concurred in that view. Non-coastal States, particularly those which, having long been engaged in fishing, had acquired for themselves a special position, must not now be placed in one of inferiority.

5. He had also recently received a letter from a Latin-American politician, to the effect that the question of the territorial sea was a burning one in South America, and that those Latin-America countries which did not aspire to a 200-mile limit had in mind something of the order of at least 100 miles.

6. The two schools of thought had been about equally represented at the Rome Conference, yet in the general conclusions reached there the special interests of coastal States had been emphasized. He did not intend to object to that emphasis, since the coastal State had an obvious interest—either actual or potential—in the conservation of the living resources of the sea. Moreover, the Commission itself had, at its fifth session, decided to place the coastal State in a privileged position by allowing it to take part on an equal footing in any system of regulation in an area within 100 miles of its territorial sea, even though its nationals did not fish there.[3] Notwithstanding the practical, not to say vital, reasons for doing so, there was something disturbing about conferring such privileges on States which might have but an insignificant fishing fleet or none at all. He was vividly reminded of the deplorable policy of establishing zones of influence in favour of certain Powers, for example, in Africa, which had thus been enabled to create a monopoly for themselves which they had frequently failed to exploit, thus hindering all progress.

7. He would not deny that the interests of the coastal State should be protected; he was simply anxious to stress that other States should possess the same right. Mr. Sandström had quoted the very relevant case of eels breeding in the Sargasso sea to show that the interests of all States must be safeguarded against any threat that might originate in unilateral action by a coastal State. Other examples, relating to tunny fish, sardines and whales, could be cited to substantiate the thesis that a State which was geographically remote from the area to which the regulations would apply might well be vitally interested in them. He had accordingly submitted his amendment, because article 4 as it stood was at variance with the principle of equality, and would give rise to differences. It would be a retrograde step to accept article 4 without modification, for the coastal State would thereby gain far more than had ever been claimed in the sixteenth century by Genoa, Venice or Queen Elizabeth I of England. His purpose could be achieved by the wording he had suggested at the previous meeting, or by the addition at the end of the article of some such phrase as *Il en serait de même, bien entendu, de tout Etat même non riverain qui pourrait se réclamer d'une situation analogue.*

8. He had been extremely interested to learn from the last *Monthly Fisheries Bulletin* published by the Food and Agriculture Organization that conservation was not at present an important issue, and was unlikely to become one for many years to come. The difficulty was not that certain species were in danger of extermination, but that some countries did not possess the technical knowledge and equipment to exploit maritime resources. That fact further strengthened his argument that there was no reason to sacrifice countries with an important fishing industry to those without comparable experience or resources. He had submitted an amendment which was perfectly consistent with actual needs, and not merely a defence of an abstract theory, and which would in no way endanger the interests of the coastal State.

9. The CHAIRMAN said that it was not easy to see in what circumstances States other than the coastal State would be able to claim that they were in a "similar position".

10. Mr. SCELLE replied that countries with a large fishing fleet, such as France, the Netherlands, the Soviet Union and the United Kingdom, might have an interest in introducing conservation measures in certain areas, and should therefore be free to initiate appropriate action in accordance with the provisions of the new draft articles.

11. Faris Bey el-KHUORI said that, in view of the fact that the high seas were *res communis*, and that with regard thereto all States enjoyed the same rights without

[1] 300th meeting, para. 1.

[2] 296th meeting, para. 16.

[3] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

distinction, he was unable to understand what "special interest" the coastal State could have in the maintenance of the productivity of the resources of the high seas. Article 4 failed to define the nature of that special interest, or to specify the extent of the area in which it would be valid. He accordingly believed that Mr. Scelle's amendment, which would safeguard the rights of the coastal State without allowing it to establish any kind of monopoly in a specific area, should be adopted.

12. Mr. GARCÍA AMADOR said he hoped that he had made it clear in his introductory statement [4] that the joint Cuban-Mexican proposal at the Rome Conference had not been rejected. As would be seen from the definition of the objectives of conservation contained in chapter II of the report of the conference,[5] that part of the proposal which expressly recognized the special interest of the coastal State in the maintenance of the productivity of the resources of the high seas contiguous to its coast had been accepted, but as was recorded in chapter VI, paragraph 6, the conference had not felt itself competent to deal with those elements of the proposal pertaining to regulations, because they involved legal problems which it was precluded from examining under the terms of General Assembly resolution 900 (IX). However, in considering the various scientific and technical questions before it the conference had not been able to avoid touching indirectly on legal ones, and had singled out from among them the special interest of the coastal State. That notion had not been dealt with either by J. L. Suarez in his report of 1926,[6] or by the League of Nations Committee of Experts for the Progressive Codification of International Law, or by the Codification Conference held at The Hague in 1930; indeed, it had emerged clearly for the first time only at the Rome Conference, though the Commission itself had given some thought to the matter at its fifth session. The notion of the special interest of the coastal State was undoubtedly a revolutionary one in maritime law and in the light of the classical theory of the absolute freedom of the high seas, but it was, of course, subject to limitation.

13. With reference to the second letter Mr. Scelle had mentioned, he wished to dispel the belief held in certain European countries that all Latin-American States were claiming a very extensive territorial sea. The views of individual governments on the subject had been summarized in the Secretariat's working paper, but he would also like to draw attention to the fact that the 200-mile limit had been rejected both by the Inter-American Council of Jurists and by the Tenth Conference of the Organization of American States held in 1954 at Caracas. On the latter occasion a proposal for a 200-mile limit had been withdrawn for lack of significant support. If necessary, he could furnish the Commission with the relevant details.

14. Turning to Mr. Scelle's amendment, he said that recognition of the coastal State's special interest was subject to a number of other qualifications which Mr. Scelle had not mentioned. The criterion suggested by the Rome Conference was not the size of the coastal State's fishing industry, but the country's economic and social interests. The criterion of analogy, which Mr. Scelle wished to introduce, was surely inapplicable.

15. The point at issue was not that major Powers were seeking to exclude other States from fishing in extensive areas of the high seas, thereby restricting the supplies of fish available to the latter. Under the terms of the proposed draft articles the coastal State would not be entitled to establish a reserved zone, but only to take such measures as were necessary for conservation in compliance with the requirements of article 6. Therein lay the difference between the present provisions and the zones of influence formerly created by the Great Powers.

16. He agreed that the principle of equality, which Mr. Scelle considered would be violated were special rights conferred on the coastal State, was fundamental and must be safeguarded, but in the present instance that could be done only by recognizing that those States with a special interest must enjoy special rights, provided such special interest could be demonstrated by reference to the criterion adopted by the Rome Conference. The interests of non-coastal States, however, were also recognized—as was clear from articles 1 and 2—and non-coastal States would take part in any system of regulation on an equal footing, provided they were engaged in fishing in the area concerned. Thus the principle of equality was adequately safeguarded; furthermore, the coastal State was expressly prohibited from discriminating against foreign fishermen. In his opinion, the general interest had never been better protected, and he personally preferred recognition of the special interest of the coastal State within a general framework safeguarding the general interest, to the anarchy which had prevailed in the past, and still prevailed, in which any State was free to take unilateral action which might prejudice the interests of others.

17. Mr. SANDSTRÖM said that, although he had helped in the preparation of the draft articles as a member of the sub-committee, he had no difficulty in accepting Mr. Scelle's amendment, because, if States other than the coastal State could prove that they had a special interest, he saw no reason why they should not enjoy the same rights in respect of that interest. It was true that the adoption of such an amendment might affect the subsequent articles, but it should be remembered that the present discussion, being in the nature of a first reading, was provisional.

18. Mr. AMADO observed that the proposed system of regulation was general in character, and he could personally entertain no restriction of any kind on the universal freedom to fish in the high seas. It was inconceivable that limitations should be placed on States

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[4] 296th meeting, para. 31.

[5] United Nations publication, Sales No.: 1955.II.B.2.

[6] See text in *American Journal of International Law*, Special Supplement, vol. 20 (1926), pp. 231–240.

with a long-established fishing industry which traditionally operated in certain areas, since their rights were an inherent element of the freedom of the high seas. However, he did not suppose that any danger would arise from allowing a coastal State to participate on an equal footing in any system of regulation, if it so desired, in accordance with the rules finally adopted. Any frivolous intervention by a coastal State could be dealt with through the arbitral procedure provided for in articles 7-10.

19. He had always been firmly opposed to the practice of bestowing advantages on less-advanced States merely because they were less-advanced, because he did not believe that their inability to acquire technical knowledge should be allowed to work to the disadvantage of more dynamic and energetic States. But as article 4 did not seem likely to bring about that result he would continue to support it, despite Mr. Scelle's arguments; neither did he share the latter's apprehensions that by adopting that text the Commission would be neglecting its duty towards the development of international law or endangering the general interests of the community.

20. Mr. FRANÇOIS (Special Rapporteur) said that the substance of Mr. Scelle's amendment was acceptable to him, but not its form; it should not be open to such objections as those put forward by Mr. García Amador and Mr. Amado. Mr. Scelle was not correct in arguing that a non-coastal State with special interests could lay claim to analogous rights, because it would not be in the same position. On the other hand, a non-coastal State should be entitled to take part in any system of regulation, even if its nationals were not engaged in fishing in the area concerned, if it could prove that the extermination of a given species in that area would affect its interests elsewhere. It would, in his view, be logical to provide for that situation within the framework of the Sub-Committee's draft. Furthermore, he wondered whether the expression "to take part" was adequate. The intention would perhaps be better rendered by some such word as "initiate".

21. Mr. SCELLE said that he could support the Special Rapporteur's suggestion.

22. Mr. HSU said that the undoubted importance of special interests could be over-emphasized. Mr. Scelle's amendment, which, at first sight, had some appeal, revealed itself on reflection to be very broad in character, since it would allow States to take part in a system of regulation even if they did not fish in the area and were remote from it. If such an amendment were accepted, the Commission might as well invest the United Nations, or some other international authority, with the power to regulate fisheries, as he had himself once proposed in connexion with the continental shelf. That proposal had been rejected outright, and he did not think that, in the context of the present draft articles, Mr. Scelle's amendment was appropriate.

23. Neither did he believe that article 4 constituted a threat to the equality of States, since the right it conferred would be enjoyed by all coastal States. On the other hand, it would undoubtedly affect the principle of the freedom of the seas, and that was undesirable; but perhaps such a concession was necessary if States were to be persuaded to withdraw extravagant claims concerning the territorial sea. From that purely practical standpoint, perhaps, article 4 merited support.

Mr. Spiropoulos resumed the Chair.

24. Mr. SALAMANCA considered that it was not possible to reconcile Mr. Scelle's proposal—which was based on political rather than on legal arguments—with the purposes of article 4. The question of the conservation of the living resources of the sea was a very real problem—contrary to what appeared to be suggested in the FAO bulletin from which Mr. Scelle had quoted. The ultimate objective of conservation was to help to maintain adequate supplies of food for mankind to meet the serious problem presented by the increase in the world's population.

25. In view of those facts, the special interest of the coastal State in any system of regulation was evident, even where that State did not actually fish in the area concerned. But it was impossible to grant an equal privilege to any other State that might claim an eventual interest, because no valid general criteria could be formulated for the case of non-coastal States.

26. As Mr. García Amador had pointed out, the claims to an abnormally wide territorial sea made by certain South-American States did not represent the general viewpoint of the Latin-American world. It must be remembered that those claims were simply the reflection of the feeling on the part of certain States that their legitimate rights and interests were not at present adequately protected. A moderate concession in the Commission's draft to those States' interests would satisfy their grievances and perhaps make it possible to persuade them to adopt a more reasonable attitude. He wished to stress that it was not his intention—any more than it was Mr. García Amador's—to support a purely negative attitude on the part of the coastal State, whose special interest would be recognized only on certain very clearly defined conditions.

27. A half-way solution did not seem feasible. The draft articles prepared by the sub-committee made adequate provision for the very different situations of the coastal State on the one hand and of non-coastal States on the other. In that sense, the true requirements of equality were met. The rights acknowledged to the coastal State were by no means excessive, for that State would be the best judge of any over-fishing it might observe in the waters adjacent to its coast.

28. By way of illustration, he quoted the conservation regulations adopted by Canada, the United States of America and Japan in the International North Pacific Fisheries Convention,[7] which laid down certain rules and provided that other States which refused to observe those rules might be prevented from fishing in the

[7] United Nations, *Treaty Series*, vol. 168, p. 9.

area. That was an illustration of the very real interest of coastal States in protecting the living resources of over-fished areas of the sea.

29. Another striking example was the practical disappearance from Argentina and Uruguay of the formerly prosperous industries based on the fur seal, following excessive sealing, mostly by sealers from remote countries.

30. Sir Gerald FITZMAURICE said that he had previously taken the view that there were only two kinds of States: coastal States and States fishing in a given area. However, the discussion that had just taken place seemed to show that there was a valid case for arguing that States other than a coastal State might have a potential interest in a given area, even though their nationals did not actually fish therein.

31. He therefore favoured Mr. Scelle's proposal in principle, but on condition that any dispute as to whether a given non-coastal State had or had not a special interest should be subject to arbitration. As the draft articles stood, the provisions for arbitration appeared to apply only to the issues raised by articles 3 and 6. With regard to article 4, so long as it related only to the coastal State, it seemed reasonable to suppose that no dispute could arise; the interest of the coastal State was patent. But where a non-coastal State, the nationals of which also did not fish in the area concerned, claimed a special interest, it was necessary to provide for arbitration to ensure the necessary safeguard against unwarranted interventions.

32. The Food and Agriculture Organization publication from which Mr. Scelle had quoted emphasized an important point: in an appreciable number of areas there was in fact no overfishing, so that conservation measures were unnecessary.

33. In such areas, the situation could and did arise where a coastal State had an interest in limiting fishing activities even though there was no need for conservation measures in the general interest. The activities of nationals of the coastal State were often limited to waters close to its shores, and comprised processes different from those employed by foreign fishermen in the deeper offshore waters: coastal fishermen often fished by line instead of trawling. The deeper waters abounded in fish which were in no danger of being exterminated, and it was in the general interest of mankind that more fish should be caught. But any increase in fishing activity to that end on the part of foreign fishermen could have an adverse effect on the less comprehensive type of fishing practised by the nationals of the coastal State. Hence it was clear that if the matter of regulation were left exclusively or largely to the latter, the outcome would be the sacrifice to its local interest of the general interest of mankind in catching the maximum number of fish possible without depleting stocks.

34. He agreed that the special interest of the coastal State must be recognized but equally a just balance must be struck between that interest and the broader objective of ensuring the maximum sustainable yield.

35. Mr. KRYLOV said that it was difficult to see what special interest could be claimed by a State which was neither a coastal State nor one whose nationals actually fished in the area concerned. In theory, it could be suggested that some future interest—the kind that might remain purely potential for centuries—might be at stake. The special interest of the coastal State was plain, and as such could be included by the Commission in its draft. But it was not practicable to endeavour to legislate for the very remote possibility of the special interest of a non-coastal, non-fishing State.

36. Law in general and international law in particular were concerned with the protection of concrete rights and positive interests; only to a very small degree could law be practically concerned with the protection of potential or eventual interests.

37. Mr. Scelle admitted that the coastal State had a special interest which merited separate mention. But that did not exclude the possibility of non-coastal States also having a special interest. With regard to the drafting of a provision to cover that interest, he would have no objection to any form the Special Rapporteur might see fit to propose.

38. In addition to the examples already given, he would point out that seaweed was becoming an increasingly important product of the sea commercially, both for medical purposes and as a source of food. It was quite conceivable that a non-coastal State might have a legitimate interest in the protection of seaweed, in the gathering of which it would have an eventual interest for its future medical or food supplies.

39. Mr. GARCÍA AMADOR pointed out that much of the discussion had centred round the special interest of the coastal State, as provided for in article 5. The question before the Commission at that stage was that of the special interest which justified the participation of the coastal State in any system of regulation, even though its nationals did not engage in fishing in the area concerned. That was the sole purpose of article 4, article 5 being concerned with the possibility of unilateral action by the coastal State—a totally different matter.

40. With regard to the statement in the Food and Agriculture Organization publication quoted by Mr. Scelle, he pointed out that the dangers of depleting stocks by over-fishing had been emphasized more than once by the highest authorities. He quoted from Russell's *The Overfishing Problem*[8] and from the valuable paper on "Concepts of Conservation" by the United Kingdom expert Mr. Michael Graham, submitted to the Rome Conference.[9]

41. In fact, the calling of the Rome Conference had been prompted by international awareness of the danger of over-fishing, and all its work had been based on the necessity for dealing with that problem.

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[8] Russell, E. S., *The Overfishing Problem* (London, 1942).

[9] A/CONF.10/L.2.

42. It was not possible to grant a non-coastal State the right to participate in the regulation of fisheries in an area where it did not fish. No practical criterion could be devised to define the special interest of a non-coastal State, and any provision along the lines suggested by Mr. Scelle would, if included in article 4, leave the door open to intervention by any State. For it would always be possible to claim that some particular product of the sea was a raw material essential to the industry of a given State.

43. There were, indeed, cases where a non-coastal State might have some indirect interest in the living resources of a particular area, or certain historical rights therein. He therefore proposed that such eventual interests of non-coastal States be protected by providing that such a State should be entitled to demand of the States concerned in fishing or the coastal State, that they adopt the necessary conservation measures if they had not done so.

44. Mr. SCELLE said he accepted Sir Gerald Fitzmaurice's suggestion that any question as to a non-coastal State's alleged special interest should be subject to arbitration.

45. The CHAIRMAN pointed out that it would not be enough for the Commission itself to agree upon a draft; it must also bear in mind what the reaction of the General Assembly was likely to be.

46. The Commission could proceed to vote on the principle of Mr. Scelle's proposal that any State, and not a coastal State alone, should be allowed to participate in the regulation of fisheries in a given area if it had a special interest therein.

47. Mr. GARCÍA AMADOR, referring to Sir Gerald Fitzmaurice's remarks on arbitration, said that the arbitration clauses applied to all the preceding articles, including article 4.

48. He could not see his way to accept Mr. Scelle's amendment as submitted, because it would not conform to the true principle of equality, which required that unequal things be treated unequally. The indirect interest of a non-coastal State could never be analogous to the special interest of a coastal State.

49. It was possible for a non-coastal State to have some indirect interest at stake in a fishery. But that interest could never justify the extension to it of the privilege, which properly belonged to the coastal State alone, of being entitled to participate in any regulation of fisheries in waters where its nationals did not fish.

50. He therefore proposed that article 4 should not be amended, but that a second paragraph should be added to it reading somewhat as follows:

> "Any other State, having a special interest in the maintenance of the productivity of the living resources in an area of the high seas, may demand from the States engaged in fishing in that area that they prescribe, where necessary, measures for the conservation of such living resources."

51. Mr. AMADO failed to see what title could be laid to the privileges conferred in article 4 by a State, that nationals of which did not fish in an area, and which was not a coastal State.

52. Mr. SCELLE maintained that the non-coastal State's title was as good as that of the coastal State. The principle of equality before the law meant that a person owning property worth 100 francs was entitled to the same legal protection, and had the same legal redress as a person owning property worth 1,000,000 francs.

53. Mr. FRANÇOIS (Special Rapporteur) considered that, following Mr. García Amador's concessions, it would probably be possible for the sub-committee to redraft article 4 in a manner that would enable it to command maximum support.

The meeting rose at 6 p.m.

302nd MEETING

Wednesday, 1 June 1955, at 10.15 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

Article 4 [*4*] (continued)

1. The CHAIRMAN announced that the sub-committee had drafted a second paragraph for article 4; it read as follows:

"Any State whose nationals do not carry on fishing in a particular area but which has a special interest in the maintenance of the productivity of the resources of the high seas in that area may make representations to the States whose nationals engage in fishing in that area, urging them to see that the necessary measures are taken to safeguard its interests. Any difference of view that may arise shall be settled in accordance with the procedure laid down in articles 7-10."

2. Mr. SCELLE accepted that text.

3. Mr. KRYLOV thought that in the French text, a better word than *insister* might be found for "make representations".

4. Mr. SCELLE agreed that the term was, perhaps, not a very happy one, but was prepared to accept it if no better alternative could be found.

5. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee might consider whether the expression "maintenance of the productivity of the resources" could not be replaced by a reference to the conservation of resources.

6. Mr. LIANG (Secretary to the Commission) wished to raise a question which was not of a substantive character, but related rather to the succinctness of the text.

7. As drafted, the proposed second paragraph provided that a non-coastal State whose nationals were not engaged in fishing in a given area should have the right to make representations, for the purpose of ensuring that its interests were safeguarded, to those States whose nationals were so engaged.

8. The position was that there were three categories of State: coastal States; non-coastal States whose nationals were engaged in fishing in a given area; and States which were not coastal States and whose nationals were not engaged in fishing in the area, but which had a special interest therein.

9. The proposed new paragraph was intended to safeguard the position of the third category of States in relation to the second, but did not appear to cover the case where a State in the third category, finding that its interests were not being properly respected, might consider it necessary to make representations to the coastal State, and not just to the States engaged in fishing.

10. The CHAIRMAN said that, if the coastal State was not engaged in fishing, it would seem that, although article 4, paragraph 1 recognized its right to participate in a system of regulation, it could not be urged by another State to adopt conservation measures. The coastal State might consider it had no interest in the matter.

11. Faris Bey el-KHOURI thought it might be more appropriate to refer to a State which "believed" it had a special interest, rather than to use the term "has a special interest".

12. The CHAIRMAN pointed out that in any dispute there was always one party which believed it had a right; it was for the competent court or arbitration tribunal to decide whether that right could be validly asserted.

13. Mr. GARCÍA AMADOR said that the new paragraph had been drafted somewhat hastily, and called for improvement.

14. The expression "the necessary measures are taken to safeguard its interests" at the end of the first sentence was not appropriate, since conservation measures were taken in the general interest and not in the interests of the particular State mentioned in the paragraph; it should therefore be replaced by the words "the necessary measures are taken for the conservation of those resources."

15. Again, the French version of the second sentences referred to *le règlement*. That seemed to suggest that the competence of the technical arbitration board would extend to the actual formulation of conservation regulations. Such was not the intention, and it was desirable that it be made clear that the competence of the board was limited to giving a ruling on the validity of the special interest invoked by the State concerned.

16. It would be better to use exactly the same wording as in article 6, paragraph 2, namely, *le règlement de la question*, in order to make it clear that the last sentence of the new paragraph referred to arbitration on the question of an alleged special interst.

17. Mr. AMADO thought it would be better not to use the word *règlement* at all in the French text since, to the ear of those using other Romance tongues, it had a somewhat equivocal connotation. It might be preferable simply to say that in case of dispute *on suivra la méthode prévue aux articles 7 à 10.*

18. Mr. SCELLE said that the term "règlement" was not inappropriate. He pointed out, furthermore, that in French legal terminology there were two kinds of court decisions: *jugement de règlement* and *jugement d'intérêts*. The former were given in such cases as disputes over water rights, where a decision had to be handed down which would apply to all those using the waters concerned. The case had some analogy with that under discussion by the Commission, in that if a decision were adopted by the arbitration board with regard to conservation measures, that decision would constitute a ruling *erga omnes* on the validity or appropriateness of those measures.

Article 4, including the new paragraph as amended by Mr. García Amador, was adopted by 11 votes to none, with 2 abstentions.

Article 5 [5, para. 1][1]

19. Mr. SCELLE said that the phrase "and that no agreement has been reached within a reasonable period of time" was superfluous, as was also the phrase "if it

[1] See *supra*, 300th meeting, para. 1.

has a special interest in the productivity of the resources of the high seas contiguous to its coast". The Commission had accepted the notion that the coastal State had a privilege in the matter, and it did not appear necessary—or even useful—to encumber the provision with the phrases in question. He would further suggest that the final phrase of the article should read "the coastal State may take the initiative of adopting whatever measures of conservation are appropriate".

20. Mr. AMADO agreed that the two phrases mentioned by Mr. Scelle were superfluous.

21. Mr. LIANG (Secretary to the Commission) said that it was most desirable that article 5 should mention specifically the circumstance that, the coastal State having actually engaged in negotiations, no agreement had been arrived at with the other States concerned within a reasonable period of time. It was vital to provide that if the coastal State refused absolutely to negotiate it would not be entitled to adopt conservation measures unilaterally. Lack of agreement alone could justify unilateral action.

22. He would prefer a simpler text along those lines, in which case the opening phrase of article 5 ("where there is no agreement among the States concerned") would become redundant.

23. Sir Gerald FITZMAURICE agreed with Mr. Liang; the sub-committee had adopted its article 5 precisely for the reasons just set forth by him. The purpose of the provision was to ensure that the coastal State would be free to adopt unilateral measures only if it had made an attempt to negotiate.

24. Mr. EDMONDS suggested, for the benefit of the Drafting Committee, that the last few words of article 5 might read "whatever measures of conservation are appropriate for such interests".

25. Mr. SCELLE considered that it would be better not to specify that the coastal State, which, after all, might allow foreign fishermen to act in a manner inconsistent with the purposes of conservation, should engage in negotiations; the initiative for instituting negotiations would thus be left with the non-coastal State or States, which in his view would be preferable.

26. The CHAIRMAN pointed out that article 2 already empowered any State concerned to invite others to negotiate on conservation measures. The purpose of article 5 was to make it clear that, in the specific case of a coastal State, such State should endeavour to reach agreement with other States before taking unilateral action.

27. Mr. EDMONDS enquired what would be the position if two coastal States adopted conflicting regulations.

28. The CHAIRMAN replied that in practice one of the two States would be the first to adopt a regulation. The other State would not then be able to adopt a concurrent regulation, but would have the possibility of resorting to the procedure provided for in articles 7 to 10.

29. Mr. AMADO pointed out that article 5 had to be read in conjunction with article 6, which specified very strictly the limitations to the right of the coastal State.

Article 5 was adopted unanimously.

Article 6 [5, paras. 2 and 3] [2]

30. Mr. SCELLE proposed the addition to paragraph 1 of article 6 of two further sub-paragraphs, the first to read:

d) *si elles n'affectent pas une étendue de mer disproportionnée avec les besoins légitimement invoqués.*

31. It was clear that some reference to a spatial limitation was necessary. No problem would arise in the case of a country like Yugoslavia or Italy, because the Adriatic was a comparatively narrow sea. But in the case, for example, of Peru, it would be essential to make it clear that invocation of its interests could not justify the adoption of conservation measures affecting an indeterminate extent of the immense Pacific Ocean.

32. He would come to his second amendment later.

33. The CHAIRMAN pointed out that the only possible way of limiting the distance was to mention a specific number of miles. No formulation of the kind suggested by Mr. Scelle could add anything to the provisions already adopted. Article 4 made reference to the high seas contiguous to the coast, and the interpretation of the concept of contiguity in that context would be a matter for the board provided for in article 8, whose ruling would determine the application of articles 5 and 6.

34. Mr. SCELLE thought that it might none the less be desirable to suggest some criterion such as he had proposed.

35. Mr. LIANG (Secretary to the Commission) considered that, as a qualification of "scientific findings", the term "appropriate" used in sub-paragraph (*b*) of paragraph 1 was inexact; the proper word would be "valid", which was used in the French text.

36. With regard to arbitration, it was clear that the problems of interpretation pertaining to sub-paragraphs (*a*) and (*b*) would relate to purely scientific enquiries, for which a technical board of experts could well be appropriate. But sub-paragraph (*c*) and Mr. Scelle's proposed sub-paragraph (*d*) were concerned also with non-technical matters, namely: the principle of non-discrimination and the problem of the spatial scope of any measures taken unilaterally by the coastal State. It was doubtful whether fishery experts would be best fitted to arbitrate on such issues.

[2] *Ibid.*

37. Article 6 was of vital importance; it was the key to the whole series. It was necessary first to settle the conditions to be required of the coastal State; the problem of their implementation should be examined only afterwards. Moreover, such implementation would have to be adapted to the agreed substantive issues enumerated in article 6. Hence it was a matter of great importance whether a sub-paragraph such as the one proposed by Mr. Scelle was to be included or not.

38. Sir Gerald FITZMAURICE supported Mr. Scelle's proposal. He himself had had in mind to propose an additional sub-paragraph along much the same lines, reading:

"(*d*) that the area within which the measures are applied is reasonable having regard to all the circumstances."

39. It was possible that, as the Chairman had suggested, the spatial limitation was implicit in the provisions already adopted by the Commission, but it was desirable, in view of the wide claims being made by certain States, that the matter be made perfectly clear.

40. The question of non-discrimination was a matter with which, in his opinion, fishery experts could well deal. In the field under consideration discrimination was never crude. Regulations were never framed so as explicitly to exclude foreign fishermen as such from a given area. The usual procedure was to prohibit methods employed by one class of fishermen and to permit others, notably those practised in the coastal State itself.

41. Mr. GARCÍA AMADOR recalled that, by adopting article 4 to replace the corresponding article in the draft on fisheries adopted at the fifth session, in which a limit of 100 miles had been laid down, the Commission had already abandoned the criterion of distance in favour of that of the coastal State's special interest in the maintenance of the productivity of resources, which was in harmony with the conclusions and recommendations of the International Technical Conference on the Conservation of the Living Resources of the Sea.

42. Article 6 had to be read in conjunction with article 5. Although the substance of Mr. Scelle's first proposal was implicit in the terms of article 5, it would not be wholly redundant to specify that the coastal State might adopt measures only in the area in which its interest was valid. He therefore proposed that article 5 be amended by adding to it the words: "in the area where that interest exists".

43. Mr. SCELLE accepted Mr. García Amador's proposal, and withdrew his own proposed sub-paragraph (*d*) in its favour.

44. Mr. SANDSTRÖM thought that both Mr. Scelle's proposal and Mr. García Amador's amendment were too vague for the formulation of a specific spatial limitation of the coastal State's right.

45. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice that the question of non-discrimination could well be decided by experts who were not jurists. It was a question of fairness rather than legality.

46. Mr. SCELLE said that his second addition to article 6 would now read:

d) *si elles ont exclusivement pour objet la conservation des ressources biologiques de la mer.*

47. Such a provision might be regarded as self-evident, yet it would be expedient. His complete confidence in the good faith of his colleagues on the Commission did not extend to governments, which of necessity had to seize every possible advantage from any given situation for the benefit of their countries. He therefore feared that if the coastal State were to be given the right to regulate unilaterally certain aspects of the fishing industry, it would inevitably take the opportunity of instituting other, more restrictive, measures which might have discriminatory consequences and hence create differences between States. The machinery for the settlement of disputes provided for in articles 7 to 10 notwithstanding, an express provision was required to prevent governments from abusing the powers they would acquire if the draft articles were adopted. His amendment thus provided a necessary safeguard against the natural tendency of governments to extend their jurisdiction wherever possible.

48. Mr. SANDSTRÖM suggested that the closing words of article 5 ("whatever measures of conservation are appropriate") were sufficient to meet the purpose Mr. Scelle had in mind. It would be illusory to suppose that repetition would be effective in preventing governments from going beyond their powers.

49. Faris Bey el-KHOURI considered that agreements concluded under article 2 should also be subject to the requirements laid down in article 6, otherwise they could not be made binding on other States. He therefore proposed the insertion of the words "and the measures adopted under article 2" after the words "adopts under article 5" in paragraph 1.

50. Mr. ZOUREK considered Mr. Scelle's first amendment to be useful, because it introduced a new element that was not to be found in Mr. García Amador's wording, which referred solely to the geographical criterion. He would accordingly have preferred the original text.

51. He wondered whether the purpose of Mr. Scelle's second amendment might not be achieved by inserting some such words as "for purposes of conservation of the living resources of the sea" after the words "the measures", at the beginning of the article.

52. Mr. GARCÍA AMADOR said that Mr. Scelle's second amendment brought the Commission back to the fundamental issue of the whole purpose of the draft articles. It had already been clearly decided that they should be designed solely and exclusively to ensure the conservation of the living resources of the sea. He believed the Commission to be unanimous in thinking that coastal States and others must alike be prohibited from unduly limiting the freedom of fishing in the high seas, but wondered whether it was necessary to formu-

late that principle explicitly in the draft. It would surely be enough to insert some kind of a preamble, defining precisely the scope of the succeeding articles. Unlike Mr. Scelle's first amendment, the second was not only superfluous but also repetitious and misleading. There was no point whatsoever, in a draft entirely devoted to conservation, in prohibiting States from promulgating measures other than those strictly designed for that purpose. Moreover, the limitation expressed in Mr. Scelle's amendment should apply to the measures taken under articles 1 and 2, since otherwise the coastal State would be unfairly penalized.

53. Mr. SCELLE did not share Mr. García Amador's complete confidence that the precise purpose of the articles could be adequately defined in some general provision. If the sense of his amendment were accepted, he had no strong views about its form or place in the draft.

54. The CHAIRMAN observed that Mr. Scelle's point could be covered either in a preamble or in a general introductory article.

55. In reply to a question by the CHAIRMAN, Mr. SCELLE said that he could accept Mr. García Amador's wording in place of his own first amendment; Sir Gerald Fitzmaurice's wording, however, seemed to him too broad.

56. Mr. GARCÍA AMADOR said that the insertion of his wording in article 6, which appeared to be what Mr. Scelle wanted, would entail repetition. He therefore maintained that it be added to article 5.

57. Mr. SCELLE said that he would be prepared to agree to that course, though he did not find it fully satisfactory.

58. The CHAIRMAN put to the vote Mr. García Amador's proposal that the words "in the area where that interest exists" be added at the end of article 5.

The amendment was adopted by 12 votes to 1.

59. Mr. AMADO, explaining his vote, said that he had opposed the amendment because neither Mr. Scelle nor Mr. García Amador had succeeded in convincing him that it was not superfluous.

60. Mr. SANDSTRÖM, referring to Faris Bey el-Khouri's amendment to article 6, said that the situation brought about by the promulgation of measures under article 5 would not be the same as that resulting from an agreement concluded under article 2. If the latter gave rise to a dispute, the provisions of article 3 would come into play.

61. Faris Bey el-KHOURI pointed out that no regulations introduced under article 2 could be made binding on States other than those which had drawn them up, unless they were consistent with the requirements of article 6.

62. The CHAIRMAN considered Faris Bey el-Khouri's observation to be very pertinent.

63. Mr. ZOUREK agreed that Faris Bey el-Khouri had raised an important issue; his amendment would be fully consistent with the general conclusions reached at the Rome Conference to the effect that, if two States agreed to promulgate regulations, they must fulfil the conditions laid down in article 6.

64. Sir Gerald FITZMAURICE supported Faris Bey el-Khouri's amendment, because it had always been implicit in article 2 that the measures promulgated in virtue of its provisions should be genuinely designed for conservation purposes. That had not been expressly stated, because the coastal State was the only one which was entitled to adopt unilaterally measures applicable to foreign fishermen: in cases under article 2 they had to be the result of an agreement, from which there was a right of appeal under article 3. It had therefore been thought more necessary to make it clear that regulations emanating from a coastal State alone should be subject to certain conditions, but Faris Bey el-Khouri's amendment would certainly serve to underline the purpose of the entire draft.

65. The CHAIRMAN, speaking as a member of the Commission, pointed out that the right of appeal against an agreement reached under article 2 could only be exercised by States which had not previously engaged in fishing in the area concerned.

66. He considered Faris Bey el-Khouri's amendment sound: all conservation regulations should fulfil the requirements of article 6.

67. Mr. SCELLE had considerable sympathy for the amendment, but considered that it went somewhat farther than the law as it stood at present. To draw an analogy from another sphere, once a treaty had been ratified, non-signatory States could not appeal against any of its provisions unless they were able to prove that their rights had been prejudiced by those provisions.

68. In fact, Faris Bey el-Khouri's amendment constituted a great step forward, since it meant that another State would be able to intervene in order to secure the promulgation of vitally necessary regulations. Such progress would to some extent be a substitute for a supranational authority within the framework of the United Nations, since it would bring nearer the integration of the international community and universal respect for *res communis*.

69. Mr. ZOUREK argued that the purpose of the amendment was surely not to concede to any State the right to intervene in agreements concluded under article 2, which would be going far beyond the existing rules of international law.

70. Faris Bey el-KHOURI said that all he had in mind was that regulations, if they were to be generally applicable, would have to be consistent with article 6. He was perfectly prepared to leave the drafting of his amendment to the Sub-Committee.

71. Mr. EDMONDS said that, if he had correctly understood the amendment, it would alter the whole

structure of the draft articles. He himself had interpreted article 2 as meaning that two or more States might negotiate an agreement on conservation measures which need not necessarily be wholly based on the requirements of article 6 pertaining to regulations promulgated unilaterally by the coastal State. He urged the Commission not to adopt the amendment without giving the most careful consideration to its ultimate effect on a draft which dealt differently with regulations promulgated by two or more States and with those promulgated unilaterally.

72. Faris Bey el-KHOURI did not consider that an agreement on conservation measures concluded between several States should confer a monopoly over a certain area of the high seas for the purpose of excluding foreign fishing vessels therefrom. They had only the right to regulate fisheries in the general interests and must therefore be bound by the provisions of article 6.

73. Mr. GARCÍA AMADOR agreed with Faris Bey el-Khouri that multilateral regulations under article 2 and unilateral regulations under article 1 must both be subject to the conditions of article 6, which circumscribed the full freedom of action both of the coastal and of other States. It would then be impossible for agreements between several States, prompted by motives of gain rather than concern for the maintenance of the maximum sustainable yield in the general interest, to be promulgated, since they would be contrary to article 6, paragraph 1 (*a*); nor would States be entitled to initiate measures which were neither imperative nor urgent, owing to the provisions of paragraph 1 (*b*). Since the purpose of all conservation measures must be to protect the general interest, they should fulfil the conditions set out in article 6, and particularly that of paragraph 1 (*b*).

74. Mr. FRANÇOIS (Special Rapporteur) said that despite Mr. García Amador's remarks, he was still doubtful about the need for Faris Bey el-Khouri's amendment, since the conditions laid down in article 6 could not apply to regulations instituted by virtue of articles 1 and 2, where there could be no question of their being obligatory on a third party: the case of third States was provided for in article 3, when it would be for the board of experts to decide whether the terms of article 6 had been complied with.

75. Mr. SCELLE found the Special Rapporteur's argument unconvincing, because under the terms of articles 1 and 2 it would be possible for States to monopolize fishing in certain areas of the high seas, thereby violating a major principle of international law. At the outset, it had seemed that the amendment went too far, but he now realized that his first impression had been mistaken, since the notion of challenging a treaty or international agreement was not a new one, and had in fact been put into practice by Germany between the wars. Violation of the overriding principle of the freedom of the seas, or discrimination against foreign fishing vessels, could constitute grounds for declaring regulations null and void. Once the Commission had introduced the concept of the "special interest", it must allow other States a right of appeal, but such a provision would be better placed in a general article dealing with the freedom of the seas, to make sure that States were precluded from invoking the requirements of conservation as a pretext for frustrating the fishing of others. However, for the time being he would be prepared to accept Faris Bey el-Khouri's amendment to article 6, on the understanding that he could later revert to the general principle involved.

76. The CHAIRMAN, speaking as a member of the Commission, observed that if the general principle implicit in the amendment were accepted, the Commission would reverse all its previous decisions on the draft before it, and would, in effect, be returning to article 32 in the Special Rapporteur's sixth report (A/CN.4/79) on the régime of the high seas.

77. Mr. KRYLOV said that the issue before the Commission was whether the three conditions laid down in article 6 must always be complied with, or whether they applied solely to measures adopted unilaterally by the coastal State.

78. Mr. SANDSTRÖM said that the Commission was faced with a very important issue which required further reflection. He himself was uncertain whether, given the present structure of the draft articles on fisheries, Faris Bey el-Khouri's amendment was appropriate. He accordingly moved that the decision be postponed until the following meeting.

The motion was carried.

The meeting rose at 1.10 p.m.

303rd MEETING

Thursday, 2 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) *(continued)*

NEW DRAFT ARTICLES ON FISHERIES *(continued)*

Article 6 [5, paras. 2 and 3] (continued)

1. The CHAIRMAN invited the Commission to consider the amendment to article 6 submitted orally by Faris Bey el-Khouri at the previous meeting.[1]

2. Mr. FRANÇOIS (Special Rapporteur) said that, having reflected on Faris Bey el-Khouri's amendment, he had decided that the obligation imposed in the opening sentence of paragraph 1 of that article should be made general. He therefore proposed a new article 1, the introduction to which would read: *Toutes les mesures que les Etats prendront en haute mer pour réglementer et contrôler la pêche en vue de la conservation des resources biologiques de la mer doivent satisfaire aux conditions suivantes.* Sub-paragraphs (*a*), (*b*) and (*c*) of article 6, suitably modified, would follow.

3. Paragraph 2 of article 6 would be transposed to form the second paragraph of article 5, to which provision it had always related, and articles 7 to 10 renumbered accordingly.

4. The new article 1 would dominate the entire draft, and the requirements laid down therein would guide the board of experts in determining whether regulations against which an appeal had been made were valid. The transposition of paragraph 2 to article 5 would also make it clear that States not engaged in fishing in a particular area would not be entitled to challenge regulations solely on the ground that they failed to meet the conditions listed in article 1.

5. Mr. SANDSTRÖM assumed that the Special Rapporteur had not intended that conservation measures should be binding on States not parties to an agreement concluded under article 2.

6. Mr. FRANÇOIS (Special Rapporteur) confirmed that that assumption was correct.

7. Mr. EDMONDS said that the Special Rapporteur's proposal did not meet the fundamental objection he had raised at the previous meeting against Faris Bey el-Khouri's amendment, namely, that if it were adopted the same criteria would apply to regulations promulgated as the result of an agreement between two or more States as to regulations promulgated unilaterally by a coastal State. Personally, he did not consider that the same criteria should be applied in the case of regulations flowing from a multilateral agreement: criteria relating to the latter might be inserted in one of the provisions dealing with arbitration, and he would at the appropriate moment indicate what they might be.

8. Mr. HSU considered that the Special Rapporteur's new proposal could provide a working basis, on the assumption that the Commission had already accepted the principle that States promulgating conservation measures must conform to certain rules whatever the circumstances. He was personally not opposed to such a solution, but urged the Commission to be quite clear about what it was doing.

9. Faris Bey el-KHOURI had been perfectly right to draw attention to the gap in article 3, which provided no criteria for use if an agreement concluded under article 2 were challenged by a third party. Unless that omission were made good the whole system of regulation provided for in the draft articles might in many cases prove inoperable. However, Faris Bey el-Khouri had gone even further and had introduced an idea entirely new in international law, namely, that all regulations would be equally subject to the conditions laid down in article 6. Again he was not necessarily opposed to that development but wondered whether the Commission was in fact willing to go so far as to empower any State to challenge any conservation regulations. If it were not, it should confine itself to the real purpose of Faris Bey el-Khouri's amendment: the filling of the gap in article 3. That, he submitted, could easily be done by making a separate article of sub-paragraphs (*b*) and (*c*) of article 6, prefaced by some such words as "The Board shall take into consideration whether the following requirements have been fulfilled..." Those two requirements should clearly be applicable to all regulations, whereas that laid down in sub-paragraph (*a*) related solely to regulations instituted unilaterally by the coastal State.

10. Mr. KRYLOV shared the Special Rapporteur's views, because in fact the Commission was in process of providing for an exception to the fundamental principle of the freedom of the high seas by allowing States to regulate fisheries for purposes of conservation. The nature of the exception must therefore be most precisely defined for the guidance of States, which were not entirely free to regulate fisheries on the high seas as they pleased. It would not be unduly audacious to transfer the fundamental element in article 6 to a new article 1; indeed, that would be consistent with the conclusions adopted at the Rome International Technical Conference on the Conservation of the Living Resources of the Sea. He was accordingly inclined to agree with the general idea underlying Faris Bey el-Khouri's amendment and to support it in the form proposed by the Special Rapporteur.

11. Sir Gerald FITZMAURICE, while agreeing in principle with Faris Bey el-Khouri's view, had some doubts, for reasons analogous to those adduced by Mr. Edmonds and Mr. Hsu, about whether the solution offered by the Special Rapporteur was the best. Mr. Hsu had been perfectly correct in pointing out that some of the criteria in article 6, while appropriate to unilateral regulations, ought not to be applicable to those promulgated by multilateral agreement. For example, in the case of the former, the requirement laid down in

[1] 302nd meeting, para. 49.

sub-paragraph (*a*) was perfectly reasonable, and was indeed both necessary and desirable. But there was no reason why the same requirement should be imposed in the case of multilateral regulations. Certain measures might well be considered desirable without there necessarily being any imperative or urgent need for them.

12. Sub-paragraph (*c*) raised the same point, but that involved a question of drafting rather than of substance. It was clearly inappropriate to refer to "foreign fishermen" in connexion with regulations reached by agreement between the States by which those regulations had been drawn up. Hence, although article 2 must be made subject to the requirement set out in sub-paragraph (*c*), those words would have to be replaced by some phrase prohibiting discrimination against the nationals of "States not parties to the agreement". He hoped the foregoing arguments would have demonstrated that the criteria laid down in article 6 were not equally applicable to all cases. There was much to be said for Mr. Hsu's suggestion, which had been adumbrated by Mr. Edmonds, that the criteria should be laid down in one of the articles pertaining to the settlement of disputes by the board of experts.

13. Faris Bey el-KHOURI observed that there appeared to be general agreement in the Commission, as there had been at the Rome Conference, that measures of conservation were necessary and that the coastal State or States engaged in fishing in a particular area were entitled to promulgate appropriate regulations. It remained to decide what criteria such regulations should meet — a matter to which insufficient attention had been paid at the Rome Conference. He therefore paid tribute to the wisdom of Mr. García Amador in making good that deficiency, though article 6 as it stood might need to be amplified.

14. There would be no problem if regulations were to be binding solely upon the parties to the agreement, but, in order to protect the freedom of the high seas, he was anxious to make certain that only regulations fulfilling certain conditions could be universally binding. He considered that that would be achieved by the Special Rapporteur's proposal. Matters of drafting could be left to the sub-committee.

15. Mr. AMADO was unable to associate himself with Faris Bey el-Khouri's views, and considered that the original text was more realistic and would have a greater chance of acceptance.

16. The CHAIRMAN feared that the Commission was not making much headway. He did not himself regard the issue under discussion as of great significance, or very controversial. In his opinion, it was perfectly obvious that regulations must be based on valid scientific findings, and that they must not discriminate against foreign fishermen, and it was of no great moment whether those criteria were placed in an introductory article or later in the draft, since the board of experts would in any case apply them in deciding any case which had given rise to a difference between States.

17. Mr. KRYLOV considered the discussion to have been useful, inasmuch as it had revealed the crucial issue at stake.

18. Mr. ZOUREK urged the Commission to bear it in mind that the whole purpose of the draft articles was to ensure conservation, and that they must therefore set forth the general principles on which regulations should be based, whether promulgated under article 2 or under article 5. It would be peculiar, and totally inconsistent with that purpose, to impose certain conditions on the coastal State, while allowing other States full freedom in drawing up their regulations. The criterion contained in sub-paragraph (*a*) was certainly applicable to unilateral regulations established by a coastal State, but it should not be included in a general introductory article, which he favoured. As Mr. Krylov had so pertinently demonstrated, the draft articles provided for an exception to the principle of the freedom of the high seas, and the conditions the relevant regulations would have to fulfil must therefore be very precisely defined.

19. Mr. SCELLE said that, despite the counter-arguments adduced, he agreed in a general way with the Special Rapporteur. The Commission would have made some progress if the provisions adopted ensured that regulations were to some extent standarized because of the existence of an international authority with powers to determine whether they were scientifically, and hence legally, valid.

20. Mr. García Amador would presumably agree that there was no reason why the coastal State should be placed at a disadvantage by having to fulfil certain conditions which were not imposed on other States. He therefore welcomed Faris Bey el-Khouri's proposal that all regulations should be subject to the same conditions, and did not think that the views expressed by Sir Gerald Fitzmaurice and Mr. Hsu were incompatible with that standpoint.

21. Mr. GARCÍA AMADOR said that the Commission should be grateful to Faris Bey el-Khouri for raising a question which had escaped the notice of the Sub-Committee. However, he warned members against taking too hasty a decision to apply the same criteria in all cases. Regulations established unilaterally by the coastal State would differ from those promulgated under articles 1 and 2. For instance, the criterion in sub-paragraph (*c*) could not be applicable to articles 1 and 2, since those articles referred to regulations applying exclusively to nationals of the State or States promulgating them. On the other hand, that criterion must apply to unilateral regulations in order to avert all risk of discrimination.

22. The criterion laid down in sub-paragraph (*a*) was not very well defined or of general application. Moreover, any State affected, in an area where it was engaged in fishing, by conservation measures which it regarded as unjustified could exercise the right of appeal provided for in article 3.

23. The criterion in sub-paragraph (*b*), on the other hand, was universally applicable and should provide a

safeguard against measures prompted solely by motives of private gain. A provision of that kind was particularly necessary in order to prevent powerful fishing interests from bringing pressure to bear on their governments to carry out conservation measures which had nothing whatsoever to do with the fundamental aim of securing a constant optimum sustainable yield. He used the word "constant" advisedly, because the whole question of conservation must clearly be approached from the long-term standpoint of the general interest rather than from that of any transitory interest of the fishing industry. The criterion in sub-paragraph (*b*) was thus crucial, and its importance should be made as clear as possible. That said, he believed that the drafting could be left to the sub-committee.

24. Mr. SALAMANCA said that one of the most important elements in the draft articles was the recognition that the coastal State had certain special rights in regulating fisheries, subject to certain conditions which should have favourable practical results. It was extremely useful to have brought out into the open the possibility of pressure by a fishing industry on a government, thus enabling the necessary safeguards to be provided against measures prompted by commercial instead of purely scientific considerations.

25. It was essential to ensure that any regulations promulgated by a coastal State would be positive and not negative.

26. Mr. SANDSTRÖM was still uncertain whether the provisions of articles 1 and 2 should be subject to the requirements laid down in article 6, and was certainly convinced that the criterion in sub-paragraph (*a*), at least, could not apply generally. On the other hand, he believed that the criterion in sub-paragraph (*c*) must be fulfilled in the case of all regulations, since those promulgated under articles 1 and 2 might well have the effect of discriminating against foreign fishermen. On that understanding, he would be able to accept the Special Rapporteur's proposal.

27. Sir Gerald FITZMAURICE said that the last sentence made by Mr. García Amador and Mr. Sandström revealed a difference of view on the important issue of how far regulations promulgated by a coastal State, by one non-coastal State or by several States together would be *ipso facto* binding on other States. Mr. García Amador had drawn a distinction, in connexion with the question of discrimination, between unilateral regulations by a coastal State and regulations promulgated by agreement between several States, and had appeared to argue that in the case of the latter there was no need to provide against discrimination because the regulations would apply only to the nationals of the States concerned, whereas in the case of the former—where the regulations would be applicable to all other fishermen—some safeguard against discrimination was needed. Perhaps such a distinction had been intended, or was necessary, but it was not embodied in the text as it stood.

28. In fact, there were two possible systems, and whichever was adopted should be the same for each class of case. Either the regulations adopted by agreement between two or more States or unilaterally by the coastal State became binding on others fishing in that area, the latter having the right of appeal; or regulations adopted in either of the two instances would not *ipso facto* become binding on other States, in which case, if the latter failed to conform with the regulations, the promulgating State or States could ask the board of experts to direct that the regulations be observed. The real point at issue, therefore, was where the onus lay for approaching the board of experts.

29. It was apparent from Mr. García Amador's statement that the draft did not make clear which system was applicable.

30. The CHAIRMAN did not think it should be difficult to decide whether all regulations, once adopted, would become binding forthwith on any State fishing in the area concerned, or whether that would be contingent upon a decision of the Board.

31. Mr. SCELLE pointed out that Sir Gerald Fitzmaurice had raised the very interesting problem of the burden of proof. Surely it would be consistent with normal practice for that burden to be borne by those States which were not responsible for the regulations. The situation would then be analogous to that obtaining in municipal law, when an administrative decision remained valid unless and until an appeal against it succeeded.

32. Mr. SANDSTRÖM did not entirely agree with Mr. Scelle, because there could be cases when it would be necessary for the promulgating States to prove that the regulations were not contrary to the conditions laid down in the draft articles.

33. The CHAIRMAN observed that the Commission must decide whether, upon adoption, regulations became generally obligatory unless subsequently annulled by the board of experts.

34. The Commission had also to decide whether all regulations should conform with the same conditions.

35. Mr. EDMONDS reaffirmed his view that regulations promulgated under article 2 should be subject to certain criteria, but not necessarily to all those set out in article 6, which in their entirety were applicable to unilateral regulations only. The issue at stake seemed to him a very important one.

36. The CHAIRMAN observed that the Commission was in effect faced with two alternative proposals. Either that the coastal State alone, in enacting regulations unilaterally, must meet the requirements of article 6; or that all regulations must fulfil one general condition, namely: that they should be based on valid scientific findings and be aimed solely at the conservation of the living resources of the sea.

37. Mr. EDMONDS observed that the discussion suggested that there was general agreement that when challenged any regulations should be judged in the light

of certain criteria, but not necessarily in the light of those laid down in article 6. Mr. García Amador appeared to have admitted that those criteria were not wholly applicable in the case of regulations enacted under article 2.

38. Mr. GARCÍA AMADOR confirmed Mr. Edmonds' interpretation. Since article 1 was concerned solely with the nationals of one State, and since regulations adopted under article 2 could not be binding on States not party to the agreement, there could be no question of discrimination. Criteria other than those laid down in article 6 must therefore be applied.

39. In reply to a question by Mr. SALAMANCA, Sir Gerald FITZMAURICE explained that his earlier suggestion had been that the criteria might be inserted in a clause dealing with the law which the board of experts would have to apply.

40. Some misunderstanding persisted, and Mr. García Amador, though disclaiming any intention of drawing a distinction between unilateral regulations and regulations arrived at by agreement between two or more States, had, in fact, made such a distinction when he had stated that the former were *ipso facto* applicable to other States, but that the latter were only applicable to nationals of the States concluding the agreement. His own interpretation of article 2 had been that agreements concluded under it would be applicable *prima facie* to other States, but that the latter would have a right of appeal. Some provision was accordingly necessary to ensure that regulations promulgated under article 2 did not discriminate against States not parties to the agreement.

41. Mr. Edmonds was right in arguing that there was no simple set of criteria which would be equally applicable in all cases, and he himself doubted whether it would be possible to devise a general introductory article which would cover all regulations, apart from the common criterion laid down in sub-paragraph (*b*) of article 6.

42. The CHAIRMAN said that the condition that measures must be based on valid scientific findings might be generally applicable, but it would have to be differently applied, since what might be scientifically valid for one area might not be so for another.

43. Faris Bey el-KHOURI considered that any regulations must become binding on all other States as soon as adopted, otherwise they would be pointless. They should also fulfil two conditions: first, they must be based on valid scientific findings; second, they must not be discriminatory.

44. Mr. FRANÇOIS (Special Rapporteur) said that the discussion had showed that there were several points which the Sub-Committee had not fully disposed of. He therefore proposed that the draft articles be referred back to the sub-committee for revision in the light of the exchange of views that had taken place.

45. It had been suggested that a vote be taken on the question whether the same criteria should apply to all regulations or whether different criteria should be framed for those promulgated by the coastal State and those promulgated by other States. For his part, he would be unable to take part in such a vote unless the criteria in question were actually specified.

46. Mr. ZOUREK said that there was not enough time to refer the matter to the sub-committee and then take it up again in the Commission. Besides, members had already expressed their views at length, and the Commission should be in a position to vote on the principle involved, namely, whether all conservation measures, no matter what their origin, must be based on valid scientific findings.

47. Mr. SCELLE agreed with Mr. Zourek. There were many minor points that could be left to the sub-committee, but the Commission was in a position to vote on the principle.

48. Sir Gerald FITZMAURICE thought it would be preferable to send the draft back to the sub-committee, but should the Special Rapporteur's proposal not be accepted, the principle to be put to the vote might be formulated somewhat as follows:

> "Subject to drafting and to seeing a final text, the Commission accepts the principle that all measures of conservation should be governed by some criteria, though not necessarily the same in all cases, except that the criteria common to all cases should be that the measures should be based on valid scientific findings and must not be discriminatory."

49. Mr. KRYLOV found Sir Gerald Fitzmaurice's proposal acceptable.

50. Faris Bey el-Khouri said that Sir Gerald Fitzmaurice's formulation expressed his own ideas very well.

51. Mr. AMADO had misgivings about the principles involved in the discussion. The articles under discussion did not appear to conform with the fundamental principle of international law that a treaty could not have any effect on States other than the signatories.

52. Sir Gerald Fitzmaurice's text was to some extent reassuring.

53. Mr. GARCÍA AMADOR said that he would be able to support Sir Gerald Fitzmaurice's proposal if the last five words were deleted. The three requirements laid down in article 6, paragraph 1, were designed for the case of a coastal State adopting unilateral conservation measures. The reason why requirement (*c*) —that relating to non-discrimination—had been stipulated was precisely that conservation measures adopted by the coastal State would be enforceable not only on its nationals but also foreign fishermen; it was therefore essential to provide that there should be no discrimination against the latter. But in the cases contemplated in articles 1 and 2 no such discrimination could possibly occur. Article 1 dealt with the case where the State whose nationals were alone engaged in fishing

in an area adopted conservation measures applicable to those nationals; clearly there could be no question of such measures being discriminatory.

54. As to the case provided for in article 2, namely, that in which the nationals of two or more States were engaged in fishing in a given area and the States concerned promulgated conservation measures by mutual agreement, a provision relating to non-discrimination would again be redundant, for the measures in question would be binding only on nationals of the States engaged in fishing in the area, and not on nationals of other States.

55. Sir Gerald FITZMAURICE said that his proposal could be voted on in parts if Mr. García Amador so wished. He felt, however, that the principle of non-discrimination should be enunciated for all States. Conservation measures had to be based on valid scientific findings, and were therefore essentially non-discriminatory in character.

56. Measures adopted by agreement on the part of all those States whose nationals were engaged in fishing in a given area would be applicable to nationals of other States, by virtue of the provisions of articles and adopted by the Commission, if those nationals too decided to engage in fishing in the area concerned. It was then open to the third-party State concerned to appeal in the manner set out in articles 7 to 10. In the circumstances, it was clear that where conservation measures were decided upon by agreement on the part of two or more States, the principle of non-discrimination must be explicitly safeguarded.

57. Mr. SCELLE agreed that it was desirable to make explicit reference to the principle of non-discrimination. But even if the Commission followed Mr. García Amador's suggestion and omitted to do so, the principle would still govern all the provisions of the draft articles on fisheries, for any State would still be entitled to appeal to the board of experts against measures of a discriminatory character.

58. Mr. GARCÍA AMADOR stressed that he was entirely in favour of the principle of non-discrimination. But that principle, which required to be explicitly stated in the case of unilateral measures adopted by the coastal State and which were to be applied to foreign fishermen, need no longer be mentioned in connexion with the cases provided for in articles 1 and 2, in which there was no possibility of discrimination.

59. It had been suggested that, pending a decision by the board of experts, regulations issued by one or more States fishing in an area would be equally applicable to fishermen belonging to a third-party State. That was clearly not the case; if the United States of America and Cuba were to agree on certain measures for regulating fishing in the Gulf of Mexico, those measures would not apply to Mexican, British or French fishermen. An even better example was provided by the Declaration of Santiago of 1952 between Ecuador, Peru and Chile on the exploitation and conservation of the maritime resources of the South Pacific,[2] to which many States had objected. But if the Commission followed the line of thought of certain of its members, that treaty would apply to the nationals of all the objecting States.

60. For his part, he would not be averse to the idea of acknowledging a sort of general legislative status to the provisions of a treaty signed by a number of States: in certain instances, that could conduce to the progress of international law. But in the particular instance under discussion he could not accept it because he was sure that the General Assembly would never approve of it.

61. Mr. SANDSTRÖM said that the question under discussion raised grave issues. For his part, he did not wish to vote on the formula proposed by Sir Gerald Fitzmaurice, because the outcome of the vote would be affected by later decisions of the Commission, which would give it a tentative character.

62. Mr. SCELLE said that several members appeared still to be mesmerised by the old maxim that treaties were binding upon only the signatories thereto. He recalled that he had had occasion, in a discussion with Professor Hans Kelsen, to quote some twenty conventions which, although signed by only a small number of States, were in fact binding on all States. He would mention specifically the Convention of Constantinople of 29 October 1888, between Great Britain, Austria-Hungary, France, Germany, Holland, Italy, Spain, Russia and Turkey: that treaty was being enforced on all the States of the world, and not merely on the handful of signatories. An even more striking example was the so-called Hay-Pauncefote Treaty concluded by the United States of America and Great Britain on 18 November 1901, concerning the Panama Canal: the provisions of that treaty had been applied not merely to the two signatories, but to all States, without any difficulty.

63. Treaties such as the two he had mentioned expressed international law *erga omnes* because their provisions satisfied an international need: the States which had signed them had acted as the mouthpieces of the international community.

64. On the other hand, a treaty which violated international law had no validity, and was not binding even on the signatories. That was the opinion he (Mr. Scelle) had expressed in a recent article in connexion with the Anglo-Venezuelan Treaty of 1942 on the continental shelf of the Gulf of Paria, which violated the fundamental principle of the freedom of the seas and was therefore invalid; it did not bind even its signatories.

65. Applying those principles to the question of fisheries, the fundamental element was the necessity for

[2] Text in *Revista Peruana de Derecho Internacional*, No. 45 (1954), pp. 104 *et seq.* Also in *Laws and Regulations on the régime of the territorial sea* (United Nations publication, Sales No.: 1957.V.2) p. 723.

conserving the living resources of the sea. Any international agreement which did not respect that purpose was to be treated as invalid. Conversely, conservation measures adopted by certain States and based on valid scientific findings were binding on fishermen of all nationalities.

66. He therefore supported Faris Bey el-Khouri's proposal, which was constructive and progressive.

67. The objections raised by Mr. García Amador were sound in logic, but it was none the less necessary to make explicit reference to the principle of non-discrimination, although for his part he considered that even in the absence of such a reference any discriminatory measures would be invalid *erga omnes*.

68. Mr. HSU said that any States had the right to object to the measures adopted by the promulgating State or States. At that stage the best course for the Commission would be to vote on the principle of adopting general criteria for the validity of conservation measures. After that, the matter could be referred to the sub-committee.

69. Mr. ZOUREK said that Mr. García Amador had very aptly expressed the present state of international law. There were, it was true, many conventions which, after being signed by a certain number of States, had been explicitly or implicitly accepted by other States which had found them satisfactory for the solution of certain international problems. But it was equally true that unless a treaty was signed or tacitly accepted by a State, it was not binding upon that State.

70. Sir Gerald FITZMAURICE now felt that the whole matter should be referred back to the sub-committee. There appeared to be fundamental differences of interpretation concerning the articles on fisheries, and those differences must be clarified. The most serious related to the effect of measures adopted by a State, or rather to their field of application. It was clear that if the nationals of ten States were fishing in an area and two of those States entered into an agreement on conservation measures, the consequent regulations would not be enforceable on the nationals of the other eight States. What the sub-committee's draft articles provided for, however, was a different contingency: under articles 2 and 3, the States whose nationals fished in an area could adopt conservation measures by unanimous consent among themselves and those measures would then be applicable to any newcomers to the area; States whose nationals wanted to engage in fishing subsequently to the adoption of the measures concerned, but objected to those measures, could resort to the procedure laid down in articles 7-10.

71. Faris Bey el-KHOURI said that the whole purpose of the articles was to enable the authority responsible for promulgating conservation measures to regulate for all fishermen. In order that the purposes of conservation might be achieved, it was essential that those measures should be binding on all who came to fish in the area concerned.

72. In such a situation, it was necessarey to assert the principle of non-discrimination, particularly as discrimination could be practised indirectly.

73. The CHAIRMAN said that three questions had been raised in the course of the discussion.

74. First, whether conservation measures—whether promulgated by the coastal State or by other States—should meet a uniform criterion.

75. Second, whether a disputed regulation should be enforceable, pending a decision by the board of experts.

76. Third, whether conservation measures promulgated by a State or States under the Commission's draft articles should apply to all States, or only to the promulgating States.

77. The Special Rapporteur had proposed that the matter be referred back to the sub-committee; that proposal implied the adjournment of the debate, and accordingly, by virtue of sub-paragraph (c) of rule 79 of the rules of procedure of the General Assembly, had precedence over all other proposals or motions before the meeting.

78. Mr. AMADO enquired what points were to be decided by the sub-committee.

79. Mr. KRYLOV asked which of the three questions formulated by the Chairman was to be referred to the sub-committee.

80. The CHAIRMAN said that all three questions would be referred to the Sub-Committee.

81. Mr. GARCÍA AMADOR said he could agree that the sub-committee should examine the issue of whether a general criterion should be laid down for all conservation measures, no matter by whom adopted; but it could not possibly take it upon itself to decide whether a convention signed by two or three States should be binding on other States that were not parties thereto. Even the Commission could not take such a decision, which would be contrary to existing international law.

82. He agreed, however, that, when examining the question of adopting a general criterion, the Commission could and should do so in the light of the general principles involved.

83. Mr. FRANÇOIS (Special Rapporteur) said that the interpretation of the text called for reference to all three questions formulated by the Chairman. He formally proposed that the draft articles on fisheries be referred back to the sub-committee for revision in the light of the discussion at that and the previous meeting.

84. Mr. GARCÍA AMADOR said that, while he would have agreed to the sub-committee's examining the problem of adopting a general criterion for all regulations relating to conservation, he was radically opposed to the Commission referring back to the sub-committee all those draft articles already adopted.

The Special Rapporteur's proposal that the new draft articles on fisheries be referred back to the sub-committee was rejected by 7 votes to 6.

85. The CHAIRMAN invited members to submit concrete proposals with a view to facilitating the discussion at the next meeting.

The meeting rose at 1.10 p.m.

304th MEETING

Friday, 3 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

Article 6 [5, paras. 2 and 3] (continued)

1. Sir Gerald FITZMAURICE recalled that at the previous meeting he had formulated the issue on which the Commission was to vote in principle, to the effect that all measures taken to ensure the conservation of the living resources of the sea should be governed by some criteria, and that the criterion common to all cases and to all States, whether coastal or non-coastal, should be that the measures must be based on valid scientific findings and that they must be non-discriminatory.[1] But in view of the observations then put forward by Mr. García Amador, he now proposed that the vote be taken on that formula without the final words that referred to the principle of non-discrimination, on the understanding that the sub-committee should decide as to the proper place and manner in which that principle should be expressed.

2. His proposal would then read:

"Subject to drafting and to seeing a final text, the Commission accepts the principle that all measures of conservation should be governed by some criteria, though not necessarily the same in all cases, except that the criterion in common to all cases should be that the measures be based on valid scientific findings."

3. Mr. EDMONDS enquired whether the reference was to one or to several criteria.

4. The CHAIRMAN said that the central idea was that all measures be based on valid scientific findings, an idea which could conceivably give rise to a number of more specific criteria.

5. Faris Bey el-KHOURI said he would have preferred to vote separately on the inclusion in Sir Gerald Fitzmaurice's text itself of a reference to the principle of non-discrimination, but was prepared to accept the latter's revised text on his understanding that the principle of non-discrimination would be dealt with elsewhere in the draft articles.

6. Mr. GARCÍA AMADOR said that he could fully support any clause laying down the principle of non-discrimination in general terms. What he did not think advisable was that such a reference should be inserted in the particular place suggested. He therefore agreed to Sir Gerald Fitzmaurice's revised proposal.

Sir Gerald Fitzmaurice's statement of principle was adopted unanimously.

7. The CHAIRMAN said that the sub-committee would consider how best a proposal by Mr. Zourek, along similar lines to that on which the vote had just been taken, could be taken into account. Mr. Zourek's proposal read:

Principe de l'article premier.

L'objectif principal de la conservation des ressources biologiques des mers consistant à obtenir le rendement optimum constant de façon à porter au maximum les disponibilités en produits marins alimentaires et autres, tous les règlements visant la conservation desdites ressources doivent être fondés sur des conclusions scientifiques valables.

8. He recalled that the Commission had yet to vote on another principle which had been elucidated in the course of the discussion, namely, that any conservation measures adopted by two or more States under article 2 would be binding on other States until challenged by invocation of the procedure laid down in articles 7-10.

9. Mr. ZOUREK said that the matter was made clear by article 3; the case was that of nationals of States

[1] 303rd meeting, para. 48.

newly engaging in fishing in an area in respect of which States whose nationals had been fishing there earlier had adopted conservation measures: either the newcomers' State accepted such regulations, or it resorted to the procedure provided in articles 7-10.

10. The CHAIRMAN called for a vote on the principle in the light of Mr. Zourek's elucidation.

Mr. Zourek's statement of principle was adopted unanimously.

11. Mr. GARCÍA AMADOR considered that the discussion on article 6 was now mature enough for a vote to be taken on the article itself.

12. Mr. SCELLE, referring to sub-paragraph (*a*) of paragraph 1, pointed out that the onus would not be on the coastal State to prove that there was an imperative and urgent need for measures of conservation; it would rather be for any other State disputing that fact to demonstrate that such need did not exist.

13. Mr. EDMONDS recalled that Mr. Scelle had earlier made a proposal for the addition of a sub-paragraph (*d*) to paragraph 1. Subsequently he had withdrawn his proposal in favour of an amendment to article 5 suggested by Mr. García Amador which did not, however, have the same implications.[2]

14. Mr. SCELLE admitted that he preferred his own original proposal, mainly because it contained not merely the idea that the measures adopted by the coastal State should be in the area in which its special interest existed, an idea which had now been included in the text of article 5, but also the concept of a proper balance between the extent of high seas affected by the measures and the legitimate needs invoked by the coastal State.

15. Mr. ZOUREK said that the Commission had agreed to include a reference to spatial limitation in article 5, but had taken no decision on the notion of balance or proportion.

16. Mr. GARCÍA AMADOR said that he would have no objection to the inclusion in article 5 of a reference to the notion of balance or proportion as just described by Mr. Scelle.

17. Mr. EDMONDS could not agree to Mr. García Amador's suggestion. The matter was not simply one of drafting; it was one of principle, namely: whether the concept embodied in Mr. Scelle's proposed sub-paragraph (*d*) was to be included in article 6 as one of the criteria by which the validity of conservation measures must be judged.

18. Mr. GARCÍA AMADOR pointed out that article 6 did not specify all the criteria of validity. The most fundamental criterion—that the coastal State should have a special interest in the productivity of the resources of the high seas contiguous to its coast—was laid down in article 5.

19. The CHAIRMAN said that it would appear that, following the adoption of Sir Gerald Fitzmaurice's proposal, paragraph 1 of article 6 would be reduced to sub-paragraph (*a*). Perhaps the article had been rendered pointless.

20. Sir Gerald FITZMAURICE said that article 6 continued to exist, because it laid down the criteria on which any unilateral action taken by the coastal State had to be based.

21. Mr. SCELLE maintained that article 6 was fundamental to the entire text.

22. Mr. AMADO pointed out that article 6 referred only to the actual content of the measures adopted by the coastal State, whereas article 5 laid down the fundamental principles governing the competence of the coastal State to adopt such measures.

23. Mr. SANDSTRÖM said that the whole article should be referred to the sub-committee for final revision in the light of the various proposals adopted by the Commission.

Article 6 was accepted in principle, and referred to the sub-committee for final drafting.[3]

Articles 7 and 8 [7][4]

24. Faris Bey el-KHOURI opposed the idea that disputes should be submitted to a board of experts, and proposed that this be referred to the International Court of Justice unless the parties could agree on an independent arbitral procedure. There was no need to set up special arbitration boards when there was a well established institution like the International Court of Justice at hand to dispose of any disputes which the parties could not agree to settle otherwise. Moreover, only the International Court was in a position to create a body of consistent and centralized jurisprudence in the comparatively new subject of fisheries conservation.

25. Mr. SCELLE supported Faris Bey el-Khouri's proposal that disputes in the matter of fisheries conservation be settled by arbitration or, where the parties could not agree on arbitration, by reference to the International Court of Justice.

26. He fully appreciated the necessity for taking expert advice in fishery conservation disputes. But he could not agree to the unheard of system of turning a body of experts into an arbitration court, as was proposed in the sub-committee's draft articles 7, 8 and 9. Such a system was open to a number of serious objections.

27. All courts, whether international or municipal, had at times to deal with cases the factual issues of which involved technical problems, in which event they sought expert advice; but they did not leave the judicial decision to the experts. When at an Assize Court a plea

[2] 302nd meeting, paras. 30 to 43.

[3] See *infra*, 321st meeting, para. 49.

[4] See *supra*, 300th meeting, para. 1.

of insanity was entered on behalf of a person accused of murder, the issue was decided by the Court itself after hearing expert witnesses, whose opinions were often contradictory. No one could entertain for a moment the suggestion that the Court should delegate to a body of experts the power to decide the issue whether or not the accused was responsible for his actions.

28. Again, the board envisaged was to include experts appointed by the several parties to the dispute. While that provision would give rise to no great difficulty when only two clear-cut interests were involved, it might necessitate an unwieldy board where the various States involved in a dispute had divergent interests: the board might then well number 8, 10 or 15 members, in which case it would resemble a general meeting rather than a court of law. It was most unlikely that such a body would ever be able to reach any definite conclusions. That was particularly so in view of the fact that the members of the board were to be experts, for gatherings of experts were notorious for their inability to reach unanimous conclusions. The Commission itself was a body of experts in international law, and many of its decisions had been taken by very narrow majorities.

29. Experts usually felt it their duty to uphold the point of view of their respective governments. Moreover, the experience of maritime conferences showed that experts were not infrequently influenced also by the interests of shipping and other commercial concerns. There was therefore abundant reason why the Commission should not approve the extraordinary system of leaving the settlement of disputes to a board of experts.

30. He disapproved of the proposal in paragraph 1 of article 8, that the Secretary-General of the United Nations should be saddled with the task of appointing, in consultation with the Director-General of the Food and Agriculture Organization, the president of the board and, failing agreement by the parties, the other members as well.

31. A better procedure would be to entrust such appointments to the President of the International Court of Justice in consultation with the Director-General of the Food and Agriculture Organization. Powers of that nature had been given to the President in other drafts drawn up by the Commission.

32. The Charter of the United Nations conferred upon the Secretary-General much more extensive powers than had been enjoyed by the Secretary-General of the League of Nations before him. Those powers were essentially political: in all his actions, the Secretary-General of the United Nations had to take into account the political situation, and the power and influence of the various States and groups of States; he had also to give the weight to the principle of geographical distribution, which was one of the cornerstones of the United Nations. But in the choice of the president and members of any arbitration board that might be set up to settle disputes relating to fisheries conservation, the essential consideration was what was the best procedure to reach a proper legal decision based on scientific conclusions? There was no room in such a system for the appointment of the president and members of the board in the light of such political considerations as, for instance, the desire to secure in the General Assembly the approval of a majority of States Members of the United Nations.

33. The disputes that would arise in the matter of fisheries would usually entail in the first instance scientific and technical issues, and only ultimately legal problems. He therefore proposed that the following system be adopted:

(*a*) States to be under an obligation to refer a dispute to a board of qualified experts—the latter to give its opinion within a specified period;

(*b*) The President of the International Court of Justice, in consultation with the Director-General of the Food and Agriculture Organization, to appoint the president of the board of experts and, in case of disagreement between the parties, the members thereof;

(*c*) The actual dispute to be settled by arbitrators or, failing agreement on arbitration, by the International Court of Justice. The Court or the arbitrators would take into consideration the report of the board of experts but, in accordance with the established practice concerning experts, would not necessarily be bound to accept its findings.

34. Mr. AMADO said that all members of the Commission were agreed on the principle of arbitration. Differences of opinion had arisen only with regard to article 8. If the Commission were to suggest that the International Court of Justice should give rulings on matter relating to fisheries conservation, it would be entrusting it with a very difficult task indeed. First, there appeared to be little or no existing rules of international law which the Court would be able to apply in accordance with Article 38 of its Statute. Moreover, the Court had been set up to solve problems of a purely technical legal nature.

35. The Secretary-General was an important organ of the United Nations, having a vital constitutional role. He agreed with Mr. Scelle's objection to imposing upon the Secretary-General the task of appointing the president, and, on occasion, the members of the board of experts.

36. He did not fully concur with the analogy drawn by Mr. Scelle concerning the position in municipal courts when judges heard expert opinion or evidence.

37. Mr. GARCIA AMADOR said that the jurisdiction of the International Court of Justice, as set out in Article 36 of its Statute, was exclusively of a legal nature. If the Commission were to suggest that disputes concerning such technical details as the width of mesh and the size of catch of fish be referred to the International Court, that would be tantamount to seeking to amend the Court's Statute.

38. The admittedly somewhat original system proposed in article 8 was based on the peculiar character of the

disputes that might arise in connexion with fisheries conservation. Hitherto, States entering into arbitration agreements had almost invariably appointed international law specialists as arbitrators, because the problems referred to the arbitrators had been essentially legal ones. Article 8 provided a flexible system, in that it did not specify that the "qualified experts" to be chosen by the parties, or possibly by the Secretary-General, must necessarily be fishery experts. If, as would more often than not be the case, the dispute concerned purely technical or scientific issues, the choice would fall upon conservation experts or marine biologists. But where legal problems arose, the "qualified experts" chosen would be jurists.

39. In that respect article 8 drew its inspiration from the general conclusions reached by the Rome International Technical Conference on the Conservation of the Living Resources in the Sea reproduced in chapter VII, paragraph 79 of its report (A/CONF./10/6).[5] There the Conference recommended that disputes concerning fisheries conservation be referred to "suitably qualified and impartial experts chosen for the special case by the parties concerned".

40. The Rome Conference had based its conclusions on past experience in the matter of fisheries conservation. Thus, the International North Pacific Fishery Commission had, under the treaty by which it had been set up, powers to give rulings on conservation issues.

41. The actual powers of the arbitration board were a much more important and vital issue than its composition or the name given to it. As set out in articles 7 to 10, the powers of the board were those of a court of arbitration.

42. Finally, he had been much impressed by Mr. Scelle's remarks about the desirability of entrusting the President of the International Court of Justice rather than the Secretary-General of the United Nations with the task of appointing the president of the board and, on occasion, members thereof. He would like to hear whether other members of the sub-committee favoured Mr. Scelle's proposal on that point as he himself did.

43. Mr. SANDSTRÖM said that the only essential point was that the draft articles should provide for disputes to be referred to a body empowered to give decisions from which no appeal could lie. Although it was not unimportant whether the disputes should be decided by the International Court of Justice or by an arbitration court, the question was a secondary one by comparison with the more vital one.

44. It would be an exaggeration to suggest that a court composed of experts was an unheard-of institution. He could quote a number of examples from Sweden of tribunals of a judicial character composed of experts and presided over by a jurist, and no doubt similar bodies existed in other countries too.

45. It would also be an exaggeration to suggest that judges could not deal with technical issues. In all countries, courts were dealing with such issues every day; they heard expert advice, but decided the issues themselves.

46. The choice between the International Court of Justice and an *ad hoc* arbitration board was a matter of expediency more than anything else, and for his part he had no marked preference for either. The main arguments for and against appeared to be as follows: first, the International Court of Justice had the advantage of being a permanent body, whereas an arbitration board would have to be set up in each specific case; secondly, the International Court of Justice was certainly in a better position than *ad hoc* bodies to create a consistent body of case-law; thirdly, the International Court's procedure would probably be more lengthy and cumbersome than that of an arbitration board; and lastly, the fact that legal problems might arise in connexion with disputes relating to fisheries conservation was no bar to the setting up of *ad hoc* arbitration boards under article 8. The reference to "qualified experts" implied that fishery experts could be chosen where technical problems arose, but it also meant that jurists could be appointed if a dispute was primarily concerned with legal questions.

47. Mr. SCELLE said that Mr. Sandström's example of tribunals composed of experts and presided over by a judge was not very germane to the issue under discussion. Such tribunals were presided over by a jurist, and his (Mr. Scelle's) criticism of the provisions of article 8 was that they could lead to a legal issue being submitted to a board of fishery experts.

48. A more serious matter was the size of the board envisaged: as he had already pointed out where several divergent interests were involved in a dispute, an unmanageable body could result. And the second sentence of article 10 implied that, where the board was unable to give a decision, it should make a recommendation. Such a feeble ending to a dispute would be most undesirable, and would lead in practice to complete *carte blanche* being given to the coastal State in the matter of introducing conservation measures.

49. Faris Bey el-KHOURI said that the International Court of Justice had jurisdiction, under sub-paragraphs (*a*) and (*b*) of Article 36, paragraph 2, of its Statute, to decide any fishery conservation problem which involved the interpretation of treaties on the subject or any question of international law generally; fishing in the high seas was essentially a matter of international law.

50. He reiterated his proposal that the system provided in article 8 be replaced by one providing in the first instance for arbitration where the parties agreed thereto, or, in default of such agreement, for the compulsory jurisdiction of the International Court of Justice. Arbitration would thus be optional, but the jurisdiction of the International Court of Justice would be mandatory.

[5] United Nations publication, Sales No.: 1955.II.B.2.

51. Finally, he pointed out that an arbitration procedure could be just as lengthy as proceedings before the International Court of Justice, especially where several parties were involved in the dispute submitted to arbitration.

52. The CHAIRMAN said that the question of fisheries could give rise to both legal and technical disputes. Where a State impugned another State's authority to adopt conservation measures in a given area of the high seas, such a dispute would certainly be of a purely legal nature. But disputes between States about actual conservation measures themselves would be technical or scientific in character. The Commission must bear those facts in mind and endeavour to find an appropriate method of settlement, or, perhaps, provide for more than one method.

53. Mr. LIANG (Secretary to the Commission) said that as the Commission had not yet taken a decision in the matter, the time was not ripe to ascertain the Secretary-General's views about the function which might be conferred upon him under article 8. There had been some misunderstanding because it had not been fully appreciated that, as envisaged by the draft articles, the Secretary-General would be called upon to appoint members of the board of experts only as a last resort after the parties had failed to agree.

54. There was a precedent for that, namely, the provision for the constitution of arbitral tribunals contained in the peace treaties concluded after the Second World War between the Allied and Associated Powers on the one hand and Bulgaria, Hungary and Rumania on the other. Article 36 of the treaty with Bulgaria, to which corresponded *mutatis mutandis* article 40 of the treaty with Hungary and article 38 of the treaty with Rumania, stipulated that any dispute referred to the Heads of Missions acting under article 35 and not resolved by them within a period of two months should be referred at the request of either party to the dispute to a commission composed of one representative of each party and a third member selected by mutual agreement from nationals of a third country. Failing such agreement, the Secretary-General of the United Nations might be requested by either party to make the appointment. The interpretation of that provision had formed the subject of an advisory opinion asked of the International Court of Justice by the General Assembly.[6] Furthermore, in its final draft on arbitral procedure, the International Law Commission had provided that, should the parties fail to make provision for the effective constitution of the arbitral tribunal, or should a party refuse to co-operate in that constitution, the President of the International Court of Justice should have the power to make the necessary appointments.[7]

55. No very clear picture of the machinery for the settlement of disputes emerged from articles 7 and 8. Article 7 referred to arbitration, but the board of experts provided for in article 8 did not possess any of the special features of an arbitral tribunal, features which the Commission had stressed in its draft convention on arbitral procedure. When preparing the draft the Commission had sought to distinguish legal arbitration, which, according to The Hague Peace Conference of 1907, was a process for the settlement of disputes on the basis of respect for law, from technical and commercial arbitration. If that distinction was sound, there was great merit in Mr. Scelle's arguments that fishery experts alone could not appropriately constitute a tribunal dealing with legal questions, and the status of international arbitration would suffer if non-legal experts were entrusted with the task of adjudicating in legal disputes.

56. Turning to another question, he said that, far from being excluded, recourse to the International Court of Justice would be perfectly possible under the terms of article 7, which expressly referred to "another manner of peaceful settlement", and cogent arguments could be adduced to show that, by virtue of its Statute, the Court was perfectly competent to take up such cases. He would not substantiate his argument by reference to article 36, paragraph 2 (*a*) of the Statute, because he was uncertain of its implications, nor by reference to paragraph 2 (*b*), because it might be argued that disputes arising out of fishery regulations could not be settled *de lege lata,* but would base it on paragraph 2 (*c*). If the draft articles became part of an international convention, signatory States would accept the obligation to conform to the criteria laid down in sub-paragraphs (*a*) and (*b*) of article 6 which might require the establishment of certain scientific facts. Accordingly, if a State held that certain conservation measures were not based on valid scientific findings, it would be able to bring the matter before the Court under article 36, paragraph 2 (*c*)[8] of the latter's Statute, provided that compulsory jurisdiction had been accepted in advance by the parties to the convention. He did not think that the argument that the Court was not capable of handling highly technical matters was sustainable.

57. Every reading of article 8 confirmed the impression that the board of experts had the characteristics of a commission of enquiry or a fact-finding body as envisaged at The Hague Convention of 1907. That, coupled with the provision that its decisions would be final, seemed to indicate some conceptual confusion. If it were intended to provide for arbitration, then the language used was quite unsuitable. On the other hand, if a fact-finding body was contemplated, then its deci-

[6] *I.C.J. Reports 1950*, p. 73.

[7] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 57, in *Yearbook of the International Law Commission, 1953*, vol. II.

[8] "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
"(*a*) . . .
"(*b*) . . .
"(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;
"(*d*) . . ."

sions could not have binding effect; otherwise the Commission would be proposing some hybrid organ which would fail to inspire confidence.

58. He was inclined to agree with Mr. García Amador that, unlike the draft articles on the continental shelf, the draft articles on fisheries must constitute a separate instrument in the form of an international convention, if the articles on implementation were to be properly understood.

59. The CHAIRMAN, speaking as a member of the Commission, considered that it would be perfectly feasible to draw up a special draft convention on the regulation of fisheries which provided for arbitration, and also to insert the articles not concerned with the settlement of disputes in the draft on the régime of the high seas to which they properly belonged.

60. Mr. HSU thought that article 7 could be accepted as it stood, since it was not restrictive either as to machinery or as to the form of settlement, since the parties could choose conciliation rather than arbitration, and were free to refer a dispute to the International Court. As methods of settlement were fundamentally similar, so far as competence was concerned there was little to choose between the various possibilities. Though in the past arbitration had contained some element of uncertainty, he hoped that that weakness might be overcome if the Commission's draft convention on arbitral procedure found practical application. Perhaps, in view of the special features of the arbitral process, arbitration would be preferable, but other means of settlement would not be excluded. In his view, the real choice lay between a standing arbitral tribunal and one established by the parties. If the latter solution were adopted it would in no way preclude the tribunal from taking expert advice. Indeed, the parties might choose arbitrators qualified in the technical rather than in the legal field. In the interests of flexibility, therefore, it might be advisable not to refer explicitly to "qualified experts".

61. In case of disagreement between the parties over the appointment of arbitrators, he doubted whether it would be advisable to entrust the task to the Secretary-General of the United Nations who, having already certain important functions, might be liable to exceed his powers.

62. Mr. ZOUREK considered that articles 7 and 8 constituted a sound basis for discussion, as a result of which the Commission might be able to devise an acceptable text. He welcomed the sub-committee's decision to entrust the settlement of disputes to a board of experts, a decision which would be consistent with the conclusions reached at the Rome Conference, since only qualified experts would be competent to judge whether regulations were based on valid scientific findings. He was also pleased to note that the board would be constituted *ad hoc,* in view of the great range and variety of problems, which would relate to widely differing regions and species. That aspect of the matter was illustrated by the large number of agreements and bodies concerned with fisheries problems. Some of those bodies were concerned exclusively with scientific research, while others were responsible for framing recommendations.

63. Nevertheless, the procedural articles did give rise to certain difficulties. In the first place, it was most unusual to stipulate that the findings of experts should be final and without appeal, in other words, that they should have the status of an arbitral decision. The Commission must not lose sight of the fact that such a provision would not facilitate the acceptance by governments of new rules whose practical implications could not easily be foreseen. Governments would be cautious about committing themselves to compulsory arbitration in matters which it could hardly be claimed belonged to the sphere of international disputes as at present understood. The board of experts would in fact be concerned with the creation of rules rather than with their interpretation. For example, if a dispute under article 2 were submitted to arbitration, the board would be empowered to create new rules of international law binding upon States. In exceptional cases it could make recommendations similar to those drawn up by the arbitrators in the case between Great Britain and the United States of America concerning seal fishing in the Behring Sea. The board would thus possess a legislative function going far beyond the normal concept of arbitration. Such a development was open to grave theoretical objections, but at the present time the Commission should concern itself more with the practical consideration of whether governments would be willing to accept such an innovation.[9]

64. Perhaps it would be wiser to entrust the board of experts with the task of drawing up the regulations, but there would be little hope of States accepting them as binding. However, the board might still usefully deal with the detailed aspects of regulation, as was done by the International Commission on Whaling. The recommendations of the Rome Conference closely followed the present practice of submitting technical problems to experts for an advisory opinion. Though such recommendations were not binding, it would nevertheless be difficult for States to reject them, and any dispute could be dealt with by the procedure agreed upon in advance or by that provided for in the Charter of the United Nations. The advantage would be that States could choose whatever machinery was appropriate for the settlement of a given dispute. Despite the respect in which he held the International Court of Justice, he contended that it might not be able to fulfill a legislative function on some highly technical question, which could be more quickly and economically solved by experts. Any important cases involving legal issues could, however, be submitted to the Court. The principal object was to eliminate disputes, and the question of machinery was a secondary issue.

65. Mr. FRANÇOIS (Special Rapporteur) maintained his original view that disputes should be referred to the

[9] See *infra*, 306th meeting, para. 3.

International Court of Justice; but that seemed to have met with strong opposition, and it was indeed regrettable that there was a marked tendency for States not to have recourse to that body.

66. In support of Mr. Sandström's remarks rebutting Mr. Scelle's contention that arbitral tribunals were never composed of experts only, he pointed out that in the Netherlands many arbitral tribunals, particularly in the commercial field, consisted entirely of experts. Differences in the wheat trade, for example, were never submitted to the courts, but always settled by experts.

67. He also firmly rejected Mr. Scelle's affirmation that experts were never independent, but were always to some extent vulnerable to political influence. Experts were less subject to government pressure than tribunals composed entirely of lawyers, and less susceptible to political opinion. On the international plane, he would point to the highly satisfactory results achieved by bodies composed exclusively of experts. He did not, therefore, share Mr. Scelle's misgivings; nor did he think that persons unversed in law were always incapable of judging on the basis of law.

68. It had been argued that arbitration was impossible unless the arbitrators were chosen by the parties themselves, but it should be noted that in cases of disagreement the Commission had also provided in its draft convention on arbitral procedure for the tribunal to be appointed by some impartial person. He was not so apprehensive as other members about the Secretary-General's being open to political pressure, because his onerous responsibility towards all States should ensure his absolute objectivity in the important matter of selecting arbitrators. However, he would have no particular objection to the function being performed by the President of the International Court of Justice. Either solution was acceptable, and in either case expert opinion would have to be sought concerning the appointments. Nor did he consider the Secretary's argument that an arbitral decision must be based on law as absolutely valid, since an arbitral tribunal could also render its judgment *ex aequo et bono*.

69. Mr. Scelle's suggestion concerning a procedure in two stages, whereby the experts would first deliver an opinion and an arbitral tribunal would then render its decision, seemed to him the worst possible solution since it would probably displease all parties.

70. He had not been at all surprised by Mr. Zourek's views, since his opposition to compulsory arbitration was well known. Though he had considerable sympathy for those views, he did not believe that it was always possible to avoid providing for implementation. In the present instance, the Commission was drawing up draft articles conferring new rights which would be exercised by States on the high seas, and he could not agree with Mr. Zourek that it should be left to States to deal with any possible differences. Such new rights could only be recognized on condition that they were accompanied by provisions for compulsory arbitration. Without such a guarantee the draft would be totally unacceptable.

71. Mr. SCELLE strongly repudiated the Special Rapporteur's interpretation of his remarks. He had not suggested that experts were never independent, but had only sought to show that experts called upon to give an opinion in any case in which national interests were involved must inevitably be influenced by the attitude of their governments. As for the tribunals which Mr. François and Mr. Sandström had mentioned, he would point out that their members ceased to be experts and became judges. In that connexion, it was pertinent to note that more and more cases were being referred to the arbitral tribunal of the International Chamber at Paris, where the arbitrators were designated in advance according to a procedure similar to that used for the Permanent Court of Arbitration. In drawing up the draft convention on arbitral procedure, the Commission itself had never excluded the appointment to the tribunal of specially qualified persons, but had taken the greatest care to ensure that, once appointed, their status should be assimilated to that of judges.

72. Further, he had never claimed that the arbitral tribunal should consist solely of lawyers, but had merely demonstrated the absurdity of empowering a conference of some 40 to 50 experts, as distinct from a tribunal of three to five judges, to render a decision binding on States.

73. Finally, he must make clear that he had never suggested that there should be two successive decisions, the first by the experts and the second by the tribunal. All he had claimed was that the latter should take expert advice before rendering its decision.

The meeting rose at 1.5 p.m.

305th MEETING

Monday, 6 June 1955, at 3 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA

AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*continued*)

NEW DRAFT ARTICLES ON FISHERIES (*continued*)

Articles 7 and 8 [7] (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 7 and 8 of the new draft articles on fisheries submitted by the sub-committee at the 300th meeting.

2. Sir Gerald FITZMAURICE said that Mr. Scelle's brief intervention at the end of the previous meeting, and an informal exchange of views with him, had convinced him that the Commission was more or less agreed and that the protracted discussion on the board of experts provided for in article 8 largely turned on a matter of drafting. Despite some variations in interpretation with regard to the board's function, the idea in the minds of most members was the same. For example, Mr. Scelle seemed willing to accept the possibility of the board's being composed entirely of fishery experts, and not necessarily of lawyers, though insisting that once appointed they would function as judges,[1] and he (Sir Gerald Fitzmaurice) entirely concurred, as he had never envisaged the board as a committee of experts convened, not to deliver judgment, but to try and arrive at certain unanimous conclusions. Surely the sub-committee—and he hoped that Mr. García Amador would agree—had contemplated a board of experts in fishery questions which, once constituted, would become an arbitral body taking its decisions by majority vote, such decisions being binding on the parties. If that conception tallied with Mr. Scelle's, there was agreement in the Commission.

3. There remained Faris Bey el-Khouri's proposal.[2] He fully understood the reasons for considering that all disputes should be referred to the International Court of Justice, but would point out that the draft articles related to a special type of problem and that the parties were not bound under article 7 to refer a difference to the board of experts, being free to agree upon any other manner of peaceful settlement. While holding the International Court in the greatest respect, he did not think that it was the most appropriate body for deciding the highly technical issues, fundamentally non-legal in character, which might arise under the draft articles. It would be difficult for any ordinary tribunal composed of judges to go into such problems as the size of mesh, seasonal movements of fish, currents and the like. Indeed, if they were referred to the International Court or some other judicial body, the body concerned would have to seek the advice of experts. In the circumstances, therefore, it might be simpler to have recourse to a board of experts from the start.

4. In his opinion, experts were good judges but bad witnesses. If the board were to consist of lawyers, each party would put up a fisheries expert and their views would be likely to differ widely, making it extremely difficult for the board to reach a decision based on the technical evidence. On the other hand, if the experts themselves were responsible for taking the final decision by a majority vote, they would be much more likely to reach agreement.

5. Furthermore, the Commission should bear in mind that some of the problems referred to the board might not, strictly speaking, constitute a dispute. It was conceivable, for instance, that States, having failed themselves to reach agreement on conservation measures under article 2, would ask the board to draw up a set of regulations for application in a particular area. It would then be concerned not with a point at issue between parties, but with a task for which it would be eminently fitted.

6. Mr. SANDSTRÖM proposed two amendments to article 8 paragraph 1: first, for the words "a Board of qualified experts" to substitute the words "an arbitral board", and second for the words "the Board of expert", to substitute the words "the arbitral board shall consist of two or four qualified experts in matters pertaining to the conservation of the living resources of the sea, plus one jurist and".

7. Mr. SCELLE entirely agreed with Sir Gerald Fitzmaurice that the discussion had largely centred on a question of terminology, and regretted having misunderstood the true purport of the text; an error for which, however, there was some excuse, because of a certain obscurity in the wording. In article 7 mention was made of arbitration, whereas article 8 was concerned with a board of experts, which seemed to suggest a large body with no resemblance whatsoever to an arbitral tribunal. Moreover, according to article 8, paragraph 2, the board could apparently put off rendering a decision indefinitely, while according to article 10 it could make recommendations which, in the case of an arbitral tribunal, could never form part of an award.

8. Having expressed his regret for that misunderstanding, he wished to make it perfectly clear that he had never denied to the parties the freedom to choose their arbitrators, who could well be experts and not lawyers, since he regarded that principle as fundamental. However, unless the size of the board were restricted in some such manner as that just proposed by Mr. Sandström, the Commission would be paving the way for a board of unlimited size which might never reach any decision at all, particularly if the provisions of articles 8, 9 and 10 were approved. In their present form those provisions belied the promise of real arbi-

[1] 304th meeting, para. 71.

[2] *Ibid.*, para. 24.

tration implicit in article 7, by offering a system which contained in it the undoubted seeds of failure. The articles might accordingly be referred back to the sub-committee for further consideration.

9. In conclusion, he observed that the parties would also be free to refer a difference to the International Court of Justice; in that connexion, the possibility envisaged in article 26 of the Court's Statute was particularly interesting.

10. Mr. GARCÍA AMADOR welcomed the emergence of general agreement in the Commission on the final articles of the draft. The two elements of fundamental importance were that the decisions of the board should be final, and that the parties should accept compulsory arbitration. Those two primary issues apart, other questions, though not without importance, could perhaps be referred to the sub-committee. The Commission was, in fact, using traditional terminology to describe an arbitral procedure which was essentially technical in character, unlike the judicial procedure followed in the past where a tribunal of judges was called upon to settle legal issues. Some linguistic modifications were therefore necessary.

11. He wished to point out that the title "Board of Experts" had not been selected at random, but had been taken from chapter VII of the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (A/CONF.10/6). The Commission clearly had to find suitable language to clothe provisions which created a procedure hitherto unknown. However, the functions and decisions of the board would be exactly the same as those of an arbitral body.

12. Referring to Mr. Zourek's observations[3] at the previous meeting, he admitted the importance of the arguments adduced against compulsory arbitration; and the Commission would note that in his original draft he had not provided for it, but for a system similar to that for accepting the jurisdiction of the International Court. He had been induced to support the sub-committee's text because he had come to recognize that the important and special right conferred on the coastal State in the draft must be balanced by a clause requiring compulsory arbitration.

13. Faris Bey el-KHOURI considered that the Commission must select one single compulsory method for the settlement of disputes in case of disagreement between the parties. He had proposed recourse to the International Court of Justice—a procedure which could be far more easily defended by governments before their legislatures and public opinion. It would be a great deal more difficult for them to secure ratification of an international convention imposing compulsory arbitration by a board of experts.

14. Mr. ZOUREK thanked Mr. García Amador for explaining that the draft articles contained an entirely new method for the settlement of differences, since the present wording seemed to suggest an ordinary arbitral procedure. Nevertheless, the two problems he had raised at the previous meeting were still unanswered. First, why should the draft articles contain a clause on compulsory arbitration, despite the fact that no such recommendation had been made by the Rome Conference, which had been attended by forty-five maritime powers? Secondly, why should the traditional concept of arbitration be extended to accommodate new rules? At the previous meeting[4] he had sought to expound the reasons why States might be reluctant to accept the draft articles, stressing first and foremost the unlikelihood of their accepting compulsory arbitration by a body which, in effect, would be exercising a legislative function when no agreement could be reached on conservation measures, which would be a complete transformation of the arbitral function. There lay the whole crux of the matter. The discussion had done nothing to convince him that such a solution would command the support of governments.

15. The Special Rapporteur had argued that such extensive rights as those conferred upon States in the draft articles must be made conditional upon compulsory arbitration, but at first sight there did not seem to be any striking innovation, with the sole exception of the right conferred on the coastal State to regulate fisheries in the high seas. The possibility of that State's nationals not being engaged in fishing in the area concerned should not be exaggerated. He did not, therefore, consider that the consequences of such a provision were serious enough to require compulsory arbitration as a *sine que non*.

16. The CHAIRMAN, speaking as a member of the Commission, asked whether article 7 applied solely to articles 3 and 6.

17. Mr. FRANÇOIS (Special Rapporteur) replied in the negative, indicating that article 7 required modification to make the point clear. If, under article 2, two or more States failed to reach agreement on conservation measures, it would be tantamount to a difference between them, and the board might then be called upon to frame the regulations.

18. Mr. AMADO, while fully understanding Mr. Zourek's point of view, welcomed the fact that the Commission was moving towards agreement. He stressed the need, however, for deciding the vital question of the composition of the board.

19. The CHAIRMAN observed that the board would be appointed by the parties or, in the event of their disagreement, by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization.

20. Mr. SCELLE proposed as an amendment that the function which the sub-committee sought to entrust to the Secretary-General should be discharged by the Pre-

[3] *Ibid.*, para. 63.

[4] *Ibid.*, paras. 62–64.

sident of the International Court of Justice, acting in consultation with the Director-General of FAO.

21. Mr. FRANÇOIS (Special Rapporteur) observed that it would be unprecedented to require the President of the International Court to consult an official of some other institution.

22. Mr. KRYLOV said that he was unable to support Mr. Scelle's amendment, and would prefer the function to be entrusted direct to the Director-General of FAO.

23. Mr. SCELLE said that he could accept that solution, though it pleased him less.

24. Mr. GARCÍA AMADOR considered that, in view of the vital importance of the board of experts' functions, the problem at issue was of great moment. Perhaps the ideal solution would be to choose the President of the Court need not preclude him from seeking in the case of disagreement between the parties. If that were not acceptable, it should be the Secretary-General of the United Nations, who occupied a more exalted position in the hierarchy than did the Director-General of FAO.

25. In the case of the first alternative, he did not believe that the Special Rapporteur's objection was a valid one. The undeniable legal authority of the President of the Court need not preclude him from seeking the advice of the specialized agency most intimately concerned, though that did not mean that he would be bound to make the appointments in consultation with FAO.

26. The CHAIRMAN observed that if the President of the Court were selected he would be free to seek information from FAO.

27. Mr. SCELLE pointed out that the President of the Court would in any event consult the Director-General of FAO. However, perhaps an express provision to that effect was advisable, since technical questions would be at stake.

28. Mr. SANDSTRÖM observed that the Director-General of FAO would not necessarily be an expert in fisheries matters, and there was therefore no reason why he should be better qualified than the President of the Court to make the appointments.

29. Sir Gerald FITZMAURICE wondered whether Mr. Scelle would be prepared to withdraw his amendment, since the discussion had confirmed his (Sir Gerald's) original view that the most appropriate procedure would be for the Secretary-General to appoint members of the board after the appropriate consultations. The President of the Court was normally asked to designate arbitrators in cases involving some legal dispute, when he had at least some idea of whom to select; that, however, would not be the case with the board of experts, when he would be obliged to seek advice. The Director-General of FAO, while possessing the technical knowledge, or having it near at hand, might be in some difficulty owing to the fact that he was the head of a world-wide organization the aim of which was to increase the total world food supply. In any difference of opinion arising between coastal States and countries with a big fishing interest, absolute impartiality was essential and would be better assured if appointments were made by the Secretary-General of the United Nations, who would pay due regard to all the interests involved.

30. There was ample, precedent, for example, in the treaties of peace concluded after Second World War, for designating the Secretary-General for such a task. Those who had any knowledge of the present Secretary-General or his predecessor would have not a moment's hesitation in that regard, knowing that he would discharge his responsibility with absolute impartiality and in the general interest, without allowing himself to be influenced by political considerations.

31. Mr. SCELLE regretted that he could not associate himself with Sir Gerald Fitzmaurice's views. The question at issue was not a legal one, but one of expediency. He failed to see how the Secretary-General could be more competent than the President of the International Court in appointing members of the board, since he had no special knowledge at all of fisheries or conservation. There was far more chance of the President making the appointment with absolute impatiality, and the precedent established by treaties of peace, which would give rise to political disputes, was not relevant in what was an essentially technical field. He was therefore prepared to accept Mr. Krylov's suggestion, since the Director-General of FAO could obtain the requisite technical advice from his staff. The Secretary-General of the United Nations, on the other hand, would inevitably be tempted to treat the appointments as a political matter and would seek not to offend the States concerned.

32. Faris Bey el-KHOURI formally moved the substitution in article 7 of the words "the International Court of Justice, unless the parties agree to have their differences settled by arbitration as provided for in article 8 or by any other way of peaceful settlement" for the words "arbitration as provided for... of peaceful settlement".

The amendment was rejected by 9 votes to 1, with 3 abstentions.

33. Mr. ZOUREK proposed, since the articles purported to deal with a new type of procedure, that the words "by arbitration" should be deleted from article 7.

34. Sir Gerald FITZMAURICE said that he could accept that amendment, which would not affect the substance.

Mr. Zourek's amendment was rejected by 7 votes to 4, with 2 abstentions.

35. Mr. GARCÍA AMADOR, referring to Mr. Sandström's amendment[5] to article 8, suggested that it might be referred to the sub-committee, or even to the Drafting Committee.

[5] See para. 6 above.

36. Mr. KRYLOV saw no reason for departing from the terminology used in the report of the Rome Conference.

37. Mr. SCELLE observed that the Rome Conference had not been concerned with legal questions, and an arbitral tribunal was something very different from a board of experts. He would have preferred the former title, but if some more neutral expression, such as "board", were chosen, then its nature and functions would have to be made clear in the comment.

38. Mr. SANDSTRÖM observed that names did not affect functions, but it would, of course, be preferable to select an appropriate one.

39. Mr. GARCÍA AMADOR said that if Mr. Sandström's first amendment to article 8 were put to the vote, he would suggest it be amended to read: "technical arbitration board composed of qualified experts", which was the expression he had used in his original draft.[6]

40. Mr. ZOUREK said that, in the light of Mr. García Amador's affirmation that the draft articles related to an entirely new procedure, he failed to see why they should refer to "an arbitration board", since those words already bore a definite connotation in international law.

41. Mr. SCELLE observed that such a new type of body was analogous to the chambers which the International Court was entitled to set up for dealing with a particular case, under Article 26 of its Statute.

42. Sir Gerald FITZMAURICE proposed the addition of the words "consisting of qualified experts" to Mr. Sandström's first amendment, because in his view, though the board would have arbitral functions, the essential point was that it must consist of qualified experts.

43. The CHAIRMAN observed that that point was covered by Mr. Sandström's second amendment to article 8.

44. Mr. FRANÇOIS (Special Rapporteur) pointed out that Mr. Sandström's second amendment should be voted upon first, since it would affect the fate of the other.

45. Mr. AMADO observed that Sir Gerald Fitzmaurice's amendment would, in effect, restore Mr. García Amador's original text.

46. Mr. GARCÍA AMADOR agreed.

47. Mr. SANDSTRÖM said that the essence of his proposal was embodied in his second amendment, which referred to a board of two or four qualified experts plus one jurist. He agreed that a vote on that amendment would more or less automatically decide the fate of the first.

48. Sir Gerald FITZMAURICE did not insist on his amendment to Mr. Sandström's amendment. The latter could therefore be voted on in the form proposed by Mr. Sandström.

49. Mr. FRANÇOIS (Special Rapporteur) said that two experts would not be enough; it would be better to make provision for four. Moreover, he suggested that the jurist member of the board should serve as its president.

50. Mr. SANDSTRÖM agreed that the number of experts should be fixed at four. As to the question of who should be president of the board, the Special Rapporteur could deal with that matter in conjunction with the final sentence of article 8, paragraph 1.

51. Mr. GARCÍA AMADOR said that the question of the composition of the board of experts had been discussed at length in the sub-committee. The text adopted for article 8 was somewhat vague, because the members of the Committee had come to the realization that, given the complexity and multiplicity of interests that might be involved in a fisheries dispute, it would be impossible to lay down a rigid stipulation concerning its size. Some equitable criterion for the purpose would have to be found, and he had suggested a system similar to that governing the composition of the Trusteeship Council.

52. If the Commission fixed a definite number of members, the system was unlikely to function well in practice.

53. Mr. KRYLOV preferred Sir Gerald Fitzmaurice's amendment, which, in view of the latter's withdrawal of it, he formally took up. It was a flexible formula, and appeared to him to meet Mr. García Amador's suggestion that the number of members of the board of experts should be decided by considerations similar to those governing the membership of the Trusteeship Council.

54. Mr. HSU said that there were invariably two sides, not several, to a dispute. If an attempt were made to provide for the representation on the board of all the States involved in a dispute, the board would be made inordinately large, and would resemble a conciliation committee rather than a proper tribunal.

55. He favoured Mr. Sandström's amendment, except for the stipulation that only one of the members of the board should necessarily be a jurist. It was equally conceivable that the parties might wish to have more than one jurist or no jurist at all on the board. The Commission should simply adopt a rule which did not preclude the appointment of jurists. He could not approve of Mr. García Amador's suggestion that the Commission revert to the term "technical arbitration board", because the implication of the word "technical" was that the board should be composed exclusively of fishery experts.

56. Mr. SANDSTRÖM recalled that, under the terms of his amendment, where the parties were in agreement they would be completely free to choose as arbitrators any persons they pleased. The rules concerning the choice of members of the board related solely to the

[6] 297th meeting, para. 28.

case where the members had to be appointed by the Secretary-General of the United Nations. The Secretary-General would plainly choose independent and neutral experts.

57. Finally, some limitation of the size of the board was necessary if the cost of maintaining it was to be kept within reasonable bounds.

58. Mr. SCELLE agreed with Mr. Sandström that a maximum number of members should be laid down. Moreover, the number must be uneven, unless the president was to have a casting vote.

59. Faris Bey el-KHOURI said he intended to abstain from voting, because he felt that the parties to a dispute should be entirely free to choose the members of the board. It was neither desirable nor practicable to impose conditions on their choice. The most that could be done by way of reference to the qualifications of the experts was to assert in the comment to the article the desirability that members of the board should be chosen from among qualified experts.

60. Mr. HSU suggested to Mr. Sandström that, instead of a hard and fast rule that one of the members of the board must be a jurist, some such form of words as "preferably a jurist" or "normally a jurist" might be used. Cases might occur where the presence of a jurist on the board would not be absolutely necessary, and others where a board composed exclusively of experts would be quite appropriate.

61. Mr. SANDSTRÖM was sorry that he could not accept Mr. Hsu's amendment. To leave the matter vague would place the Secretary-General of the United Nations in a position of considerable embarrassment; before he could decide whether the presence on the board of a jurist was really necessary, he would have to go into all the facts of the dispute—a procedure that would be both cumbersome and undesirable.

62. Mr. KRYLOV formally proposed that all reference to the presence of a jurist on the board be deleted from Mr. Sandström's amendment.

63. Mr. GARCÍA AMADOR said that he would have no objection to Mr. Sandström's amendment if a proviso were added to it along the following lines:

> "provided always that with that number of members, an equitable representation of all the interested States shall be obtained."

64. Such a proviso would avert the possibility of the amendment resulting in an impracticable formula, or in one which could be exploited to the detriment of an interested State. He had in mind the case where a coastal State was in dispute with a number of other States, which would not necessarily share identity of interest; it was necessary to give the Secretary-General sufficient latitude to enable him to ensure fair representation of all the divergent interests involved.

65. The CHAIRMAN, replying to Mr. García Amador, said that the implication of Mr. Sandström's amendment must be that the Secretary-General would choose the members of the board from nationals of States which were not concerned, either directly or indirectly, in the dispute. The Secretary-General would choose experts on their individual merits, and those experts would give their decision according to their consciences and in their personal capacity, without reference to the divergent interests involved.

Mr. Krylov's amendment was rejected by 5 votes to 3, with 5 abstentions.

66. Mr. GARCÍA AMADOR inquired how, under Mr. Sandström's amendment, the Board would be constituted if the coastal State were in dispute with three other States fishing in the sea area concerned.

67. Mr. SANDSTRÖM said that, where the parties to the dispute were in agreement concerning the choice of experts, there would be no difficulty. If no agreement were reached, and the Secretary-General of the United Nations were called upon to appoint all the members of the board, he would necessarily choose impartial persons of "neutral" nationality, that was, persons unconnected with any of the States parties to the dispute.

68. Mr. SCELLE said that he did not share Mr. Sandström's opinion as regards recourse to the Secretary-General for the choice of impartial arbitrators.

69. Sir Gerald FITZMAURICE thought that the matter was, perhaps, more complex than the discussion suggested. It was not simply a question of adequate representation of the divergent interests of the States parties to a dispute. A difficulty relating to the regulation of fisheries might well have a number of somewhat unrelated aspects, such as the biological and other interests involved in conservation. Bearing that in mind, it would not always be easy to appoint the members of the board in such a manner as to do justice not only to all the parties, but also to all the scientific interests which might be affected by the dispute.

70. For all those reasons, he proposed that the board should consist of one jurist and not more than six, but not less than four, expert members.

71. Mr. SANDSTRÖM accepted Sir Gerald Fitzmaurice's amendment.

72. Mr. GARCÍA AMADOR also accepted Sir Gerald Fitzmaurice's amendment, and withdrew his own.

73. Mr. KRYLOV said that the provision for the maximum was the really important consideration, and the one which was always laid down in texts of that type both in constitutional law and elsewhere. It was a very rare thing to stipulate a minimum number of members for arbitral boards.

74. Mr. SCELLE said that the Commission was wavering between the concept of a proper arbitration tribunal and that of a mere board of experts. The essential point was to lay down the maximum number of members.

75. The CHAIRMAN put to the vote Mr. Sandström's second amendment as amended by Sir Gerald Fitzmaurice that the words "Board of Experts" in the second sentence of article 8, paragraph 1, be replaced by the phrase: "Board composed of not less than four, and not more than six, qualified experts, plus one jurist".

The amendment was adopted by 9 votes to 2, with 2 abstentions.

76. Mr. SANDSTRÖM suggested that his first amendment, namely, that the Board should be described as an arbitral board, should be left to the Drafting Committee.

It was so agreed.

77. The CHAIRMAN put to the vote Mr. Scelle's amendment that the references to the "Secretary-General of the United Nations" in article 8, paragraph 1, be replaced by references to the "President of the International Court of Justice".

The amendment was rejected, by 5 votes to 5, with 3 abstentions.

78. The CHAIRMAN observed that the reference to consultation with the Director-General of FAO remained. Furthermore, it was clear that the Secretary-General of the United Nations, in consultation with the Director-General of FAO, could well appoint as president of the board a person who was not a jurist.

79. Mr. GARCÍA AMADOR said that it would be as well to include in article 8 a reference to the desirability of the Secretary-General's choosing the members of the board in such a manner as to ensure fair representation of the interests of all parties.

80. Mr. SCELLE pointed out that the proper place for a recommendation of that kind was in the comment; no useful purpose would be served by including it in the article itself. The Commission clearly could not suggest that the recommendation should be of a kind that would make it possible for interested parties to impugn the validity of the Secretary-General's choice of arbitrators.

81. Mr. HSU said that he would vote against article 8, because it was inadvisable to involve the Secretary-General of the United Nations in the appointment of members of the board of experts.

82. Mr. KRYLOV said that he had originally agreed to the text adopted by his colleagues on the Sub-Committee on the understanding that the board for which provision was being made would be a technical board. Following the adoption of Mr. Sandström's amendment, as modified by Sir Gerald Fitzmaurice, it would be a hybrid body including a jurist. In these circumstances, he would have to vote against article 8.

83. The CHAIRMAN drew the attention of members to the fact that unless article 8 as a whole were adopted the entire draft articles might be imperilled.

84. Mr. ZOUREK said that he would vote against article 8 for the reasons he had given in the course of the discussion. If the article were rejected, that would not mean the end of the whole draft on fisheries conservation. In the first place, it would be possible to substitute another text for the one he urged the Commission to reject. Again, it was not indispensable that the Commission should adopt an article on the practical enforcement of the rules it advocated in articles 1 to 6. Even without such a measure of implementation, the articles were capable of standing firmly on their own feet. The Commission had not infrequently adopted regulations without provisions for their enforcement.

85. The CHAIRMAN pointed out that the Commission had yet to adopt article 7 as a whole. So far it had only rejected the two amendments proposed to the article.

Article 7 was adopted by 10 votes to 2, with 1 abstention.

86. Mr. SCELLE suggested, but without pressing the point, that separate votes be taken on paragraphs 1 and 2 of article 8, since paragraph 2 seemed to hold the possibility that the board might extend indefinitely the time-limit for its decision.

87. Mr. FRANÇOIS (Special Rapporteur) said that the board must be trusted not to do so.

88. The CHAIRMAN put to the vote article 8 as a whole, subject to drafting changes, particularly in connexion with Mr. Sandström's suggested amendment of the board's title. The article, as amended, read:

"Article 8

"1. The method of settlement referred to in the preceding articles shall be by reference to a board of qualified experts, to be chosen by agreement between the parties. Failing such agreement within the period of three months from the date of the original request, a board composed of not less than four, and not more than six, qualified experts, plus one jurist, shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. The president of the board shall equally be appointed by the Secretary-General of the United Nations.

"2. The board shall in all cases be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time limit."[7]

Article 8 as a whole was adopted by 8 votes to 3, with 2 abstentions, subject to drafting changes.

89. Mr. SCELLE explained that, although in fact he disapproved of the role being thrust upon the Secretary-General of the United Nations, he had not voted against the article but had merely abstained from voting because he did not wish to hamper the work of the Commission.

[7] These paragraphs later became paras. 2 and 3 of article 7.

90. Mr. GARCÍA AMADOR suggested that reference be made in the Commission's report to the desirability of the members of the board being chosen with a view to ensuring the fair representation of all the interests involved, along the lines he had already suggested.

91. Mr. FRANÇOIS (Special Rapporteur) undertook to include in the report some reference of the kind, which, he hoped, would satisfy Mr. García Amador. He could not, however, use the term "representation", because the members of the board would be impartial arbitrators chosen precisely because of their independence of the parties to the dispute.

92. Mr. SANDSTRÖM pointed out that the question of representing in a fair manner the various interests involved could only arise where the members of the Board were to be chosen by the parties to the dispute themselves.

Article 9 [8, para. 2][8]

93. Mr. SCELLE recalled that the Commission had already decided at the previous meeting that conservation measures adopted by two or more States fishing in an area would be binding on other States unless challenged by them under the procedure laid down in articles 7 to 10.

94. Mr. AMADO said that the term "decision" was perhaps preferable to the term "award". He would suggest the term *laudo arbitral* for the Spanish text.

95. Sir Gerald FITZMAURICE agreed that the term "decision" was better than "award".

96. With regard to the validity of conservation measures pending the board's decision, he wished to place on record the fact that he had urged in the course of the discussions in the sub-committee a point of view which was that of an important group of States at the Rome Conference concerning the specific case of conservation measures adopted by the coastal State in virtue of the unilateral powers granted to it, rather than the more normal case of measures adopted in concert by a number of fishing States.

97. It had been the considered opinion of that important group of States that, if the exceptionally wide power of adopting conservation measures unilaterally was to be recognized to the coastal State, it was preferable that that State should be required to secure the approval of an independent technical board before actually putting any such measures into force.

98. Had the viewpoint of that group of States been accepted, all need for recourse to arbitration would have disappeared *ipso facto,* since conservation measures adopted unilaterally by the coastal State would have received due sanction before actual enforcement. But it was thought that such a system would delay the enforcement of conservation measures, the need for which might perhaps be urgent.

99. The general feeling in the sub-committee had been that, in view of the rather strict criteria to which unilateral action on the part of the coastal State had been made subject by articles 5 and 6, and provided also that a strict time-table were adhered to, it was unnecessary to require a coastal State to secure the prior approval of an independent authority before adopting the measures concerned. It would be sufficient to give the board powers to suspend the unilateral measures if it deemed it necessary.

100. Article 9 as drafted by the sub-committee reflected that consensus of feeling. The solution adopted by the Committee might commend itself to the important group of States he had mentioned, though of course that might not be so.

101. Mr. SCELLE said that any conservation measures in dispute would in any event remain valid for a certain length of time, namely, the minimum time required for the board to meet and decide whether the application of the measures should be suspended. Such delay might well interfere with a whole fishing season. As an illustration, he quoted the case of the sedentary fisheries dispute between Japan and Australia, from which it was apparent that the disputed measures would in practice be enforced for an appreciable time before any action could be taken by the competent court.

102. The CHAIRMAN pointed out that any violation on the part of the coastal State of the strict criteria laid down as the prior conditions to unilateral action would, as a matter of course, engage that State's liability for damages in respect of injured parties.

103. Mr. GARCÍA AMADOR pointed out that Mr. Scelle had spoken with an eye to the interests of the fishing industry and probably to those of the consumer, also. But from the point of view of the conservation of species, it was clear that unless the coastal State had the power to adopt measures which would remain valid until the board took an appropriate decision, complete depletion of stocks in a particular area and loss of productivity might ensue.

104. It was essential to bear in mind that, in accordance with the terms of article 6, the interest the Commission had had in view in drafting the present regulations was first and foremost that of conservation. The prerequisite for the unilateral adoption of conservation measures by any coastal State was "an imperative and urgent need" for such measures.

105. Mr. SCELLE said that a coastal State might be led to proclaim the complete prohibition of fishing out of a desire to conserve species.

106. Mr. SANDSTRÖM pointed out that any such prohibition would have an effect on the nationals of the coastal State, as well as on foreign fishermen.

107. The CHAIRMAN put article 9 to the vote. It read:

[8] See *supra*, 300th meeting, para. 1.

"Article 9

"The board may decide that pending its decision the measures in dispute shall not be applied".

Article 9 was adopted by 9 votes to none, with 4 abstentions.[9]

Article 10 [9] [10]

108. Mr. FRANÇOIS (Special Rapporteur) said that there appeared to be some misunderstanding about the second sentence of article 10. It was not suggested that the board should make recommendations instead of taking decisions. The sentence in question simply meant that, when giving a decision on an actual dispute, it would be open to the board to make what recommendations it considered appropriate concerning suitable conservation measures.

109. Mr. ZOUREK said that it might well happen that the board would be unable to arrive at a decision, because it could find no rule of international law on the subject in dispute. It would appear that in that case, under the second sentence of article 10, the board would merely make a recommendation.

Further discussion of article 10 was deferred.[11]

Programme of work

110. The CHAIRMAN said that, on completing the discussion on fisheries the Commission would first take up Mr. Scelle's proposed general arbitration clause relating to all the draft articles on the régime of the high seas. It would then go on to deal with the territorial sea, particularly the breadth of the territorial sea, in which connexion he urged members not to re-open the general discussion, but to submit concrete proposals.

111. Mr. LIANG (Secretary to the Commission) said it was desirable that at its next meeting but one the Commission should discuss the question of the time and place of its next session, as well as proposed amendments to its Statutes.

112. The CHAIRMAN announced that those topics would be discussed in private at the next meeting but one.

The meeting rose at 6.10 p.m.

[9] See *infra*, 306th meeting, para. 2.

[10] See *supra*, 300th meeting, para. 1.

[11] See *infra*, 306th meeting, para. 8.

306th MEETING

Tuesday, 7 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

** The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (A/CN.4/79, A/CONF.10/6) (*resumed from the 305th meeting*)

NEW DRAFT ARTICLES ON FISHERIES
(resumed from the 305th meeting)

1. The CHAIRMAN invited the Commission to resume its discussion of the new draft articles on fisheries.

Article 9 [*8, para. 2*] (resumed from the 305th meeting)

2. Mr. EDMONDS explained that he had abstained from the vote on article 9 at the previous meeting because he was of opinion that, once challenged, conservation measures should not apply until the competent board of experts had given its decision.

Article 6 [*5, paras. 2 and 3*]
(resumed from the 304th meeting)

3. Mr. FRANÇOIS (Special Rapporteur) said that in the course of the discussion on articles 7 and 8 Mr. Zourek had raised an important point, namely, the question of the rules the arbitration board would have to apply.[1] A provision covering that point would be extremely useful in the draft, but would require a separate article.

4. The answer to the problem would probably be found in the fate of article 6. At its 304th meeting the Commission had, on Mr. Zourek's proposal, adopted a statement of prinicple to the effect that the principal objective of conservation was to secure the optimum sustainable yield, and that all conservation measures must be based on valid scientific findings. The decision was tantamount to making article 6, paragraph 1, sub-paragraph (*b*) applicable to all States and not to the coastal State alone.

5. Furthermore, the Commission had decided that the principle of non-discrimination, originally asserted in article 6, paragraph 1, sub-paragraph (*c*) should have a wider application than was implicit in the text of that sub-paragraph, but had left it to the Drafting Committee to decide where and how that principle could most appropriately be expressed.

6. Thus the only one of three principles embodied in article 6, paragraph 1, which remained applicable to the coastal State alone was the requirement that scientific evidence should show that there was an imperative and urgent need for measures of conservation.

7. In order to put the Commission in a position to vote on new texts laying down the criteria on which the arbitration board should base its decisions, he proposed that the whole matter be referred to the Drafting Committee, which should piece together the various provisions adopted by the Commission concerning the criteria for determining the validity of conservation measures.

It was so agreed.

Article 10 [*9*] (resumed from the 305th meeting)

8. Mr. SANDSTRÖM inquired whether the second sentence of the article implied that the board might address recommendations to States that were not parties to the future convention on fisheries conservation, and against which no actual decision was possible.

9. Mr. FRANÇOIS (Special Rapporteur) said that the second sentence had been drafted with a definite purpose: it envisaged the case in which, when giving its decision on a dispute, the board would recommend measures that it was not in a position to impose, but whose usefulness had become apparent as a result of the investigation of the dispute.

10. Mr. Sandström's point could perhaps be met by a suitable statement in the comment.

11. Mr. KRYLOV said that it would be most unusual for an arbitration board of the kind provided for to issue recommendations *erga omnes*.

12. Sir Gerald FITZMAURICE said that the Commission's draft articles on fisheries would ultimately be embodied in a convention that would normally not be binding on States which did not accede to it: such States would not be obliged to submit their disputes to the board. Should such a State voluntarily accept the board's jurisdiction, that would imply its acceptance of the board's findings; but should it decline to do so, it was obvious that the board's recommendations would serve no useful purpose.

13. Mr. SCELLE said that the entire draft was based on the assumption that, upon adoption by the State whose nationals fished in an area, or by the coastal State, conservation measures would be applicable to any newcomers to that area.

14. The draft articles prepared by the Commission at its fifth session in 1953 (A/2456, para. 94) had made provision for an international authority to prescribe conservation measures *erga omnes*, the Food and Agriculture Organization of the United Nations (FAO) being the authority in view.

15. If the validity of the principles adopted by the Commission were to be made subject to the signing of a convention by all the interested States, the Commission's work would be of no avail.

16. The CHAIRMAN said that the General Assembly would no doubt adopt the Commission's draft articles as a draft convention, and open it to signature with the customary proviso that it would become effective only after a given number of States had acceded to it. For his part, he felt that the accession of a sufficient number of States with an important fishery industry should also be stipulated.

17. When a convention of that kind came into force, it would have such moral authority that even States that had not actually acceded to it would have to respect its provisions. There would be some analogy with the treaties on international waterways, or again with that on Swiss neutrality, all of which, though signed by only a certain number of States, were valid *erga omnes*.

18. Mr. LIANG (Secretary to the Commission) said that the Commission's decisions at the present session did not seem so radical a departure from the 1953 articles as Mr. Scelle had suggested. Article 3 of the earlier draft had been couched in terms which lacked precision; it referred to "an international authority", whereas what had probably been intended was an organ rather than an authority—indeed, an organ of the same

[1] 304th meeting, para. 63.

kind as the board for which the Commission had made provision in article 8 of the new rules.

19. The purpose of the 1953 provision, despite the rather authoritarian tone in which it was expressed, was not really incompatible with the present articles. When the earlier provision spoke of an international authority prescribing a system of regulation of fisheries, it did not, and indeed could not, imply that FAO would be empowered to issue such rules as binding on all States. FAO could not be invested with such authority without the consent of States. In essence, the 1953 provision amounted to much the same thing as article 10 of the present draft: that the competent board would decide disputes and make recommendations.

20. The main difference between the present system and that proposed in 1953 lay in procedure.

21. Mr. ZOUREK pointed out that there was one important departure from the 1953 procedure; instead of a permanent organ, the Commission had now come out in favour of an *ad hoc* body.

22. Mr. HSU considered that the second sentence of article 10 was unnecessary. It added nothing to the meaning of the article, and could only serve to create the mistaken impression that in certain cases the board might not give a decision, but merely issue recommendations.

23. Mr. FRANÇOIS (Special Rapporteur) proposed that, to clarify its meaning, the second sentence should be amended to read:

Au cas où des recommendations y seront jointes, ces recommendations doivent recevoir la plus grande considération.

24. Mr. HSU expressed his satisfaction with that proposal.

Article 10 as amended by the Special Rapporteur was adopted by 9 votes to 2, with 2 abstentions.

25. Mr. AMADO said that as he could not understand what useful purpose the second sentence of article 10 could serve, he had abstained from voting.

26. Faris Bey el-KHOURI recalled that in its draft code of arbitral procedure, the Commission had made detailed provision for the possibility of challenging the validity of an arbitral award where the tribunal exceeded its powers. He had therefore abstained from voting on article 10, which stipulated that the decisions of a mere board of experts should be final and without appeal.

27. Mr. KRYLOV explained that having voted against article 8, it was only logical that he should have voted against article 10.

28. Mr. ZOUREK said that he too had voted against article 10 because of his opposition to article 8.

29. Furthermore, he disapproved of the amendment introduced by the Special Rapporteur. The real purpose of the provision concerning recommendations was to cover the case where the board might not be in a position to take a formal decision.

Article 6 [*5, paras. 2 and 3*] (resumed from para. 7)

30. Sir Gerald FITZMAURICE, reverting to the question of the proposed new articles to deal with the subject matter of article 6 and with Mr. Zourek's introductory provision, recalled that at the 304th meeting[2] the Commission had adopted his own proposal to the effect that the criterion common to all cases and all States should be that conservation measures must be based on valid scientific findings. It was clear from that decision that sub-paragraph (*b*) alone of the requirements of article 6 applied to all States alike. Sub-paragraph (*a*) applied only to the coastal State; that State alone was required to demonstrate that scientific evidence showed that there was an imperative and urgent need for conservation measures. Where measures were adopted by agreement among States whose nationals fished an area and not unilaterally by a coastal State, that criterion would not apply, for clearly the States concerned might agree on certain measures which they considered desirable and useful, but the need for which was not imperative and urgent.

31. Mr. FRANÇOIS (Special Rapporteur) proposed that the whole matter be referred to the Drafting Committee.

It was so agreed.

32. Mr. SCELLE raised the question of the fate of the articles to which the Commission had just given a first reading. He suggested that the Commission should ask the General Assembly to adopt the articles in the same manner in which the Convention on Genocide had been adopted; that would endow them with great force. On the other hand, were the General Assembly merely to draft a convention on the understanding that it would apply only to those States that were prepared to accede to it, the Commission's efforts would be of little avail.

33. Mr. KRYLOV was more optimistic than Mr. Scelle about the fate of the draft articles. He suggested that the Drafting Committee should go into the question of the manner in which the draft articles on fisheries conservation should be presented to the General Assembly.

It was so agreed.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 4, A/CN.4/93, A/CN.4/L.54) (*resumed from the 299th meeting*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*resumed from the 299th meeting*)

Article 22 [*20*]*: Charges to be levied upon foreign vessels*

Article 22 was adopted without comment.

[2] Para. 6.

Article 23 [21]: Arrest on board a foreign vessel

34. Mr. FRANÇOIS (Special Rapporteur) said that article 23 had elicited from the United Kingdom Government (A/2934, Annex, No. 16) the comment that paragraph 3 should be made more precise in order to give greater weight to the interests of navigation.

35. For his part, he felt that the interests of navigation had been adequately provided for in paragraph 3, particularly in view of the comment on the article, the third paragraph of which reproduced the relevant part of the comment on the similar provision in the report of the Second Committee of the 1930 Conference for the Codification of International Law.[3]

36. Sir Gerald FITZMAURICE said that the text of paragraph 3 was somewhat vague. He suggested that it should read:

> "3. The local authorities shall carry out any arrest on board a vessel in such a manner as to cause the least possible interference with navigation."

37. Mr. FRANÇOIS (Special Rapporteur) thought that Sir Gerald's text did not go so far as his own. Under his own, the coastal State would have to refrain altogether from making an arrest where that would seriously interfere with the freedom of navigation, whereas it was not possible to interpret Sir Gerald's text so broadly.

38. Sir Gerald FITZMAURICE said that if the Special Rapporteur's interpretation of paragraph 3 were correct, he would certainly favour it. But all the text said was: "...when making an arrest..." That clearly implied that there was nothing to prevent a coastal State from making any arrest it desired.

39. Mr. LIANG (Secretary to the Commission) submitted that the term "pay due regard" was always capable of such an interpretation as would minimize the obligation placed upon the State concerned. As Sir Gerald Fitzmaurice had proposed, a sentence inspired by the provision in the report of the 1930 Codification Conference would give more effective expression to the obligation on the coastal State not to interfere with navigation.

Article 23 was approved in principle, and referred to the Drafting Committee for the recasting of paragraph 3.

Article 24 [22]: Arrest of vessels for the purpose of exercising civil jurisdiction

40. Mr. FRANÇOIS (Special Rapporteur) said that article 24 followed the lines of article 9 of the report of the 1930 Codification Conference. It did not go so far as the International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships, signed at Brussels on 10 May 1952,[4] which allowed arrest for claims against sister ships belonging to the same company, and also for claims in respect of liabilities incurred during a previous voyage. For his part, he would prefer the Commission's text to be brought into line with the 1952 provisions, which had been agreed upon by a diplomatic conference after very thorough examination of the 1930 text. It was not irrelevant to point out that the 1930 provision had been the first of its kind on the subject, and that subsequent experience had shown that it needed improvement.

41. Sir Gerald FITZMAURICE drew attention to the United Kingdom Government's comments (A/2934, Annex, No. 16), which were in harmony with those of the Netherlands Government (A/2934, Annex, No. 10). Both governments had mentioned the desirability of reconciling article 24 with the terms of the 1952 Convention.

42. That Convention was the outcome of many years of work, its provisions representing a balance between many conflicting factors. Shipping circles attached very great importance to the new procedure, and the Commission should not depart from it without extremely good reason.

43. Mr. ZOUREK said that paragraph 1 related only to ships merely passing through the territorial sea, which were naturally treated better than ships at rest in a port.

44. The 1952 Convention listed no fewer than seventeen cases in which a ship might be arrested for the recovery of maritime claims. Freedom of navigation would be seriously impaired if in any of those many cases it was permissible to levy execution against or to arrest a vessel which was merely passing through the territorial sea.

45. Mr. FRANÇOIS (Special Rapporteur) proposed that discussion on that point be deferred until the Drafting Committee submitted a definite text.

It was so agreed.

46. Mr. FRANÇOIS (Special Rapporteur) proposed that the words "in the inland waters of the State or" be deleted from paragraph 2. The Commission was only concerned with the problem of the territorial sea, and any reference in its draft to inland waters would be out of place.

47. Mr. ZOUREK questioned the desirability of the penultimate phrase of paragraph 2, reading:

> "or passing through the territorial sea after leaving the inland waters of the State".

A vessel leaving the inland waters of a State would presumably have spent some time in a port where the coastal State would have had ample opportunity to arrest it had there been any good reason. It seemed undesirable in such a case to allow the coastal State to pursue the vessel when it was crossing the territorial sea to reach the high seas.

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[3] *Acts of the Conference for the Codification of International Law*, League of Nations publication, *V. Legal, 1930.V.14* (document C.351.M.145.1930.V), p. 129.

[4] United Kingdom, *Parliamentary Papers*, 1952–53, vol. XXIX, Cmd. 8954. Also extracts in *Laws and Regulations on the régime of the territorial sea* (United Nations publication, Sales No.: 1957.V. 2), p. 723.

48. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee would take Mr. Zourek's remarks into consideration.

Article 24 was adopted, subject to appropriate drafting changes.

Article 25 [23]: Government vessels operated for commercial purposes

49. Mr. FRANÇOIS (Special Rapporteur) said that he could not quite follow why the United Kingdom Government's objections (A/2934, Annex, No. 16) to articles 18, 19 and 20 should apply equally to government vessels operated for commercial purposes.

50. Mr. KRYLOV proposed that article 25 be deleted. It raised extremely complicated issues, and was not indispensable to a set of provisional articles on the territorial sea.

51. A great many States wanted to assimilate government vessels operated for commercial purposes to merchant vessels. Other States, in particular the Soviet Union and Poland, did not wish such vessels to come under ordinary maritime law.

52. In the presence of those two diametrically opposed views, the Commission could not do better than to leave the subject alone. It should attempt to codify only subjects that were ripe for the process.

53. Sir Gerald FITZMAURICE explained that the United Kingdom Government's comments on article 25 must be read in conjunction with its proposal for a new article 17 entitled "The right of innocent passage", which consisted of eight paragraphs intended to replace articles 17, 18, 19, 20, 26 and 27, as adopted by the Commission at its sixth session (A/2693, Chapter IV). The acceptance in principle by the United Kingdom Government of the proposal that government ships employed in commercial service should be subject to the provisions of articles 17 and 21 to 24 clearly covered the content of articles 18, 19 and 20, which, in the United Kingdom Government's proposal, should be made part of a new article 17.

54. The United Kingdom Government's objection to article 25 as it stood was that it failed to define with sufficient precision what types of ship were to enjoy immunity.

5. Mr. AMADO agreed with Mr. Krylov that article 25 was not absolutely indispensable. The subject was certainly not ripe for codification.

56. Mr. SANDSTRÖM recalled that the Commission's provisional articles (A/2693) had originally been subdivided into two sections: section A dealing with vessels other than warships, and section B dealing with warships. Article 25, which constituted the final article of section A, dealt with a special category of ship, namely, government vessels operated for commercial purposes.

57. Mr. ZOUREK said that the fact that the Brussels Convention of 10 April 1926[5] had included for the first time a provision to the effect that state-owned vessels operated for commercial purposes should be treated as merchant ships proved that, under general international law, government vessels enjoyed immunity.

58. He recognized that his opinion was not shared by everyone, and he therefore agreed with Mr. Krylov about the desirability of deleting article 25.

59. In any event, the article itself did not dispose completely of the problem it raised, since it did not cover government vessels not operated for commercial purposes.

60. Sir Gerald FITZMAURICE said that government vessels could fall into either of two categories: some might well be classed with warships, others were merchant vessels pure and simple. Hence the United Kingdom Government's insistence on some clearer definition of the vessels covered by article 25; as drafted, its provisions were far too broad to be acceptable.

61. Mr. FRANÇOIS (Special Rapporteur) said that the deletion of article 25 would conduce to misinterpretation. The absence of such a provision might be taken to mean that all government vessels enjoyed complete immunity. Such an interpretation would arouse the opposition of a great number of States.

62. The situation would be different if it were made clear that the deletion of article 25 left the matter open.

63. Mr. KRYLOV said the fact that the question remained open could be indicated in the comment. That would leave both groups of States in their respective positions.

64. Mr. SANDSTRÖM said that if the subdivision into sections A and B were retained, it would not be possible to omit a reference to government vessels operated for commercial purposes.

65. Mr. AMADO said that it was very difficult to codify—or to petrify—a doubt.

66. Mr. FRANÇOIS (Special Rapporteur) said that a re-reading of the observations contained in the report of the Second Committee of the 1930 Conference for the Codification of International Law[6] had confirmed his impression that the present text of article 25 was not particularly felicitous, because it failed to define the position with regard to government vessels not operated for commercial purposes. It would be remembered that the rules laid down in the articles relating to arrest on board foreign vessels, and to arrest of vessels for the purpose of exercising civil jurisdiction, had been adopted by the Codification Conference without prejudice to the question of the treatment of vessels exclusively employed in a governmental and non-commercial service. Perhaps the Commission might omit article 25 altogether, stating in the comment that the position of

[5] Société des Nations, *Recueil des Traités*, vol. 120, p. 188.

[6] League of Nations publication, *V. Legal, 1930. V. 14* (document C.351.M.145.1930.V), p. 129.

government vessels operated for either commercial or other purposes was reserved.

67. Mr. HSU wondered whether that procedure might not be a step backwards, since it would leave a gap in the draft, and States without guidance.

68. The CHAIRMAN observed that would not be the only omission.

69. Mr. KRYLOV pointed out that, as the situation had changed since 1930, the Commission might well follow the Special Rapporteur's suggestion.

70. Mr. HSU said that he was not necessarily opposed in principle to omissions, provided there was good reason for them. If he were given a valid explanation of the change that had occurred since 1930 that would justify the deletion of article 25, he would be the first to support it.

71. The CHAIRMAN observed that the issue was a very delicate one.

72. Mr. AMADO considered that the Commission's reasons for omitting article 25 could be explained fully in the comment.

73. Mr. SANDSTRÖM pointed out that the change that had supervened since 1930 consisted in the considerable increase in the number of vessels operated by States for commercial purposes. In view of that development, he doubted whether such vessels should be left outside the scope of the draft. Government vessels for non-commercial purposes, being fewer, presented no such problem. For those reasons, he would prefer a provision of the kind adopted by the 1930 Codification Conference.

74. Mr. SCELLE agreed with Mr. Sandström. The number of vessels operated by governments for commercial purposes was growing steadily, and he considered that they should be treated on exactly the same footing as private merchant vessels. The draft would be deprived of much of its force by the deletion of article 25, and he would be firmly opposed to such a step.

75. Mr. KRYLOV considered that the State was an indivisible entity and retained all its attributes when entering the commercial field. If, for example, the French Government were to nationalize the French merchant fleet it would not regard itself as a private shipowner.

76. Mr. SCELLE said that he personally had no knowledge of such an entity as "the State", and strongly denied its existence. On the other hand, the actions of a head of State, of ministers or of a local authority were definite and recognizable. It would be most retrograde to hold that when a government acquired rights in any sphere, those rights were not subject to any control.

77. Sir Gerald FITZMAURICE observed that the difficulty had perhaps arisen as a result of the distinction drawn between merchant vessels and warships. He had not insisted on that point at the 299th meeting, because the Special Rapporteur had not found the United Kingdom Government's suggestions (A/2934, Annex, No. 16) for rearranging the articles in chapter III entirely satisfactory. Nevertheless, the suggestion, which was based on the premise that some provisions concerning the right of passage had a general application to all vessels, might usefully be examined by the Drafting Committee. If the suggestion to unite all those provisions in a single new article 17 were adopted, the Commission would no longer have to concern itself with a separate category of government vessels operated for commercial purposes.

78. Mr. FRANÇOIS (Special Rapporteur) pointed out that no one had proposed that article 24 should be applicable to warships. The question of whether an arrest could take place on board a government vessel operated for commercial purposes must be answered, and could not be shelved by any rearrangement of the articles.

79. Mr. ZOUREK considered that those who wished article 25 to be retained were inspired by a subjective concept of the nature of the State. He entirely disagreed with them, being convinced that the State itself must fix the limits of its competence and decide how much could be left to the individual. He deplored the efforts of certain members to force a decision in favour of their own view, which was fundamentally contrary to that of certain States and might render the draft unacceptable as a whole.

80. The CHAIRMAN put to the vote Mr. Krylov's proposal that article 25 be deleted.

The proposal was rejected by 6 votes to 2, with 5 abstentions.

81. Mr. AMADO said that he had abstained from voting because he had no clear idea of what was meant by government vessels operated for commercial purposes. In view of the great variations in types and conditions of ownership some definition was required.

82. Faris Bey el-KHOURI explained that he had voted against the proposal because he saw no reason why States engaging in commerce should not be treated on an equal footing with private individuals or companies, or why they should enjoy a privileged position.

83. Mr. SANDSTRÖM suggested that article 25 be accepted and referred to the Drafting Committee on the understanding that the issues involved would be fully elucidated in the comment.

It was so agreed.

Article 26 [25]: Passage

84. Mr. FRANÇOIS (Special Rapporteur) observed that article 26 had given rise to a number of observations by governments, which showed that it had not been fully understood. That was hardly surprising in

view of its defective drafting, which failed to make clear the relationship between paragraphs 1 and 2.

85. It would be remembered that the Commission had first sought to indicate that several of the preceding articles, and notably article 20, paragraph 2, were applicable to warships. The coastal State could, if necessary, temporarily suspend the right of innocent passage in definite areas of its territorial sea. Another question which the Commission had wished to settle was whether the coastal State was entitled to require previous authorization or notification in all cases, and it had finally been decided that that could be done only in exceptional circumstances. Several governments had questioned that decision on the ground that previous authorization or notification was in fact already required by many countries. The point must therefore be reconsidered.

86. In conclusion, he drew the Commission's attention to the new text he had submitted for article 26 (A/CN.4/93).

87. Mr. SALAMANCA was unable to see the reason for the Special Rapporteur's new text. The meaning of the words "or in times of crisis" was particularly obscure. By virtue of Article 51 of the Charter of the United Nations, States could take exceptional measures for legitimate self-defence but were not free to declare war. The original text of article 26 seemed to him less ambiguous.

88. Mr. SANDSTRÖM held that the position of merchant vessels, for which freedom of communication was vital, was quite different from that of warships, since the latter's presence in the territorial sea of another State might possibly imply a show of force. That was not very palatable to States with a small fleet, and if there was any lack of clarity in article 26, the article should be modified in the direction of limiting freedom of navigation in the territorial sea, particularly as the legitimate interests of warships were adequately safeguarded by paragraph 4 of the original text.

89. Sir Gerald FITZMAURICE asked what grounds were provided by international law for the attitude adopted by the Special Rapporteur and Mr. Sandström. The Commission was not laying down ideal rules but was codifying existing law and practice, which established a clear distinction between warships passing through the territorial sea of another State and warships visiting a foreign port or anchoring in a foreign roadstead. Mr. Sandström had seemed to suggest that warships were in the habit of steaming about haphazardly in the territorial sea of another State. In practice that hardly ever occurred, as they were usually either passing though a territorial sea because it was the natural route between two points, or visiting a foreign port. It had been the practice to give previous notification of such movements, and visits to ports were usually arranged in advance. However, in the exceptional case of warships in distress seeking safety in a foreign port, it had never been suggested that previous authorization was necessary.

90. If previous authorization or notification were to be required in all instances a severe restriction would be placed on the normal movements of warships in peacetime. Commerce was not the only legitimate object of navigation and vessels passing through a territorial sea for another reason should not be *ipso facto* regarded as suspect. If Mr. Sandström's suggestion were followed a totally new and unnecessary burden would be imposed on warships, which he could not agree should be embodied in a code of rules already containing ample safeguards for the protection of the interests and safety of coastal States.

91. Mr. SCELLE observed that the adoption of the United Nations Charter had materially altered the situation, since before that act States had been free to commit an act of aggression and to send their warships to any area for purposes of attack. The right to initiate offensive action now belonged exclusively to the Security Council, with the result that any coastal State could invoke the provisions of the Charter to refuse the right of passage to a warship committing a hostile act or threatening to do so. However, warships could use the territorial sea of another State for purposes of legitimate defence, but it remained to be seen who was to decide whether the requirements of legitimate defence were in fact at stake. Was it to be left to the coastal State or to the Security Council?

92. Mr. FRANÇOIS (Special Rapporteur) considered that the coastal State should have the right to close some areas of its territorial sea altogether to foreign warships, for example, in order to protect ports vital to its defence system. The provision in article 20, paragraph 2, was inadequate to protect the interests of the coastal State.

93. Sir Gerald Fitzmaurice appeared to think that the right of passage could never be denied to a foreign warship if the passage were genuinely innocent, but in the Netherlands, for example—and it was probably not the only country in that position—innocent passage was not in all circumstances allowed to warships without previous authorization.

94. He therefore considered that article 26 required modification, because on the one hand it was obscure and on the other hand it was too rigid. He had submitted a new text to safeguard the right of coastal States to demand previous authorization or notification.

95. Mr. SCELLE was anxious that the article should stipulate that prior authorization must be obtained, because it must be denied in cases involving offensive acts or threats.

96. Mr. LIANG (Secretary to the Commission) did not consider it possible to deal with authorization and notification in a single article. His personal experience some years ago in the Ministry of Foreign Affairs of his own country confirmed Sir Gerald Fitzmaurice's impression that, while it was obligatory in international

law to grant the right of passage without authorization, notification had always been the practice except in urgent cases of vessels in distress. That fact had been clearly brought out in the comment of the Yugoslav Government (A/2934, Annex, No. 18) which deserved attention.

97. Referring to Mr. Scelle's remarks, he said that in the cases mentioned the Security Council would have already reached a decision and world have requested States to carry out the enforcement measures called for under the Charter. In the absence of such a request it would be risky for a State to take a unilateral decision to refuse passage to a foreign warship. Such cases need not be provided for, since they belonged to the general category of questions connected with enforcement measures initiated by the Security Council in accordance with the provisions laid down in Chapter VII of the Charter.

The meeting rose at 1.5 p.m.

307th MEETING

Wednesday, 8 June 1955, at 12.15 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS
Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 26 [25]: Passage (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 26 of the provisional articles adopted at the previous session (A/2693), together with the Special Rapporteur's proposed new text (A/CN.4/93).

2. Mr. FRANÇOIS (Special Rapporteur) said that, as he had explained at the previous meeting,[1] the original text of article 26 had not been entirely clear, and had given rise to misunderstandings. In response to the observations of certain governments, he had indicated in his new draft the circumstances in which coastal States could require previous authorization or notification of the passage of warships through their territorial sea.

3. The CHAIRMAN observed that the coastal State might wish, for other than military reasons, to prohibit passage through parts of its territorial sea, for example, for the purpose of safeguarding its neutrality.

4. Mr. FRANÇOIS (Special Rapporteur) explained that he had mainly had in mind the possible need to protect that part of the territorial sea surrounding a port of military importance.

5. Mr. AMADO asked for a precise definition of the words "in times of crisis".

6. Mr. FRANÇOIS (Special Rapporteur) said that he had envisaged times of political tension giving grounds for expecting an imminent outbreak of war.

7. Mr. ZOUREK observed that, in the light of the comments made at the previous meeting and of the observations of certain governments, particularly that of Sweden (A/2934, Annex, No. 13), it would be advisable for the Commission to vote on the principle which several members had upheld, namely, that passage by warships through the territorial sea should be subject to the consent of the coastal State. In the interval since the previous meeting he had had a further opportunity of consulting the authorities, most of whom confirmed that the prevailing rule of international law was that passage for warships was not a right but a concession granted by the coastal State. The Institute of International Law had left the question aside in 1914, but in 1928 had recognized the right of coastal States to regulate the passage of warships through their territorial sea.[2] The Harvard Draft (article 19) followed the same line.[3]

8. Some coastal States did not invariably require special authorization or notification, having imposed once and for all certain conditions on the passage of warships.

9. The Commission must also consider the point raised by Mr. Scelle at the previous meeting about the new situation created by the signing of the Charter of the United Nations, whereby States were prohibited from resorting to the threat or use of force against the territorial integrity or political independence of any State. Warships by their very nature constituted a potential

[1] 306th meeting, para. 85.

[2] Institut de droit international, *Annuaire*, 1928.

[3] Harvard Law School, *Research in International Law*, III, *Territorial waters* (Cambridge, 1929), p. 245.

threat: a fact which reinforced the thesis that they could not pass through the territorial sea of another State without its consent.

10. The Special Rapporteur's new text was not acceptable, because it asserted as a principle that warships enjoyed the right of innocent passage subject to certain exceptions. Furthermore, it employed a number of ill-defined terms which were open to very broad interpretation. He accordingly proposed that the question of passage through straits used for international navigation be left aside; then, once the Commission had decided on the principle, the drafting could be left to the Drafting Committee.

11. Mr. SALAMANCA considered that there was no fundamental discrepancy between the new text suggested by the Special Rapporteur and the views put forward by certain members at the previous meeting regarding the provisions of the United Nations Charter. However, some adjustment was required to make the wording consistent with the Charter.

12. Clearly, something must be done to elucidate the precise meaning of the expression "in time of crisis". A coastal State should only be entitled to prohibit the passage of warships when that was necessary in the interests of legitimate defence. It was true that warships always constituted a potential danger. However, their right of passage should be assured, provided it was innocent.

13. Mr. KRYLOV observed that there was a considerable measure of agreement on the very important issue before the Commission. Gidel had clearly stated that there was no right of passage for warships, but only a concession on the part of coastal States. And Root had held that, whereas merchant vessels had a right of passage, warships required prior authorization because "they may threaten".

14. Referring to the Special Rapporteur's explanation of what he had had in mind when using the words "or in times of crisis", he suggested that those words be deleted, because the Commission should concern itself with times of peace.

15. Once the question of principle had been decided, the matter should be referred to the Drafting Committee, which should also give careful thought to the important point raised by Mr. Scelle at the previous meeting. He agreed with Mr. Zourek that the question of passage though straits used for international navigation should be studied separately.

16. Sir Gerald FITZMAURICE said that Mr. Salamanca had raised a pertinent point by referring to the connexion between a possible violation of the provisions of the United Nations Charter and the question whether a passage was innocent or not. He agreed that if a passage were inconsistent with those provisions it would not be innocent, but the point was surely covered by the opening words of the Special Rapporteur's new text reading: "Subject to observance of the provisions of articles 17-21", since article 17 already embodied a definition of innocent passage. The definition, if it were included at all, should certainly be placed in article 17. The whole law relating to the right of passage was based on the assumption that such passage was innocent, because if it were not, there was no right. Accordingly, it seemed unnecessary to provide in detail for those cases when passage was forbidden, because, for the most part, they related to passage which was not innocent.

17. The introductory words of the new text should therefore allay the concern expressed by certain members. Article 20, paragraph 2, already provided for the temporary suspension of the right of innocent passage on grounds of public order and security. Hence there was no reason to reintroduce a similar provision in article 26. The Special Rapporteur's new text required pruning. If the introductory words he had quoted were retained, it was unnecessary to enumerate at the end of paragraph 1 the cases in which previous authorization and notification might be required; only if those words were deleted would the necessary safeguards have to be specified.

18. He was strongly of the opinion that in the present instance it would be most unwise for the Commission to go beyond the strict limits of the law as it stood. Admittedly, the existence of a right of innocent passage for warships had always been the subject of controversy. Oppenheim, who could not be accused of favouring the interests of a particular group of States against another, had summarized the position very fairly in the following passage:

> "But a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized. Although many writers assert the existence of such a right, many others emphatically deny it. As a rule, however, in practice no State actually opposes in times of peace the passage of foreign men-of-war and other public vessels through its maritime belt. If may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace..."[4]

19. In practice, the right of passage of warships was recognized, provided it was inoffensive. Warships had to move about the high seas, and there was no reason why they should be forced to follow devious courses in order to avoid traversing the territorial sea of a State. The law as it stood at present was much the same as it had been in 1930, when the Conference for the Codification of International Law had adopted the following provision:

> "As a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea and will nog require a previous authorization or notification.
>
> "The coastal State has the right to regulate the conditions of such passage.
>
> "Submarines shall navigate on the surface."[5]

[4] *International Law*, 7th edition, para. 188, p. 388.

20. In his opinion, if any change had occurred since 1930 it was in a direction which further emphasized the need to recognize the right of passage for warships, because of the tendency of some countries to seek greatly to extend the limits of their territorial sea. In the case of States claiming a limit of 200 miles and prohibiting the right of passage, or making it subject to previous authorization, it would be quite unrealistic to suppose that the vessels of maritime States would refrain from traversing such a belt because they had no permission to do so, and it was inconceivable that a prohibition of that kind could be enforced in what was clearly the open sea. The present trend to claim an extensive territorial sea should have as its concomitant more liberal conditions governing the right of passage.

21. The changes brought about by the adoption of the United Nations Charter, to which Mr. Scelle had referred, had little bearing on the issue. The Secretary to the Commission had pertinently raised the question of who was to decide whether a passage could be forbidden on the ground that it would involve violation of the Charter, if there had been no relevant decision by the Security Council. Some might argue in favour of conferring such an abstract right on coastal States because that would tend to prevent violations of the Charter. But views might differ on a given situation, and the granting of such a right could mean that the coastal State would have power to forbid a passage which other States might hold to be in the interests of the purposes of the Charter. It would be both dangerous and potentially controversial to leave it to the coastal State to decide such issues. There would therefore be grave disadvantages in referring in article 26 to passages contrary to the provisions of the Charter. The point was adequately covered by the requirement that passage must be innocent. The case of a passage which was manifestly not innocent was a totally different one, because then there could be no right of passage.

22. Mr. SANDSTRÖM agreed with Mr. Zourek about the need for defining more precisely the right of innocent passage of warships and suggested that the article be replaced by a provision along the following lines:

23. A first paragraph would set out the general principle recognized in the judgment delivered by the International Court of Justice in the Corfu Channel Case of 9 April 1949,[6] namely, that in time of peace States had a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorization of the coastal State, provided that such passage was innocent; unless otherwise prescribed in an international convention, no coastal State enjoyed the right to prohibit such passage.

24. A second paragraph applicable to the territorial sea, as distinct from straits used for international navigation, would specify the right of the coastal State to prescribe conditions for the passage of warships.

25. A formula along those lines would draw a clear distinction between straits used for international navigation between two parts of the high seas, where the right of passage had to be safeguarded very strictly, and the territorial sea in general, where the coastal State had the right to regulate conditions of passage for foreign warships. It would ensure to warships of States other than the coastal State all the rights they could legitimately claim. It would acknowledge also to the coastal State all that it could legitimately claim. It would acknowledge also to the coastal State all that it could reasonably claim in the way of control over the passage of foreign warships.

26. Of the various arguments put forward by Sir Gerald Fitzmaurice, he had been strongly impressed only by that which referred to the extensive claims being made by certain States regarding the breadth of their territorial sea. Such claims were however quite unacceptable, and the Commission should in no circumstances take them into consideration in its discussions; in his opinion, they should be ignored.

27. He agreed that the whole matter should be referred to the Drafting Committee.

28. The CHAIRMAN said that more than a matter of drafting was involved. The Commission had to take a decision on the question of principle, namely, the vital issue of whether the coastal State had the right to forbid passage.

29. In practice, there was usually little or no difficulty. As Sir Gerald Fitzmaurice had pointed out, it was a matter of common usage to allow—except in certain exceptional circumstances—the passage of foreign warships through the territorial sea.

30. But the Commission had to decide whether it would instruct the Drafting Committee to lay down the coastal State's privilege to interfere with the passage of foreign warships as a right, or as a mere faculty to be exercised in certain extreme cases.

31. He recalled that the 1930 Codification Conference —in the work of which he had participated—had found considerable difficulty in drafting its article 12, which corresponded to article 26 of the Commission's provisional articles. In English, the first paragraph of article 12 read: "As a general rule a coastal State will not forbid..." That wording suggested that the Conference merely made a recommendation to States not to forbid the passage of foreign warships through their territorial sea in the majority of cases. Had it intended to deny to the coastal State the right to forbid such passage, the paragraph would have read: "The coastal State has no right to forbid..."

32. In other words, as a matter of principle, the coastal State had the right to forbid the passage of foreign warships through its territorial sea, although it was recommended that that right be exercised sparingly.

[5] *Acts of the Conference for the Codification of International Law*, League of Nations publication, *V. Legal, 1930.V.14* (document C.351.M.145.1930.V), p. 130.

[6] *I.C.J. Reports 1949*, p. 28.

33. Mr. SCELLE said that the coastal State did not simply have the right to forbid the passage of foreign warships through its territorial sea; it might well have the duty to do so in certain circumstances.

34. The coastal State exercised sovereignty over the territorial sea, but that sovereignty was not absolute, being to some extent conditioned by higher principles of international law. Before the adoption of the United Nations Charter, aggressive action by warships of one State against another had not been forbidden by international law; in those circumstances, it might have been possible to assert the right of passage of warships through the territorial sea when they needed to do so to avoid lengthening their journey unduly, whatever the purpose of that journey might have been. But the adoption of the Charter had materially changed international law. Article 2, paragraph 4 of the Charter prescribed, as a rule of international law, the prohibition in international relations of the use of force, or the threat of force, against the territorial integrity or political independence of any State or in any manner inconsistent with the purposes of the United Nations. Some reference to that important change in international law must be embodied in the article.

35. In the new form proposed by the Special Rapporteur the article emphasized the right of the coastal State to protect itself. But in addition to that inherent right, which was recognized in Article 51 of the Charter, the coastal State had a duty under Article 2, paragraph 4 of the Charter to forbid the passage of any foreign warship suspected of being on an aggressive expedition against any State other than the coastal State itself. Should the latter fail in its duty, it would become an accomplice in the crime of aggression.

36. Sir Gerald Fitzmaurice had certainly drawn attention to the fact that the passage referred to in the article was described as "innocent passage", and aggressive activities and threats of force inconsistent with the purposes of the Charter were clearly not cases of innocent passage. But it was nonetheless essential to specify that any passage inconsistent with article 2, paragraph 4, of the Charter placed the coastal State under an obligation —and did not merely give it the right—to stop such passage.

37. Article 26 as framed by the Special Rapporteur was concerned only with the interests of navigation, and with those of the coastal State. It made no reference to the loftier interests of universal peace and respect for international law.

38. The CHAIRMAN invited the Commission to vote first on the issue of principle.

39. That issue reduced itself to a choice between two views. The first was Sir Gerald Fitzmaurice's view that, save in exceptional cases, the coastal State had no right to forbid the passage of foreign warships through its territorial sea.

40. The second was Mr. Zourek's view that the coastal State had the right to forbid the passage of foreign warships through its territorial sea.

41. Mr. SALAMANCA thought that there was no fundamental disagreement between Sir Gerald Fitzmaurice and Mr. Scelle; the difference was rather one of emphasis. Both were agreed that the right of passage of foreign warships through the territorial sea of a State could only be denied in exceptional cases. The coastal State's inherent right of self-defence must be exercised within the framework of the United Nations Charter, and not unilaterally. If the coastal State suspected the intentions of the foreign warship it would certainly have the right to control its passage.

42. The CHAIRMAN pointed out that the two views between which he had asked the Commission to choose were those of Sir Gerald Fitzmaurice and Mr. Zourek.

43. Sir Gerald FITZMAURICE said that the question to be put to the Commission should be that of whether the coastal State had the right to prevent innocent passage of foreign warships through its territorial sea. All members of the Commission were agreed that where passage was not innocent the coastal State was entitled to prevent it.

44. Mr. KRYLOV said that it was impossible to put the issue to the Commission in the form suggested by Sir Gerald Fitzmaurice: where passage was permissible, it must be innocent; where the coastal State could forbid it, it could not be. Sir Gerald's proposal was begging the question.

45. The question was whether, as a matter of principle, the coastal State had the right to forbid the passage of foreign warships through its territorial sea.

46. The CHAIRMAN said that, as he saw it, the Commission was being asked to decide whether the coastal State could in principle forbid the passage—even innocent—of foreign warships through its territorial sea. It might well happen that a coastal State would have security reasons for such interference, without being directly threatened by the warships concerned; the threat to the coastal State might come from some other quarter, yet constitute a valid security reason for interfering with the movements of foreign ships, however innocent.

47. Mr. AMADO said that there could be no doubt that, in the exercise of its full sovereign rights, the coastal State was free to do anything it pleased in its territorial sea.

48. Mr. SCELLE denied that the coastal State's sovereign rights over the territorial sea were absolute. It could forbid passage, or restrict it, only in cases sanctioned by international law.

49. There was another important point, namely, the fact that should the coastal State err in the exercise of its rights and duties with regard to the passage of foreign warships through its territorial sea, it would be liable for damages. The coastal State certainly had the right to forbid the passage of foreign ships in certain

circumstances, but should it do so in a case where passage would have been innocent, financial responsibility would ensue.

50. So far as he could see, the only difference between Sir Gerald Fitzmaurice and himself was that in his (Mr. Scelle's) opinion any violation of the United Nations Charter would deprive passage of any claim to innocence.

51. Sir Gerald FITZMAURICE said that it would serve no useful purpose to put the question of principle to the Commission in the form suggested by the Chairman. No member of the Commission doubted that there were some exceptional cases in which the right to forbid passage through the territorial sea existed; the problem was that of defining those cases.

52. Mr. ZOUREK drew attention to the fact that the view attributed to him by the Chairman had not been exclusively his own: it was shared by several other members of the Commission, including Mr. Sandström. The question before the Commission was whether the principle of the article should be the general right of a coastal State to forbid passage, subject to innocent passage being respected, or whether the principle of innocent passage should be asserted as the general rule, the cases where interference was allowed constituting exceptions thereto.

53. At the invitation of the CHAIRMAN, Mr. ZOUREK suggested the following wording for the question on which the Commission should be asked to vote: Does the coastal State enjoy, in virtue of its sovereignty over the territorial sea, the general right to forbid the passage of foreign warships through its territorial sea — in other words, the right to make such passage subject to previous authorization or notification?

54. The CHAIRMAN invited the Commission to decide whether the coastal State could, in law and as a matter of principle, forbid the passage of foreign warships through its territorial sea. If the Commission accepted that principle, it would do so on the clear understanding that the right in question must be construed in the light of international usage and standing practice concerning its exercise. Once the principle had been adopted, the Drafting Committee would have to elucidate in its text the international usage concerned.

The principle was approved by 6 votes to 3, with 4 abstentions.

55. Mr. EDMONDS explained that he had abstained because he could not see how the Commission could take a vote on the question as worded by the Chairman. All members agreed that in certain cases the coastal State had the right to interfere with the passage of foreign warships through its territorial sea. The problem was how to formulate the cases in which such right of interference existed.

56. Sir Gerald FITZMAURICE said that he had voted against the principle because—perhaps unintentionally—it held the implication that, in any and in all circumstances, the coastal State had the right to prevent even the innocent passage of foreign warships through its territorial sea. Had the question put to the Commission been that of determining whether there were some circumstances in which interference with the right of passage was permissible, an affirmative answer would have been acceptable.

57. Mr. AMADO said that he had voted in favour of the principle because any refusal to acknowledge the coastal State's right in the matter would have been tantamount to a denial of the whole concept of the territorial sea.

58. Mr. KRYLOV said he had voted in favour of the coastal State's right in principle to interfere with passage in general, not with innocent passage. The issue on which the Commission had just taken the vote involved nothing less than the right of a coastal State to exercise its sovereignty over its territorial sea.

The meeting rose at 1.15 p.m.

308th MEETING

Thursday, 9 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Date and place of the Commission's eighth session (item 8 of the agenda)

1. The CHAIRMAN called on the Secretary to the Commission for his observations.

2. Mr. LIANG (Secretary to the Commission) said that, in accordance with its usual practice, the Commission, at a private meeting held the previous day, had discussed, and unanimously decided the time and place of its eighth session; it remained for it to place that decision formally on record. He would then communicate it to the Secretary-General and request his views.

3. The CHAIRMAN announced that the Commission had decided to hold its next session in Geneva, for a period of ten weeks, beginning on 23 April 1956.

4. The Commission required adequate time to complete its final reports on the régime of the high seas, the regime of the territorial sea and related problems, to all of which the General Assembly attached great importance.

5. Mr. GARCÍA AMADOR said that he intended at the next meeting[1] to propose that article 12 of the Commission's Statute be amended to provide that the Commission should sit at Geneva, instead of at United Nations Headquarters, with the right to hold meetings at other places if it so decided. He recalled that on several occasions difficulty had been encountered in securing the General Assembly's approval to the holding of sessions in Geneva, a city which had proved very well suited to the Commission's work. The purpose of his amendment to the Statutes was to avert such difficulty in the future.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*resumed from the 307th meeting*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*resumed from the 307th meeting*)

Article 26 [25]: Passage
(resumed from the 307th meeting)

6. Mr. SALAMANCA explained that he had voted against the proposal not because he was opposed to the principle, but because he was opposed to the implications of the form in which it was couched.

7. In voting in favour of recognizing in principle the right of the coastal State to interfere with the passage of warships through its territorial sea, the Commission had asserted a truism; no one doubted the coastal State's inherent right of self-protection. But since the Commission was legislating for peacetime it was not permissible to suggest that the coastal State could decide unilaterally the existence of a state of crisis that justified interference with the movements of foreign warships. Automatic intervention by the coastal State could only be justified where foreign warships were acting in violation of the United Nations Charter.

8. Faris Bey el-KHOURI explained that he had voted against the proposal because it drew no distinction either between innocent passage and passage in general, or between peacetime and wartime.

9. In his opinion, all ships engaged in warfare, that was, warships of a belligerent State, could be interfered with by a coastal State in the defence of its neutrality. A belligerent warship could not claim the right of innocent passage, even though the coastal State were completely dissociated from the war in which the warship was engaged.

10. He drew the attention of the Drafting Committee to the desirability of incorporating in article 26 some distinction between belligerent and non-belligerent warships.

11. Mr. HSU said that he abstained for the same reasons as had been given by Mr. Edmonds at the previous meeting.

12. The CHAIRMAN explained he had abstained because he had felt that he ought to do so in his position as Chairman.

13. Mr. FRANÇOIS (Special Rapporteur) said he assumed that article 26 would now be referred to the Drafting Committee.

14. Mr. ZOUREK said that the Commission had first to discuss the principle involved in paragraph 4, which laid down that there should be no interference with the passage of warships through straits used for international navigation between two parts of the high seas. The Special Rapporteur had, in that provision, adopted a geographical criterion about which he (Mr. Zourek) had already expressed doubts at the sixth session. That criterion, which had been applied by the majority opinion in the decision rendered by the International Court of Justice in the Corfu Channel Case,[2] had been criticized by many leading specialists. Among others, Professor Bruël, the author of a standard work on international straits,[3] in a recent article published in *Mélanges en l'honneur du Professeur Laun* had emphasized that an international strait was not characterized merely by its geographical position, but rather by the importance of the international traffic using it.

15. It was apparent that paragraph 4 was far too broad, in that it treated identically all straits used for navigation between two parts of the high seas. But there were really three categories of straits: straits which were the subject of international regulation; straits which, although not covered by international conventions, were important to international navigation; and straits which were not used for international navigation.

16. It would appear to suggest that, in certain cases, a strait between an island and the coast, or one through an archipelago, would be considered as an international

[1] The proposal was made at the 311th meeting.

[2] *I.C.J. Reports 1949*, p. 28.

[3] E. Bruël, *International Straits – A treatise on international law* (Copenhagen, 1947).

strait, with all the consequences that would entail in the way of limitation of the sovereign rights of the coastal State.

17. It was essential to keep a proper balance between the interests of international navigation and the sovereign rights of the coastal State. It would be undesirable to impose limitations upon the sovereignty of the coastal State which were not justified by the requirements of international navigation.

18. He suggested that the Commission should simply state in paragraph 4 that there should be no interference with the passage of warships through international straits. An explanation of what was meant by the term "international straits" should be given in the comment.

19. Mr. KRYLOV said that in the matter of straits three separate interests were involved: that of the State which guarded the straits, for example, Turkey; those of the coastal States of a closed or semi-closed sea to which access was given by the straits; and the "oceanic interests" of the great maritime powers, for example, the United Kingdom and the United States of America.

20. The interplay of those various interests influenced the regulation of the right of passage through straits, and made it difficult to draw up a general definition of an international strait. A number of international straits were covered by special conventions, but each such convention provided for a different régime.

21. He advised the Commission to exercise the utmost prudence in formulating a principle on which there were differences of opinion of the kind he had described. He recalled that he had expressed a dissenting opinion[4] as a judge of the International Court of Justice when the Corfu Channel decision had been rendered.

22. Mr. FRANÇOIS (Special Rapporteur) said that Mr. Zourek's proposed change to paragraph 4 was no answer to the problem. It would simply shift the responsibility for solving it on to the drafting committee, which would have to draft a definition of the term "international straits" for inclusion in the comment. Clearly, it was for the Commission and not the Drafting Committee to decide to which straits the provision embodied in paragraph 4 should apply.

23. Opinions differed about the right of passage of warships through straits. A fairly widely accepted one was that that right must be respected in the case of straits necessary for international navigation between two parts of the high seas. The International Court of Justice had gone farther, and had adopted the opinion that it was sufficient for straits to be used for such international navigation to assure the right of passage of warships. In its judgement of 9 April 1949 in the Corfu Channel case, the Court had described that opinion as "generally recognized and in accordance with international custom".[5]

24. Although he himself was inclined to favour the view which restricted the right of passage of warships to straits that were actually necessary for international navigation between two parts of the high seas, he had drafted the provision along the lines of the Corfu Channel decision because it was desirable that the Commission's draft articles should agree with that ruling, in view of the very clear terms in which the Court had laid down the international law on the subject.

25. Mr. SCELLE said that, in addition to the three sets of interests mentioned by Mr. Krylov, there was a fourth set, namely, the higher interests of humanity and of the maintenance of peace.

26. Where a State had reason to suspect that foreign warships passing through a strait were engaged in the preparation of an act of aggression, or even in a threat of force in violation of the terms of the United Nations Charter, it must have the right—indeed, it was a duty—to refuse passage, even though the straits joined two parts of the high seas. The only exception that could be allowed to that rule was the case where the straits were indispensable to international navigation between two parts of the high seas.

27. Sir Gerald FITZMAURICE said that paragraph 4 did not give an absolute right of passage to warships through straits merely because those straits connected two parts of the high seas. It was explicitly provided that they must be used for international navigation between two parts of the high seas. That wording was sufficiently strict, and it was neither desirable nor practicable to try to change it. It had been suggested that the term "necessary for international navigation" be used, but that at once raised the issue of who was to be the judge of such necessity. Neither was it feasible to speak of "straits regularly used for international navigation", because it might easily happen that certain straits which were only occasionally used by maritime traffic none the less constituted the natural passage from one part of the high seas to another. Finally, it had been suggested that the term "indispensable" be employed. But that term, besides being open to differences of interpretation, would place an altogether too stringent restriction on the right of passage. There were straits which formed the natural channel between two parts of the high seas without actually being indispensable to international navigation; and there was no valid reason why shipping should be compelled to make a long detour because right of passage was denied. In the interests of freedom of navigation, it was undesirable to subordinate that right to vexatious conditions.

28. The wording of paragraph 4 was quite sufficient to safeguard the legitimate interests of the coastal State.

29. Mr. SCELLE said that he too was an advocate of freedom of navigation, but the question under discussion concerned warships rather than merchant ships. He fully agreed with Sir Gerald Fitzmaurice's remarks so far as the latter were concerned, but differed from him in the case of the former. He felt that even if straits were indispensable to international navigation between two parts of the high seas, it should be possible to stop

[4] *I.C.J. Reports 1949*, pp. 68–79.

[5] *Ibid.*, p. 28.

passage through them in cases where the warships concerned were suspected of carrying out acts contrary to the provisions of the United Nations Charter. Admittedly, he had proposed that an exception be made in the interests of freedom of navigation, but it would be quite unwarrantable to go farther and allow freedom of passage—possibly with intent to commit aggression—to warships that did not absolutely need to pass through the straits in question.

30. Sir Gerald FITZMAURICE said that Mr. Scelle's proposal would place tremendous powers in the hands of the coastal State. It was suggested not merely that the coastal State might interfere with passage in defence of its own interests, but also that that State be made the sole judge whether passage was innocent within the meaning of the Charter. The latter question was properly one for the Security Council or the General Assembly of the United Nations, and not for individual States.

31. Mr. ZOUREK said that, contrary to existing international law, paragraph 4, as it stood, conferred an excessive right on a State other than the coastal State. In international law there was no uniform régime for straits. Some had been placed under an international régime by international convention, and there the passage of warships was accordingly subject to the rules laid down by the convention. Others were essential to international navigation because they served as maritime highways for international trade. Still others linked two parts of the high seas but, not being used for the main stream of international trade, were not essential to international navigation and were subject to the régime of the territorial sea pure and simple. Finally, there were straits whose waters were subject to the régime of internal waters, e.g. the Norwegian *Indreled,* or the straits between the islands of an archipelago.

32. He emphasized that article 26 related only to warships and did not affect international shipping. Seeing that under existing international law the coastal State had the right, as the Commission had expressly recognized by its vote on paragraph 1 as re-worded, to make the passage of warships through its territorial sea subject to previous authorization or notification, it would be a remarkable state of affairs if it were refused that right where the straits were subject to the régime of the territorial sea or even more so where they constituted internal waters.

33. Mr. SCELLE quoted the well-known maxim of the French sixteenth century jurist Loysel: *Qui peut empêcher et n'empêche pas, pèche.* An interesting application of that principle had quite recently been incorporated in French criminal legislation, by the enactment of a law to the effect that any person witness to the preparation of a crime who did not do everything in his power to prevent its perpetration became an accomplice therein.

34. Similarly, a coastal State which did not wish to become an accomplice in an act of aggression should have the right—indeed, the duty—to interfere with the passage through straits of foreign warships bent on aggression or a show of force. He was prepared to concede that there should be no such interference, except by decision of an international authority, where the straits concerned constituted an indispensable channel from one part of the high seas to another. But where the straits were simply useful for the purposes of navigation, there would be nothing untoward in empowering the coastal State to refuse passage on its own responsibility. The only consequence of such refusal would be to oblige the warships concerned to make a detour, which was something a coastal State might well do in order to avoid becoming involved in a possible international crime.

35. Mr. SANDSTRÖM said that the *Indreled* was acknowledged to be part of Norwegian internal waters. The Commission's draft articles, however, related to the territorial sea; reference to the *Indreled* was therefore irrelevant to paragraph 4.

36. Sir Gerald FITZMAURICE said that the Commission's draft articles were clearly described as articles on the régime of the territorial sea; internal waters were outside their scope.

37. Mr. KRYLOV pointed out that the *Indreled* was not a strait: it was a shipping lane which could only be used with the co-operation of the Norwegian authorities. There could be no doubt that it was part of Norwegian internal water, and not part of the territorial sea subject to the right of passage.

38. There had been an interesting development in his own country to which the example of the *Indreled* was relevant. Development in Arctic navigation had made it possible for ships to ply from the White Sea to the mouths of the great Siberian rivers. But such navigation was entirely dependent upon the assistance not only of pilots, but also of ice-breakers, from the Soviet Union.

39. Mr. ZOUREK formally proposed that the phrase "indispensable to international navigation" be substituted for the words "used for international navigation" in paragraph 4.

Mr. Zourek's amendment was rejected by 4 votes to 3, with 5 abstentions.

40. The CHAIRMAN suggested that, following that vote of principle in respect of straits, and the previous one relating to the coastal State's right to forbid the passage of foreign warships through its territorial sea, article 26 as a whole could be referred to the Drafting Committee, with a view to a final vote being taken upon it at a subsequent meeting.

It was so agreed.

Article 27 [26]: Non-observance of the regulations

41. Mr. FRANÇOIS (Special Rapporteur) proposed the deletion of paragraph 1. It was proposed to re-draft article 21, which dealt with the duties of foreign vessels during their passage, so as to make it apply both to merchant vessels and to warships, and that would make paragraph 1 redundant.

42. Mr. KRYLOV said that paragraph 1 was redundant in any case. Paragraph 2, by stating that warships which did not comply with the coastal State's regulations might be required to quit the territorial sea, was an adequate reference to the duties of warships during passage.

The Special Rapporteur's proposal was adopted unanimously.

Article 27 was referred to the Drafting Committee.

Article 3 [3]: Breadth of the territorial sea
(resumed from the 295th meeting)

43. The CHAIRMAN invited the Commission to resume its discussion of article 3, and drew attention to the amendment submitted by Mr. Hsu to replace the second paragraph of the Special Rapporteur's new text (A/CN.4/93) by the following words:

> "The coastal State may, however, extend the territorial sea up to a limit of 12 nautical miles from the base line."

44. Mr. FRANÇOIS (Special Rapporteur) said that as he had already made an introductory statement on article 3 at the 295th meeting (para. 44) and at the previous session, he would be brief. The Commission would remember that he had proposed a new text because it had become clear from the replies from governments that there was little possibility of reaching agreement on a fixed limit for the territorial sea. Mr. Hsu had been very sanguine in proposing a three-mile limit extensible up to twelve miles; the replies from governments certainly did not suggest that even a twelve-mile limit would command majority support. Some other solution must therefore be sought.

45. He had accordingly proposed a three-mile limit which could be extended in special cases, particularly for historical or geographical reasons; perhaps economic reasons might be added. However, if the freedom of the seas were not to be imperilled, States should not enjoy absolute liberty to extend their territorial sea, and he had therefore proposed that their claims should be subject to the approval of an international organ. In drafting that part of the text he had had in mind the type of organ, or separate chamber, provided for in article 3 of the Commission's original draft articles on fisheries.[6] The Commission might also consider an organ similar to the committee to be set up under article 28 of the convention on the Inter-Governmental Maritime Consultative Organization,[7] which had not yet come into force, not having received the requisite number of ratifications.

46. Now that the Commission had decided to make provision in the new draft articles on fisheries for the settlement of disputes by arbitration, it might wish to devise a similar system for dealing with claims concerning the breadth of the territorial sea. He would have no objection in principle, but it must be borne in mind that arbitration in the latter domain might run up against greater difficulties because a great number of States might regard their interests as being affected. That was no reason for rejecting an arbitral procedure outright, but it was nevertheless important not to overlook the difference between fisheries disputes and disputes over the breadth of the territorial sea.

47. Objections to extensions of the territorial sea would probably be based on fisheries considerations. Excessive claims were generally prompted by the desire to establish exclusive fishing rights in the territorial sea for nationals of the coastal State, which then sought to reassure other States by affirming that freedom of navigation and the right of innocent passage would be guaranteed.

48. The CHAIRMAN pointed out that the limit of the territorial sea had been fully discussed at the fourth session, and all members except those who had joined the Commission since that date had expressed their views. The position each would take was virtually known in advance, and further protracted debate was therefore unlikely to be conclusive. He accordingly appealed to speakers to confine themselves to definite proposals.

49. Mr. EDMONDS said that as he had not taken part in earlier discussions on the subject he would, despite the Chairman's admonition, venture to outline certain basic principles which lay at the heart of a difficult and vexatious subject.

50. First and foremost, it must be clearly realized that international relations made necessary the freedom of navigation and use of the high seas, for which a legal status had been established, in the best interests of all nations. It was in the general interest that the régime of the territorial sea, which was a derogation from that principle, should be limited to the utmost possible degree.

51. He had some doubts about the words "shall be" in the first paragraph of the new text proposed by the Special Rapporteur, since they implied that the three-mile limit was something new, whereas it was a fundamental principle of existing international law, which it was the function of the Commission to codify. The three-mile limit was the only one which had ever enjoyed general acceptance by a substantial number of States. That long-established acceptance seemed to have been, and continued to be, overlooked in discussions on the subject. No other limit had ever received common consent, or been claimed without giving rise to objection.

52. By opening the way to unlimited claims, and offering no criteria by which they might be judged, the proposal to provide for extensions in special cases on historical or geographical grounds would only create uncertainty and difficulty. If the claims of one State for a wider belt were admitted, he doubted whether others would be satisfied, and that would give rise to a whole series of conflicting claims which would never be reconciled and would militate against the interests of the freedom of the seas.

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[6] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

[7] United Nations, *Treaty Series*, vol. 289, p. 3.

53. There was general agreement that at least some of the individual claims for a wider limit were based on sound reasons, mainly connected with the conservation of the living resources of the sea. But they would be better dealt with in the light of special considerations, as was proposed in the new draft articles on fisheries, while maintaining the three-mile limit.

54. Mr. HSU wished to dispel the impression created by the Chairman that the question of the limit of the territorial sea had been thoroughly discussed in the past. To the best of his recollection, he and Mr. Manley O. Hudson had been the only ones to express their views when the subject had first been broached[8] and at the previous session members had, if anything, shirked discussion, with the result that the onus of commenting had been thrown on to governments, although the Commission alone was competent to pronounce on the matter. The various criteria for determining the limit of the territorial sea mentioned in the report on the sixth session had not been examined at all in plenary meeting.

55. The Special Rapporteur's new text (A/CN.4/93) was even less satisfactory than that submitted at the previous session. That was perhaps because he had not given sufficient weight to the changes that were taking place, and had ignored many facts, one of which was that approximately three-quarters of the States in the world had departed from the three-mile rule, and that the remainder adhered to it not out of conviction, but for other reasons.

56. The States which continued to uphold the three-mile rule fell into three groups: first, certain European countries, hemmed in on the north by the Scandinavian countries which maintained a four-mile rule, and in the south by the Mediterranean countries with their six-mile rule: secondly, the countries formerly under the political tutelage or economic domination of the first group; and thirdly, the United States of America. The last named could not be considered a genuine adherent of the three-mile rule, because it claimed a twelve-mile contiguous zone in which, of course, it could not exercise sovereignty, since the zone was designed for certain special purposes; but if others were added the zone would immediately become territorial sea.

57. For various reasons, most of the countries formerly within the British and Netherlands empires had not expressed their views, but the Union of South Africa had recognized that, in view of the technical advances of the past few years, the historical reasons for the three-mile rule no longer applied, and had suggested a limited extension to 5 or 6 miles. Undoubtedly, the remaining countries in that group, with possibly one exception, would in due course assert the need for extension. Indeed, Australia had already tried, under the pressure of circumstances, to exclude the Japanese from fisheries outside the three-mile limit, and the Republic of Korea had claimed jurisdiction over large areas of the sea in much the same way as El Salvador, Peru, Chile and Ecuador.

58. Of the European countries maintaining the three-mile rule, all those which were in a position to do so had commented (A/2934, Annex), and none could be said to have objected to an extension. The Netherlands was prepared to consider extending "certain particular rights of coastal States to a small area beyond the three-mile limit". The United Kingdom, of course, could not be called a genuine adherent of the three-mile rule, since it not only approved of the institution of the régime of the contiguous zones for certain purposes, but also claimed sovereignty over the continental shelf. Belgium had proposed "authorizing a State to extend the territorial sea, and so to limit the zone of the high sea, on condition that agreement has first been reached with the States interested in the fishing zones proposed to be restricted".

59. The Special Rapporteur had thus ignored the existing situation. In his second report (A/CN.4/61)[9] he had proposed a limit of twelve miles, while insisting that exclusive fishing rights could be claimed by the coastal State for its nationals only within a distance of three miles. He had then proposed that a contiguous zone be instituted for the purposes of fisheries conservation. But those proposals failed to meet either the economic or the security needs of the coastal State, and would not solve the problem of conservation in respect of deep-sea fisheries, because they limited the coastal State's right of regulation to the contiguous zone, a defect which the Commission had sought to remedy in its new draft articles on fisheries. In his new text the Special Rapporteur had not even attempted to set a limit to possible extensions, but had passed on the problem to an international organ which, even if set up, would be helpless in the absence of an established limit. If there was a body in the United Nations competent to determine the limit, it was the Commission itself. The Special Rapporteur had referred in his text to special circumstances, forgetting that the extension of the territorial sea for which he had sought to provide did not fall within that category, but was intended to meet needs that were common to all nations, namely, the security of the State and the economic welfare of the people. He had also mentioned "historical and geographical reasons" without realizing that, though some of them might be usefully invoked—as they had been by the United Kingdom Government in its comment (A/2934, Annex, No. 16)—to support the argument that the three-mile rule had once been generally accepted, none was pertinent to the question of extension in order to meet the needs of all coastal States.

60. If the Commission was to do the job properly it would have to draft a far better text, and he suggested that it should revert to the Special Rapporteur's earlier proposal that the territorial sea be open to extension to any distance within a limit of twelve miles, but without the qualification prohibiting the coastal State from regu-

[8] *Yearbook of the International Law Commission, 1952*, vol. I, 166th–169th meetings.

[9] *Yearbook of the International Law Commission, 1952*, vol. II.

lating fisheries beyond the three-mile limit, since the exclusive right over fisheries in the territorial sea was the most vital point at issue. The question was entirely different from that of fisheries in the adjacent high seas, which could be dealt with by means of international conservation measures, since there only economic interests were involved.

61. Some more drastic solution was necessary in the case of fisheries in the territorial sea because, apart from economic interests, security considerations were involved, and those sufficiently justified the claim to sovereignty by the coastal State. Subversion was more difficult to control and an infinitely greater potential source of harm than the liquor traffic, and if the latter justified the establishment of a contiguous zone, the prevention of subversion justified to an even greater degree the extension of the territorial sea to the same distance. It would be easy to imagine the views of countries in the western Pacific and east Indian Ocean which had suffered at the hands of the Japanese.

62. The twelve-mile limit was the broadest so far adopted for normal purposes, that was, excluding extensions for conservation in deep-sea fishing areas or the exploitation of the natural resources of the continental shelf. That limit might be adopted, if only because it was already upheld by some half a dozen States, including the Soviet Union. It would be unrealistic to ask those States to reduce their limit. Furthermore, such a limit was the only effective one in view of modern technical progress; indeed, the fact that it had been chosen some thirty years before by the United States of America for the contiguous zone suggested that, if anything, it might be too narrow. At all events, it certainly could not be too wide. If the Commission failed to propose a twelve-mile limit, some countries might propose an even wider one, thereby making it still more difficult to reach agreement.

63. Since the Commission had practical problems to solve, it might, instead of seeking to defend the old three-mile rule, consider how best to safeguard the security of the coastal State and protect the interests of its population. It must also seek means of safeguarding the principle of the freedom of the seas from further inroads through the extension of the territorial sea. The Commission had just decided in its draft articles on fisheries to strengthen the position of coastal States with regard to deep-sea fisheries conservation. It might yet decide to withdraw the sovereign rights over the continental shelf conferred on States in the draft articles adopted at the fifth session, and substitute for them exclusive rights of exploitation. Such wise steps might serve to check excessive claims concerning the breadth of the territorial sea. But in dealing with the normal limit based on the general need of all coastal States, he hoped that the Commission would agree that twelve miles, being realistic and reasonably effective, would have some chance of general acceptance.

64. Faris Bey el-KHOURI agreed with Mr. Hsu that the problem had not been adequately discussed in the past, and wished to take the present opportunity of contributing some new considerations to the discussion.

65. In Islamic law, running water, even that used for irrigation, was common property. Lakes, for example, could not be owned by an individual. It was therefore held that the seas were *res communis,* but that, for strictly indispensable requirements, the coastal State might lay claim to some portion of them as its territorial sea; moreover, the belt must be of a uniform breadth, because all States were equal and none could claim a privileged position in relation to another.

66. Clearly some general principle must be adopted for delimiting the breadth of the territorial sea, since it could not be left to the arbitrary action of individual States. He personally did not agree with certain authorities that the three-mile rule was in fact based on the range of shore batteries, because of the possible variations in range. But the rule did happen to correspond with the range of visibility from a point five feet above the shoreline, and he believed that that easily applicable criterion would be the most appropriate. If it were decided to extend the limit of the territorial sea to four miles, the position of the observer would have to be nine feet above the shore.

67. Mr. GARCÍA AMADOR said that at the previous session he had proposed that the Commission defer consideration of article 3 until it had dealt with the question of fisheries, because of the close interrelationship between the two problems. He had on that occasion drawn attention to the fact that in 1930 the Conference for the Codification of International Law had agreed that the principal motive for extending the territorial sea was the desire to protect the living resources of the sea against extermination through over-fishing or the use of modern equipment and techniques. Countries seeking to extend their territorial sea were not in every case claiming exclusive sovereignty beyond the traditional three-mile limit, but only special rights for purposes of conservation. That was the view of a number of experts in maritime law, including Gidel, and was further confirmed by the study in 1930 and subsequently of the different claims.

68. Thus the draft articles on fisheries might provide a basis for solving the problem, since they contained a provision recognizing the right of coastal States to institute conservation measures unilaterally. Before taking a final decision about the limit of the territorial sea, it might be wise for the Commission to obtain the views of governments on those draft articles, in order to ascertain whether the recognition of certain rights of coastal States would satisfy those governments which were claiming an extensive territorial sea. At the present moment, when conservation measures became necessary, coastal States had no other alternative but to extend their territorial sea, and consequently their sovereign rights. He would not encourage the Commission to be too optimistic, but hoped that States would respond reasonably to the draft articles on fisheries and realize that they had materially changed the situation. Perhaps they would then be led

to comply with the conditions governing the new right conferred on the coastal State. In that connexion, he drew the attention of the Commission to the fact that the claims made at the second session of the Inter-American Council of Jurists for the superjacent waters over the continental shelf to be assimilated to the status of the territorial sea, and the arguments advanced at the tenth Inter-American Conference in 1954 in favour of a 200-mile limit, had been rejected as being without sound foundation. Subsequently, certain governments, instead of claiming a considerable extension of their territorial sea, had demanded that their right to take unilateral action for conservation purposes be recognized: that was a most important development.

69. In the light of those considerations he would be unable to vote either for or against any specific limit to the territorial sea, and hoped that the vote might again be postponed.

70. Mr. SALAMANCA agreed with Mr. García Amador that it would take a considerable time to reach a decision on the limit of the territorial sea. Indeed, the subject should be left to the last, since it was clearly not ripe for codification. The replies of governments revealed the existence of various criteria, mostly connected with fisheries and the exploitation of the continental shelf. The wide divergence of views seemed to suggest four possible methods for the settlement of differences. First, an international body responsible for deciding whether special interests justified an extension beyond three miles; secondly, arbitration; thirdly, international agreements on the lines suggested by the Belgian Government (A/2934, Annex, No. 2); and lastly, some method of regulation similar to that adopted in he case of fisheries and the continental shelf. Perhaps a combination of all four methods might be possible, but it should be remembered that a uniform solution was hardly feasible owing to the diversity of local and special interests at stake.

71. Mr. EDMONDS, replying to Mr. Hsu, said that the United States of America had never made any claims inconsistent with the three-mile rule; to apply that argument to its claims concerning the contiguous zone or the continental shelf was to forget the distinction between the two latter and the territorial sea. The claims of States to a territorial sea beyond three miles, which had all been prompted by different motives, had never won general consent.

72. Mr. HSU disclaimed having charged the United States Government with a violation of international law; he had only pointed out that, in company with the United Kingdom, it had never been a genuine adherent of the three-mile rule.

73. Turning to another question, he observed that whether disputes were settled by an international body or by arbitration, some criteria for determining whether claims were justified would still have to be established by an authoritative body. In his opinion, that task could only be carried out by the Commission itself, since the General Assembly was a political body and open to bias. None of the replies from governments suggested what should be the maximum permissible limit, and the Commission could not shirk the problem if it was to conclude its work within the time-limit set by the General Assembly in resolution 899 (IX). He also urged the Commission to shoulder its responsibilities in the face of the anarchy caused by excessive claims. The draft articles on the conservation of the living resources of the sea did not solve all the problems connected with fisheries. As he had sought to explain in his previous intervention, the fishing interests involved in the territorial sea were not so much those of large undertakings, but those of the population living in the coastal area, the vital issue at stake being the livelihood of individuals. He also appealed to the Commission not to ignore the danger of subversive acts in the territorial sea, to which certain States in some areas of the world were particularly vulnerable.

74. The CHAIRMAN observed that Mr. García Amador had confirmed his original view that there was no link whatsoever between the conservation of the living resources of the sea and the limit of the territorial sea. In reply to those members who had argued that the Commission should not take a precipitate decision, he pointed out that, in accordance with the General Assembly's instructions, the work on the régime of the high seas and the régime of the territorial waters and all related problems must be completed by the end of the next session.

75. As he had already stated in the General Assembly, he did not consider it possible to arrive at a satisfactory solution to the limit of the territorial sea, in view of the very divergent views on the subject, or at any rate at a solution capable of commanding a substantial majority, which in such an important matter was essential. The Commission would also do well to bear in mind that a draft containing a single provision unpalatable to a great number of States was in danger of meeting with a very bad reception in the General Assembly. He therefore intended to propose at the proper time that the question should not be dealt with in the provisional articles under consideration.

76. Sir Gerald FITZMAURICE, in reply to Mr. Hsu, pointed out that the United Kingdom was one of the foremost champions of the three-mile rule. It neither claimed a contiguous zone, nor exercised any rights outside the three-mile limit, and had never formally recognized the claims of other States to a contiguous zone. Finally, it had never claimed a continental shelf round the United Kingdom. Admittedly, it had done so elsewhere, but without laying claim to the superjacent waters, which, like the Commission, it regarded as part of the high seas.

The meeting rose at 1.10 p.m.

309th MEETING

Friday, 10 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 3, said that in order to refute the suggestion that he was seeking to stifle discussion on the breadth of the territorial sea, he wished to point out that several meetings had been devoted to the subject at the fourth session.[1] At that session most members had expressed their views at length and Mr. Kozhevnikov's proposal that a decision be deferred had been adopted,[2] together with his own amendment that the Commission should request the Special Rapporteur to submit specific proposals at the fifth session in the light of the views expressed and the proposals made.

2. If Mr. Hsu, who was opposed to leaving it to States to find a solution, were to examine the summary records of the fourth session, he would see that he (the Chairman) had held very similar views.

3. Mr. HSU considered that the discussion at the fourth session had not been so thorough as the Chairman had suggested. It was true that the Chairman had throughout maintained a very consistent attitude, but there was a wide gulf between the belief that no agreement was possible, to that the Commission could do nothing, and the feeling that every effort should be made to reach an agreement, failing which and as a last resort, the matter should be referred to a diplomatic conference. He persisted in thinking that, at the last session at any rate, discussion had been avoided, and he therefore hoped that the Commission would now get down to the task with which it had been entrusted, and attempt to reach some conclusion.

4. Mr. AMADO shared the Chairman's view. It would be idle for the Commission to suppose that it could change rules which had grown up through custom and long practice. Codification was not feasible on such a controversial issue, and the Commission should refrain from putting forward a solution which States would not take seriously.

5. Mr. KRYLOV said that there was no agreement, either between States or in the Commission, about the breadth of the territorial sea. Nor was it true, as had been argued by several members, that the sole principle at stake was the freedom of the seas, a point which the Government of Iceland had clearly brought out in its comment (A/2934, Annex, No. 7). The other principle involved was the sovereignty of the coastal State over the territorial sea. Bearing those two principles in mind, it was possible to reach certain practical conclusions. First, each State determined the breadth of its own territorial sea. For example, the Imperial Russian Government had in 1912 established a twelve-mile limit, and that rule had been embodied in the legislation of the Soviet Union Government. Some other countries, Bulgaria, for instance, had followed suit. The Scandinavian countries claimed a breadth of four miles, and so far as the Baltic was concerned might have reason for disliking the twelve-mile rule. However, specific difficulties could be overcome by special agreement. The Mediterranean countries generally adhered to a six-mile limit.

6. In his book entitled "The Problem of Territorial Waters in International Law",[3] Mr. Nicolaev, showed that of the seventy maritime States which were already Members of the United Nations or wished to become Members, more than thirty applied a limit exceeding three miles. The Special Rapporteur's new text for article 3 seemed therefore to be the least felicitous in the whole history of the draft articles.

7. If any provision were to be inserted at all, it might read:

> "The breadth of the territorial sea shall be determined by the national legislation of each coastal State."

[1] *Yearbook of the International Law Commission, 1952,* vol. I, 165th-169th meetings.

[2] *Ibid.*, 169th meeting, paras. 15, 17, 26-27.

[3] A. N. Nicolaev, *Problema territorialnykh bod b mejdunarodnom prave* (Moscow, gosudarstvennoe izdatelstvo yuridicheskoy literatury. 1954).

8. The establishment of an international organ within the United Nations, as proposed by the Special Rapporteur, might be envisaged, but the Commission should duly consider whether it was desirable to expand the already large staff of the United Nations any further. If differences could not be settled by diplomatic means, they might be submitted to conciliation or arbitration.

9. He had put forward those considerations, not in any spirit of pessimism, but because he wished the Commission to make progress. He could not agree with the United Kingdom Government's view that the present tendency to claim extended, and in many cases very extensive, limits for the territorial sea was retrograde, and had been greatly surprised by its continued adherence to the three-mile rule.

10. Mr. SANDSTRÖM considered that even if the chances of reaching final agreement were slight, the discussion should be continued, particularly as replies had been received from governments and as the Special Rapporteur had made a most commendable effort to carry out the ungrateful task of reconciling what appeared to be conflicting points of view. However, even his new text was open to criticism. First, it would entitle States to extend their territorial sea, subject to the approval of an international organ, and that was contrary to the essential function of law to create stability in human relations. It might lead to the unfortunate result of humble fishermen encountering in their traditional fishing grounds a vessel of the coastal State which would prohibit further fishing, possibly confiscate their catch and even fine them. Secondly, it would be very difficult to induce States claiming an extensive territorial sea, or affirming that they already possessed rights over such a sea, to renounce their pretensions and submit them for examination by an international administrative authority. Thirdly, it would not be easy to establish the criteria by which an international authority could render its decisions. There could be some uncertainty about historical reasons, and it would be still harder to determine what constituted geographical reasons.

11. Despite the difficulty of the subject, he still considered that the Commission should state what the law was, if any existed. He personally believed that certain rules had been established which should be upheld. In the first place, it would be natural to take the three-mile rule as a starting point, since it had commanded the greatest measure of agreement. On the other hand, the four-mile rule proclaimed by the Scandinavian countries had also long been recognized, and had not been questioned by the International Court of Justice in the Fisheries Case.[4] The situation concerning countries claiming a six-mile limit might be similar.

12. Thus, if certain rights did exist with regard to the breadth of the territorial sea, they should be safeguarded, and he accordingly proposed that article 3 read as follows:

> "The breadth of the territorial sea is three nautical miles measures from the base line of the territorial sea, or such other distance from the same line to which a State is entitled to extend its territorial sea on account of continuous and ancient usage."

13. He was unable to accept Mr. Krylov's text, which would legalize anarchy, but could support any reasonable limit, provided that some definiton of what was reasonable could be found.

14. Mr. AMADO submitted for the Commission's consideration a proposal he had just put forward at the fourth session.[5] It read:

(1.) The Commission recognizes that international practice is not uniform as regards limitation of the territorial sea to three miles.

2. The Commission considers that international practice does not authorize the extension of the territorial sea beyond twelve miles.

(3.) In view of the lack of uniformity in international practice, the Commission has not been able to propose a general formula for recommendation.

15. Mr. ZOUREK considered that the Special Rapporteur's new text was unrealistic both in respect of the proposed limit and in respect of the international organ to be set up within the framework of the United Nations. It was regrettable that his views should have developed in a direction which was hardly conducive to any considerable consensus of opinion, let alone general agreement. The Special Rapporteur had first proposed that States should themselves determine the breadth of their territorial sea up to a maximum of six miles. He had then extended that maximum to twelve miles, but had now reverted to the three-mile rule. If a solution was to be found, the Commission must take as its starting point existing international law and prevailing conditions. Accordingly, the legend that the three-mile rule had enjoyed general acceptance must be exploded. In reality, the breadth of the territorial sea had originally been determined by the rule that *terrae potestas finitur ubi finitur armorum vis*. Despite technical progress, the three-mile limit had been upheld by certain authorities, although the rule had really been based on the *de facto* jurisdiction of the coastal State. Some States, however, such as the Scandinavian countries and Russia, had never accepted the three-mile rule, and in 1760 Spain had adopted a six-mile limit. Even those States professing to uphold the three-mile rule were not always consistent, and Seward, a Secretary of State of the United States of America, had proposed an extension to five miles for normal purposes and to ten miles for belligerent vessels. Yet Mr. Edmonds had at the previous meeting affirmed that his country had never claimed more than three miles. It was interesting to note that the Institute of International Law had proposed a six-mile limit at the end of the last century, and that the same proposal by the Netherlands Government at

[4] *I.C.J. Reports 1951*, p. 116.

[5] *Yearbook of the International Law Commission, 1952*, vol. I, 168th meeting, para. 45.

a later date had met with firm opposition on the part of the United Kingdom Government.

16. Thus, there could be no doubt whatsoever that the three-mile rule did not exist in international law, and could not provide a basis for agreement.

17. The Commission must also reject the contention that the freedom of the seas was the sole principle at stake, and that the exercise of jurisdiction by the coastal State in the territorial sea was an exception to that rule, since that contention was historically inexact. The two principles were of equal importance, and must be reconciled by means of some reasonable compromise acceptable to all.

18. He did not consider that there was any absolute necessity for establishing a uniform limit, because the breadth of the territorial sea was determined by several factors, such as the configuration of the coast, economic interests and considerations of security. The present practice of States was the result of a long process of evolution, and it would be illusory to suppose that they would be prepared to abandon claims which had already become part of their municipal law, though it was of course necessary to find some means of preventing States from claiming excessive extensions. He believed that the best approach would be, on the one hand, to recognize that coastal States had a right to determine the breadth of their territorial sea in accordance with their requirements and the configuration of the coast, and, on the other hand to seek a means of fixing a maximum limit. Such an approach had in fact been advocated by several governments, including those of Sweden and India (A/2934, Annex, Nos. 8 and 13), the latter proposing a maximum limit of twelve miles, and he suggested that the Commission should consider what the prospects were of reaching agreement on those lines.

19. Mr. SCELLE said that the Commission had entered the domain of pure speculation and the philosophy of law. He would be bold enough to state at the outset that in his opinion the concept of the territorial sea was a pure abstraction, which, as A. de Lapradelle[6] had demonstrated, was bound to meet with failure, because it did not correspond to reality.

20. Mr. Krylov's proposal would lead to anarchy or, if Mr. Krylov preferred the lesser, a state of feudalism; to allow each State to determine its own territorial sea was not codification, which called for the establishment of common rules. In that connexion, the judgement of the Permanent Court of International Justice in the case concerning the factory at Chorzów was most instructive, because the Court had held that, from the point of view of international law, a rule of municipal law constituted nothing more than a simple fact and, unless it had come to form part of an international rule, had no legal validity.

21. He did not believe that it would be possible to devise a uniform rule for fixing the limit, because requirements varied; but international rules already existed for determining the breadth of the territorial sea of each State. At that point his views approached those of the Special Rapporteur, who had proposed a minimum limit of three miles to meet the essential requirements of States, coupled with the establishment of an international authority within the framework of the United Nations to approve individual claims. Such a proposal had considerable appeal, merited careful study and, despite the difficulties which the Commission had encountered in considering the part to be played by experts in the settlement of fisheries disputes, he hoped it would be adopted. The system proposed was very similar to that adopted in the draft articles on fisheries, since the international organ would clearly have to have recourse to experts in ruling on the validity of claims. The growth of a corpus of case law had already begun with the International Court's finding in the Fisheries Case[7] that the Norwegian claim was well-founded. It was important to note that the Court had not affirmed that the claim was in conformity with international law, but had stated that it was not at variance with it. Thus, the foundations had been laid of an excellent system whereby each State might claim a particular limit which would then have to be approved by an international judicial body: in fact, what he had proposed in the case of the draft articles on fisheries. Personally, he would prefer that international authority to be either the International Court of Justice or an arbitral tribunal.

22. Mr. AMADO observed that States, such as France, the United Kingdom and the United States of America, with large fishing interests and highly equipped fishing fleets, always claimed a narrow limit for the territorial sea, because they wished to safeguard the freedom of their fishermen to operate near the coasts of other States. That point of view was perfectly admissible, because it was one of the primary duties of any State to foster the prosperity of its people. Mr. Scelle's arguments were therefore easily comprehensible; but in such matters it was perhaps hardly necessary to address the gallery. Any lawyer worth his salt must be a realist.

23. Mr. SCELLE stated in reply to Mr. Amado that, when in the realm of international law, he (Mr. Scelle) was not influenced in the slightest degree by the political interests of his country.

24. Sir Gerald FITZMAURICE said that, though the subject had been discussed at the fourth session, five of the seven new members elected since were now present and ought to express their views on so important a question. Mr. García Amador's suggestion that the Commission should defer its final decision until it had received the comments of governments on the draft articles on fisheries deserved examination, because claims to an excessive belt of territorial sea were undoubtedly largely inspired by consideration of fisheries, and if the draft articles gave reasonable satisfaction con-

[6] A. de Lapradelle, *La Mer* (Paris, 1934).

[7] *I.C.J. Reports 1951*, p. 116.

cerning the safeguarding of special interests, States might modify their attitude considerably.

25. However, the Commission would eventually have to pronounce itself on the problem of the breadth of the territorial sea, and could not present the General Assembly with a purely negative reply. In view of the wide differences of opinion, it could state that its primary duty was to codify *lex lata* and that the practice of States in respect of the breadth of the territorial sea was so divergent that it was difficult to lay down a rule—if indeed one existed—and that it was unable to make a definite proposal *de lege ferenda* because of the technical and political problems involved. It could then propose a diplomatic conference. He was not necessarily advocating that procedure, which followed the lines of that suggested by the Belgian Government (A/2934, Annex, No. 2), but wished to indicate that it would provide a possible method of approach if a strong majority did not emerge in favour of any particular solution at the eighth session.[8]

26. Even in the event of the Commission's achieving a purely negative result, it could decide on certain general propositions which might serve to clarify and introduce some order into the situation. First, the breadth of the territorial sea was governed by international law, and was not a matter which each State was free to decide entirely on its own. Secondly, the Commission should lay down that in principle uniformity was desirable, though it was subject to special considerations based on historic usage or geographical considerations. The strong practical argument in favour of uniformity was that States were equal, and that every claim to a territorial sea beyond the normal limit was a claim to previlege because it derogated from the principle that the use of the high seas was open to all mankind. Such claims must therefore be substantiated by cogent special considerations. Thirdly, the Commission must stipulate that, whatever the proper extent of the territorial sea, there must be some restraint on the claims of States, thus laying down a principle of relative restriction.

27. Turning to the first of those three principles, he stressed that the territorial sea entailed restriction of the areas which were common to the use of all nations and in which all States had equal rights. There could be no doubt that the extent of such restriction was governed by international law: a State could not appropriate at will the high seas, which were an area common to all nations.

28. In its judgement of 18 December 1951 in the Fisheries Case, the International Court of Justice had stated:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends on international law."[9]

The Anglo-Norwegian fisheries dispute had been concerned with two main issues: first, whether the limits of territorial waters could be measured from straight base lines instead of from the low-water mark following all the sinuosities of the coast; and secondly, whether Norway had the historic right, by long continued usage, to delimit its territorial sea in a certain manner. The mere fact that the International Court of Justice had had to go into those two issues and render judgement upon them constituted irrefutable proof that international law provided for a limitation of the breadth of the territorial sea. Clearly, if as had been suggested by certain members of the Commission—the coastal State had the right to define at will its territorial waters, the discussion on those two issues would have been completely irrelevant. Apart from any question of internal waters, there would have been no point in giving a ruling as to straight base lines which "rounded off" the outline of the territorial sea, had Norway been completely free to extend its territorial sea to any limit it desired. For fishing purposes it could have got all the waters it wanted without bothering about the base-line problem.

29. International law undoubtedly prescribed some maximum limit to the breadth of the territorial sea; to hold the contrary opinion would be tantamount to suggesting that international law did not govern the breadth of the territorial sea but that it was a matter for the municipal law of coastal States.

30. He recalled that Mr. Lauterpacht, in the course of the discussions at the fourth session, had emphasized that there was no practical difference between the two following propositions: one, that States were free to fix at their discretion the breadth of the territorial sea; and two, that under international law there was no limit to the breadth of the territorial sea.[10]

31. As to the maximum breadth which international law allowed for the territorial sea, there could be only one answer in the light of history and of constant practice: the extent of the breadth of the territorial sea was equivalent to one marine league. He purposely referred to a marine league, and not to three miles, because the Scandinavian four-mile limit proceeded on fundamentally the same idea, but was based on the different concept of the marine league held by the Scandinavian countries.

32. Two recent articles by Mr. Wyndham Walker[11] and Mr. H. S. R. Kent,[12] based on a great deal of

[8] See *Yearbook of the International Law Commission, 1956*, vol. I, 363rd meeting.

[9] *I.C.J. Reports 1951*, p. 132.

[10] *Yearbook of the International Law Commission, 1952*, vol. I, 168th meeting, para. 9.

[11] Wyndham Walker, "Territorial Waters: the Cannon Shot Rule", *British Year Book of International Law*, vol. 22 (1945) pp. 210 *et seq.*

[12] H. S. R. Kent, "The Historical Origins of the Three-Mile Limit", *American Journal of International Law*, vol. 48 (1954), pp. 537 *et seq.*

historical research, had shown quite conclusively that the origin of the three-mile rule of western Europe —the four-mile rule of Scandinavia—had only an incidental connexion with the reach of cannon-shot, and were both fundamentally based on the concept of the marine league.

33. There was no solid basis for any of the distances, other than the marine league, which were now being claimed by various States: the situation of those States was in most cases no different from that of those which abided by the three- or four-mile rule. There was no special justification, for instance, for the claim made by some of the Mediterranean and other countries to a six-mile limit.

34. There were, on the other hand, very solid grounds for considering the distance of one marine league as representing the rule in international law. The fact that a number of States did not apply it in no way detracted from its validity. The actions of those States merely represented breaches of international law, unless they were based on historical or other valid grounds. It was not accurate to suggest that a legal rule ceased to exist because it was occasionally, or even often, broken.

35. The marine league had a strong historical foundation; it had been almost universally observed for well over a century. Until about 1930, it had scarcely been challenged. It was true that the Institute of International Law had at its session in 1894 proposed that the rule be changed to six miles, but the same body had, as late as its session at Stockholm in 1928, endorsed the three-mile rule, which the International Law Association had also endorsed at its Conference in 1926.

36. At the Conference on the Codification of International Law of 1930, only two out of the twenty-one governments which replied to the questionnaire had claimed more than three—or four—miles; no less than eighteen had supported the marine-league rule. At the Conference itself, only five or six States had proposed more than the marine league, and none had gone further than six miles.

37. In his third report (A/CN.4/77), the Special Rapporteur had shown that twenty-five out of fifty-five States supported the marine-league rule. The other thirty adopted various distances, and no particular distance—other than the marine league—had the support of more than a few States.

38. Again, examination of the comments by governments (A/2934, Annex) on the Commission's report covering the work of its sixth session (A/2693) showed that out of the ten States which had made specific replies on article 3 of the Commission's draft, no less than six, i.e., a majority, considered the marine league as part of existing international law.

39. He emphasized that the preponderance of States adhering to the marine league was not purely numerical. It included most of the leading maritime Powers. And any rule on the breadth of the territorial sea must command the support of those Powers if it was to be invested with the necessary authority and be capable of effective enforcement. In time of war—and that had been significantly the case in both the world wars—no belligerent had been prepared to admit the application of the rules of neutrality beyond a distance of one marine league from the coast of neutral States.

40. The marine league had in its favour a great many practical arguments. It represented the normal horizon of an average man standing a little above ground level. Shipping experts attached great importance to the normal horizon even at the present time when modern scientific aids to vision were generally available. Most fishermen did not possess such equipment, and, in order to keep outside the limits of the territorial sea of the coastal State, were accustomed to getting out of the range of visibility — a process which enabled them to fix their position with some degree of certainty.

41. As had been pointed out by Judge Alvarez in his dissenting opinion in the Anglo-Norwegian Fisheries Case,[13] the possession of territorial waters entailed duties as well as rights. The coastal State had among other things to assist shipping and to exercise police duties with regard to navigation. Even important maritime Powers were not in a position to discharge those functions beyond a comparatively short distance from the coast.

42. It had been suggested that the marine league had no scientific basis; but if so, that was equally true of all the other distances that had been proposed. And, as he had already said, the marine league had in its favour a number of extremely cogent practical reasons.

43. It had also been suggested that a distance of three miles had become insignificant in the light of modern progress, particularly as regards the speed of motor boats and aeroplanes. Such an agreement could be progress, particularly as regards the speed of motor in view of the fact that the speeds now attained, particularly by aeroplanes, were of a very high order. But scientific progress actually contributed a very powerful argument in favour of the marine-league rule. The use of radar equipment now made it impossible for a smuggler to reach the coast unperceived. The coastal State no longer required a broad belt of territorial sea to detect smugglers, or, indeed, any other persons engaged in undesirable activities near its shores.

44. The provisions adopted by the Commission in connexion with the continental shelf and fisheries conservation, together with the notion of contiguous zones, were quite sufficient to give the coastal States all the scope they could reasonably require to meet special purposes. He emphasized that the contiguous zone was an area in which the State exercised certain rights—in respect of such matters as customs and sanitation—without enjoying therein or thereover any sovereignty or dominion. Such sovereignty or dominion were in no way necessary beyond a very limited distance.

45. With an eye to the future, it was essential that the

[13] *I.C.J. Reports 1951*, pp. 145–153.

Commission adopt a conservative policy. If the Commission were to adopt as the maximum breadth for the territorial sea a distance greater than the marine league, twenty years thence the same arguments that were now being levelled against the three-mile limit would be adduced against the longer distance thus adopted. It was clear that once a breach was made in international law on the subject there would be no end to the process of disintegration of the freedom of the high seas.

46. He would not oppose a proposal along the lines of the one made by the Special Rapporteur (A/CN.4/93) or along those of Mr. Sandström's proposal (para. 12, above). He would, however, prefer the Commission clearly to recognize the principle of the marine league, coupled with the notion of contiguous zones.

47. Mr. EDMONDS made the following formal proposal for inclusion in the Commission's report:

> "After discussions at the present session of the Commission, there continue to be wide differences of opinion as to the limit which should be fixed for the width of the territorial sea. It appears that the claims of many States to more than three miles are based upon real concern for the conservation of the resources of the sea or other legitimate interests. The Commission has dealt with two of such interests in the adoption of articles in regard to the continental shelf and in articles on the subject of fisheries now being formulated which will be presented in the report to be submitted to the General Assembly.
>
> "In these circumstances, the Commission defers its decision of the breadth of the territorial sea until it has reached final conclusions as to fisheries and its articles upon that subject have been studied and commented upon by governments."

48. Mr. GARCÍA AMADOR recalled that he had stated at the previous meeting that he would abstain if any vote were taken during the present session on a resolution concerning the breadth of the territorial sea. But he would certainly vote against any such proposal as that put forward by Mr. Krylov, which suggested that the coastal State had absolute freedom to delimit the breadth of its territorial sea.

49. The determination of the breadth of the territorial sea could not be considered as an attribute of sovereignty. At all events, sovereignty was coming to be compassed to an ever increasing extent by international law in all fields. It was not permissible for a State to take possession of parts of the high seas in which interests of the international community existed in respect of such matters as fishing and freedom of navigation.

50. The dangers of unilateral action were obvious, and recent examples, both of claims to the superjacent waters of the continental shelf and of claims to an extensive breadth of territorial sea, had clearly demonstrated those dangers.

51. International law could not grant a coastal State the right to extend its territorial waters without limitation, because such a privilege would affect the interests of other States.

52. If a vote were taken on the three principles put forward by Sir Gerald Fitzmaurice, he would vote wholeheartedly in favour of the first principle — namely, that the breadth of the territorial sea was governed by international law. A vote on that principle would help the Commission to arrive at a decision on the issue as a whole.

53. The CHAIRMAN said that the breadth of the territorial sea was an interstate problem, and as such was undoubtedly governed by international law. He felt certain that Mr. Krylov did not mean to deny that proposition: all that he intended was that under international law States were entitled to determine the breadth of their respective territorial seas. The question before the Commission was whether any definite limit existed to that breadth.

54. Mr. HSU said that if the Commission failed to lay down any maximum for the breadth of the territorial sea, it would have to fall back on Mr. Krylov's idea — namely, that States were free to delimit their own territorial sea.

55. Sir Gerald Fitzmaurice's argument about the variety of distances adopted by the thirty States out of fifty-five which did not recognize the marine-league rule in no way belittled the fact that those thirty States were more numerous than the twenty-five which did respect that rule.

56. The argument based on the refusal of belligerents to recognize neutrality beyond a distance of three miles from the coast of a neutral State was not decisive. Neutral States themselves adopted a diametrically opposed attitude. During the Second World War, the meetings of Ministers of Foreign Affairs of the American Republics, held in Panama in September 1939 and at Rio de Janeiro in January 1942, had laid down security zones hundreds of miles in breadth.

57. The problem of security was vital to any discussion on the territorial sea. It was necessary to think not in terms of large fleets that might invade the territorial waters, but rather in terms of subversive activities that might be conducted under the guise of fishing. The Commission had to deal with the problem of the breadth of the territorial sea, having in mind that problem as well as that of coastal fisheries. The latter meant the livelihood of poor people who might be left destitute if well — organized fishing expeditions from remote lands could rob them of their catch.

58. The Commission had above all to bear in mind that some definite limit must be set to the claims being made on behalf of coastal States, which were becoming more and more extensive simply because the international community had not yet taken its stand on some well-defined limit for the breadth of the territorial sea. Article 13, paragraph 1(*a*) of the United Nations Charter —pursuant to which the International Law Commission had been set up—provided that the General Assembly

should initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. From that formulation, it was clear that the Commission's main duty was to ensure the progressive development of international law; its secondary duty was to codify existing law. International law was going through a period when it stood in need of principles based on equity. The Commission, which was not representative of States but rather a technical body acting in the interests of humanity as a whole, could not do better than submit to the General Assembly a proposal which would constitute an equitable solution to the problem of the breadth of the territorial sea.

59. The CHAIRMAN pointed out that it would be dangerous to postpone the problem of the breadth of the territorial sea, for in that case the Commission would have to cover much the same ground at its next session. In accordance with its Statute, the Commission had submitted its draft to governments for their comments, and now that those comments had been received (A/2934, Annex) was preparing its final draft. Having reached that stage, it could not do otherwise than take some decision on the breadth of the territorial sea. Constitutionally, there was no other course open to it.

The meeting rose at 1.05 p.m.

310th MEETING

Monday, 13 June 1955, at 3 p.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. J. P. A. FRANÇOIS, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. Georges SCELLE, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. The CHAIRMAN recalled that at the previous meeting proposals for article 3 had been submitted by Mr. Krylov,[1] Mr. Sandström,[2] Mr. Amado[3] and Mr. Edmonds.[4] Mr. Zourek had now proposed the following principles as a basis for the drafting of the article:

"1. The coastal State has the right to fix the breadth of its territorial sea in the light of its requirements and of the shape of its coastline.

"2. Consequently, it is not possible to fix a uniform breadth of territorial waters for all maritime States.

"3. However, since the principle of freedom of the high seas constitutes a limitation of the coastal State's powers in regard to fixing the breadth of the territorial sea, it is essential to lay down objective criteria for the exercise of the right in question, in order to preclude any arbitrary measures."

2. In addition, the Special Rapporteur himself had now submitted a new draft for the article which he would read to the Commission.

3. Mr. FRANÇOIS (Special Rapporteur) proposed that article 3 should read as follows:

"Subject to any historical rights which a State might claim over a greater breadth, the breadth of the territorial sea which a State can lawfully claim against all other States is three nautical miles.

"Other States are under an obligation to recognize territorial waters fixed by the coastal State at a greater breadth than that laid down in the foregoing paragraph only if

"1. They have assumed treaty obligations in the matter, or claim an equal or greater breadth for their own territorial sea,

"2. They have been parties in a case which has given rise to a judgement by the International Court of Justice or an award by a court of arbitration recognizing the legitimacy of the extension."

4. Earlier proposals before the Commission on the breadth of the territorial sea had given rise to the objection that they disputed the right of States to fix the breadth of their territorial sea. That difficulty was avoided in the text he now proposed, which did not actually deny to States the right to fix their territorial

[1] 309th meeting, para. 7.

[2] *Ibid.*, para 12.

[3] *Ibid.*, para. 14.

[4] *Ibid.*, para. 47.

sea at a distance greater than three miles, but simply stated the existing rule of international law that States other than the coastal State were under no obligation to recognize a greater breadth than three miles except where they themselves claimed such greater distance, or were parties to a convention on the subject, or were bound by a decision by the International Court of Justice or a court of arbitration, recognizing the extension in question.

5. That method of approach had some parallel with the International Court of Justice's recent judgment in the Nottebohm case between the governments of Guatemala and Liechtenstein.[5] The Court acknowledged the undisputed right of Liechtenstein as a sovereign State to naturalize aliens at its discretion, but also proclaimed the right of other States, Guatemala for instance, not to recognize such naturalization.

6. Mr. SANDSTRÖM accepted the Special Rapporteur's proposal and withdrew his own.

7. Mr. KRYLOV did not approve the Special Rapporteur's new draft, which illustrated the French maxim *le mieux est l'ennemi du bien.* Its opening words "subject to..." implied that the Special Rapporteur did not have very greath faith in the principle he was advocating.

8. With regard to the three principles proposed by Mr. Zourek, he felt that the third made no contribution to the solution of the problem.

9. Of all the proposals before the Commission, Mr. Edmonds' was the best because it would give the Commission an opportunity of examining the problem of the breadth of the territorial sea in the light of the work done by the International Technical Conference on the Conservation of the Living Resources of the Sea. The most serious problem involved in the regime of the territorial sea was that of fisheries and, if the Commission's proposals on that issue proved satisfactory, a solution of the problem of the breadth of the territorial sea might be facilitated.

10. Mr. AMADO said the first paragraph of his proposal recognized that international practice was not uniform in limiting the territorial sea to a breadth of three miles. The Commission had no authority to decide, in view of the diversity of State practice on the subject, that the three-mile rule was part of international law. The formulation he proposed in paragraph 1 gave as much recognition to the three-mile principle as could properly be accorded it.

11. Paragraph 2 of his proposal, by laying down that international practice did not warrant the extension of the territorial sea to a breadth greater than twelve miles, made it possible to call a halt to the more exaggerated claims made by certain States.

12. The CHAIRMAN said that, of the various proposals before the Commission, that of Mr. Edmonds had to be voted upon first because it invited the Commission to defer its decision.

13. For his part he (the Chairman) did not favour that course, because it would merely lead to the whole discussion being renewed at the following session.

14. The suggestion that the Commission would be justified in deferring its decision because of the interconnexion between the problem of fisheries and that of the breadth of the territorial sea was nog a valid argument. The question of fisheries conservation had been debated and voted upon without reference to any specific distance from the coast. On the other hand, the various States claiming a wider territorial sea than three miles were doing so not principally for reasons connected with fisheries but mainly owing to problems of security, customs and policing.

15. Faris Bey el-KHOURI opposed Mr. Edmonds' proposal that the decision be deferred. It was most unlikely that, before the next session, the Commission would gather any new information likely to enable it to reach a unanimous decision. He urged the Commission to take a decision now by a majority, since it could not reach unanimity.

16. He himself felt strongly that the Commission should fix some definite distance for the breadth of the territorial sea and that that distance could only be three miles, in accordance with long-standing usage.

17. Mr. EDMONDS said he had introduced his resolution while under the impression that the majority of members were in favour of postponing the discussion. He therefore withdrew it, subject to the right to reintroduce it later.

18. Mr. SALAMANCA asked whether, at an earlier stage in the discussion, the Chairman himself had not proposed that further discussion be postponed. He suggested that a postponement for one year might be appropriate.

19. The CHAIRMAN said that he had not made a proposal in those particular terms. What he had suggested was rather that the Commission should put on record its inability to arrive at a definite conclusion on the breadth of the territorial sea.[6]

20. Mr. AMADO pointed out that that was precisely the substance of his own proposal.

21. The CHAIRMAN, in further clarification of his proposal, said it implied that the Commission would not take a decision on the question, even at the following session.

22. Mr. SANDSTRÖM said the General Assembly expected some definite opinion from the Commission. If a majority could not be obtained in the Commission for any particular formation with regard to the breadth of the territorial sea, the separate opinions of the various members of the Commission might be submitted to the General Assembly.

23. Mr. FRANÇOIS (Special Rapporteur) said the

[5] *I.C.J. Reports 1951*, p.4.

[6] 308th meeting, para. 75.

breadth of the territorial sea was the crucial question in regard to all the problems of the international law of the sea on which the General Assembly was awaiting the Commission's final report. It was therefore absolutely essential that the Commission should give some guidance on the question, which had a considerable bearing on all related problems.

24. The CHAIRMAN said he did not press his proposal. He though, however, that it was quite illusory to expect agreement by States on the breadth of the territorial sea.

25. Mr. HSU said there was general agreement as to the desirability of a general rule for the breadth of the territorial sea. It was, however, clear that the three-mile rule was not accepted by the majority of the members of the Commission as a rule valid for all States.

26. Mr. SALAMANCA suggested that the Commission, even though it might not be able to adopt a solution for the breadth of the territorial sea, might well propose to the General Assembly a means of solving the problem. One such means would be the convoking of a conference of plenipotentiaries so that the problem might be solved by an international convention.

27. Mr. GARCÍA AMADOR pointed out that General Assembly resolution 899 (IX) instructed the Commission to submit a final report on the regime of the high seas, the regime of territorial waters and all related problems, so that they could be considered as a whole, thus avoiding piecemeal solutions.

28. The problem of the breadth of the territorial sea was indirectly connected with that of fisheries conservation. The majority of States which were putting forward claims to an extensive territorial sea were doing so primarily for the purpose of conserving fishery resources. If the draft articles on fisheries acknowledged a special role of coastal States in the matter of conservation, those States would perhaps no longer have any great interest in claiming a very wide territorial sea belt.

29. The Commission would be acting in accordance with the spirit of resolution 899 (IX) if it were to postpone its decision on the breadth of the territorial sea until its next session. By then, the reactions of States to the articles on fisheries would be known and it would be possible for the Commission to take a decision on the breadth of the territorial sea in the light of the comments received on the fisheries issue. For his part he felt he could not vote on any article on the breadth of the territorial sea before he knew the reaction of States to the draft articles on the conservation of fisheries.

30. The General Assembly required from the Commission one final report on the various related problems of the international law of the sea as a whole. At its eighth session in 1956, the Commission would have to discuss all those related problems with a view to drafting that final report. It would be quite an appropriate method of work for the Commission to leave the breadth of the territorial sea to be decided last, i.e., at the Commission's eighth session, after government comments had been received on the draft articles on fisheries.

31. Mr. AMADO pointed out that the problem of fixing the breadth of the territorial sea had been described by the Chairman and certain members of the Commission as well-nigh insoluble. In those circumstances, it was surprising to hear it suggested that the Commission could not report on all the other questions relating to the international law of the sea until a well-nigh insoluble problem had been solved.

32. He did not support Mr. Sandström's suggestion that the Commission should submit to the General Assembly the various opinions of its members. The General Assembly required the opinion of the Commission as a whole—a decision to which, however, the dissenting views of certain members might well be attached.

33. His own proposal granted a certain measure of recognition to the three-mile rule while stating that State practice was not uniform with regard to it. The second principle formulated in his proposal—namely, that international usage did not warrant a territorial sea of more than twelve miles—would serve to restrain the more extensive claims being made by some States.

34. Mr. SCELLE did not agree to the proposal to defer discussion till the following session of the Commission. Such a decision would be an admission of impotence on the part of the Commission.

35. The Commission had made some progress in its discussion. The new proposal by the Special Rapporteur and Mr. Amado's proposal offered some assurance that the Commission would arrive at some solution of the problem of the breadth of the territorial sea. That solution would not necessarily be a final one, since all the related problems would have to be discussed again at the 1956 session with a view to drafting the final report to the General Assembly in accordance with resolution 899 (IX).

36. It was most improbable that States would reach agreement on the maximum breadth of the territorial sea. The best system would be for the claims made by States to be adjudged by an international authority.

37. Finally, he expressed support for the first two paragraphs of Mr. Amado's proposal.

38. The CHAIRMAN said that, under rule 76 of the rules of procedure, Mr. García Amador's proposal that further discussion be deferred until the next session would be put to the vote after two speakers in favour of it and two against it had spoken for three minutes each.

39. Sir Gerald FITZMAURICE, on a point of order, said Mr. García Amador's proposal raised more than a mere question of procedure and involved the whole substance of the debate. Rule 76 had been framed to deal with a very different type of problem from the one with which the Commission was at present faced. The purpose of rule 76 was to facilitate the disposal of procedural issues before questions of substance at a time when, discussion having been terminated, the

Assembly or one of its committees or commissions was going to vote on the various proposals before it.

40. With regard to the very important question of the breadth of the territorial sea, discussion had by no means been exhausted by the Commission and a number of points had been raised on which he himself would like to express his views. There was no need for any special hurry and the best course for the Commission was to discuss all the proposals before it.

41. Mr. SALAMANCA said he did not favour an abrupt termination of the debate on the breadth of the territorial sea but would have supported postponement of the question for a year, if the majority of the Commission had been in favour of that course.

42. Mr. GARCÍA AMADOR pointed out that he had never meant to propose that the Commission defer further discussion of the breadth of the territorial sea. There were, moreover, certain issues not directly relating to the question of limitation which could also be taken up, such as the first of the three propositions mentioned by Sir Gerald Fitzmaurice at the previous meeting. What he had proposed was that the vote on the question be postponed until the next session. In that connexion he drew attention to the statement he had made at the 308th meeting.[7] His view had subsequently been endorsed by Mr. Salamanca.

43. His proposal had not been prompted by a desire for delay, since he was perfectly well aware that the Commission must complete its work on the regime of the territorial sea by the end of its next session, but by the belief that any decision taken before the comments of governments on the draft articles on fisheries had been received must necessarily be a provisional one.

44. Mr. LIANG (Secretary to the Commission) said that the proposals before the Commission fell into two distinct groups and could not be treated on the same footing. The texts proposed by Mr. Amado and Mr. Zourek sought to define the attitude of the Commission to the problem of the breadth of the territorial sea and could form part of the comment attached to the draft articles or the Commission's report. They were not intended to serve as texts for an article in the draft, in the same way as the other proposals.

45. Mr. FRANÇOIS (Special Rapporteur) considered the proposal to postpone the vote premature, in view of the fact that the Commission had barely begun discussing the proposals before it and was therefore not in a position to foresee that none of them would secure a majority. He did not believe that the comments of governments on the draft articles on fisheries would greatly simplify the task. On the other hand the Commission itself could help governments by submitting some more definite proposal than the nine alternatives concerning the territorial sea put forward the previous year. The importance of the question of the conservation of the living resources of the sea, though considerable, should not be exaggerated; its solution could not dispose of the issue of the breadth of the territorial sea, which had always given rise to difficulties, as, for example, at the Conference on the Codification of International Law in 1930—long before there had been any question of conservation or claims to a 200-mile belt.

46. The CHAIRMAN suggested that the Commission take up in turn the proposals before it, starting with those submitted by Mr. Amado and Mr. Zourek.

It was so agreed.

47. Mr. KRYLOV said that if the Commission finally failed to reach agreement on the breadth of the territorial sea it would have to revert to his original proposition that it was a question which came within the domestic jurisdiction of States.

48. Sir Gerald FITZMAURICE observed that Mr. Amado's text formed a balanced whole. Without committing himself in advance to supporting it, because he might prefer other proposals, he would suggest that it be amended by the insertion of the word "traditional" before the word "limitation" in paragraph 1 and the substitution of the words "The Commission, without pronouncing on the question of the correct extension to be given to the territorial sea, considers that in any case" for the words "The Commission considers that" in paragraph 2. With those amendments the text would constitute a statement of fact.

49. Mr. AMADO accepted Sir Gerald Fitzmaurice's amendments.

50. Mr. SCELLE said that he could accept paragraphs 1 and 2 as amended, but not the conclusion in paragraph 3. The first two paragraphs were fully consistent with the Special Rapporteur's text and he hoped that Mr. Amado would see his way to withdrawing the last.

51. Mr. AMADO agreed to withdraw paragraph 3.

52. Mr. GARCÍA AMADOR suggested that paragraph 2 as amended might give the impression that international practice authorized the extension of the territorial sea up to a maximum of twelve miles.

53. Mr. EDMONDS said that if the function of the Commission was to codify international law, he was unable to see the relevance of paragraph 1 which should state the rule accepted by the majority, perhaps adding the proviso that certain States had departed from it. If his understanding of the facts was correct, and he appeared to have been supported by Sir Gerald Fitzmaurice, there had been for years some kind of general agreement on a three-mile rule, and the numerous claims for a wider belt had never gained any appreciable measure of support and had always given rise to objections.

54. Mr. AMADO observed that he had sought to reflect the Commission's attitude.

55. Mr. SCELLE pointed out that international practice, unlike international custom, did not constitute a rule of law and was not binding. If Mr. Amado's pur-

[7] 308th meeting, para. 69.

pose was to elucidate the situation concerning the delimitation of the territorial sea, paragraphs 1 and 2 were acceptable and might facilitate agreement on a method of delimitation or at least on the minimum breadth, though it was extremely difficult to devise a uniform rule when there were so many divergent interests at stake. Nevertheless, the problem was not insoluble, and perhaps States might eventually be willing to submit their claims to the judgement of an international authority.

56. The insertion of the word "traditional" in paragraph 1 would indicate that there had at one time been an international custom concerning delimitation of the territorial sea which had subsequently undergone modification.

57. He also wishes to stress that the word "authorize" in paragraph 2 was too strong, since international practice could neither authorize nor prohibit. Some other wording would therefore have to be found.

58. Mr. AMADO said he did not insist on the word "authorize".

59. Mr. HSU said that although he preferred his own proposal, Mr. Amado's text would be acceptable provided that the rule or rules finally adopted were liberal, in other words that they met the needs of States.

60. Mr. SANDSTRÖM said that his views were very similar to those of Mr. Scelle and he would find it possible to accept Mr. Amado's text as well as the Special Rapporteur's proposal. However, paragraphs 1 and 2 in the former, even as amended by Sir Gerald Fitzmaurice, were cast in a negative form and could be interpreted to mean that States were virtually entirely free to extend their territorial sea to twelve miles.

61. Mr. ZOUREK said that Mr. Amado's text might usefully pave the way to an ultimate solution. However, for reasons he had given at the previous meeting, he could not accept the insertion of the word "traditional", which would mean that the Commission recognized that the three-mile rule had been at one time part of international law. That would be historically inaccurate, since apart from the rule of the median line and the rule based on visibility from the shore, some countries had long adhered to a four or a six-mile limit. The words "to three miles" should accordingly also be deleted.

62. In the absence of a written text he could not at the present comment on Sir Gerald's amendment to paragraph 2.

63. Mr. SCELLE observed that there had been a customary rule for a three-mile limit but he would personally find it extremely difficult to say whether it had been modified by international practice, and if so, whether that modification was a violation of a rule or the first step in a more liberal direction.

64. Mr. GARCÍA AMADOR said that he still had serious doubts about the implications of paragraph 2, for although Sir Gerald Fitzmaurice's amendment made it clear that the Commission was not proposing any specific limit, the existence of an international practice was admitted. And Article 38 b of the Statute of the International Court of Justice made it clear that international custom constituted evidence of a general practice accepted as law. If the Commission were of the opinion that international law allowed States to extend the territorial sea up to a limit of twelve miles it should say so explicitly. If it merely wished to make a factual statement, it must frame the paragraph differently, saying that international practice indicated that a number of States had made such an extension, though of course that would be an incomplete description of the situation.

65. Mr. SCELLE pointed out that, as was borne out by Article 38 b of the Court's Statute, it was only the general practice adopted by a number of States which was recognized as a rule of law.

66. Sir Gerald FITZMAURICE observed that Mr. García Amador had drawn attention to a real danger in paragraph 2, but it had surely not been the intention of the author that the text should be interpreted in that way. The purpose of the paragraph was purely negative since it did not seek to state what was the correct extension but only to affirm that any extension beyond twelve miles was inadmissible, a point he had tried to bring out more clearly by his amendment. Perhaps the point should be further elucidated in the comment so as to show that the Commission was not necessarily endorsing extensions up to the limit of twelve miles.

67. Faris Bey el-KHOURI considered that there was a discrepancy between paragraphs 1 and 2. The great majority of States adhered to the three-mile rule mentioned in paragraph 1, but no international practice existed extending the territorial sea to twelve miles, only claims by certain States.

68. Mr. AMADO said that some mention might be made of the fact that certain States had extended their territorial sea to six or twelve miles.

The discussion was adjourned.

The meeting rose at 6.5 p.m.

311th MEETING

Tuesday, 14 June 1955, at 10 a.m.

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* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Proposal to amend the Commission's Statute

1. The CHAIRMAN reminded the Commission that at the opening of the 308th meeting Mr. García Amador had announced his intention of proposing an amendment to the Commission's Statute in order to avoid a repetition of the difficulties which had frequently arisen in the Fifth Committee of the General Assembly after the Commission had taken the decision to meet in Geneva. Though the Commission had sat both at Headquarters and in Paris, it had found that the European Office of the United Nations provided the most favourable conditions for fruitful work, and it was therefore most desirable to settle once and for all that its sessions should be held in Geneva, without excluding the possibility of sometimes meeting elsewhere.

2. Mr. GARCÍA AMADOR said that the Chairman had summed up admirably the purpose of his proposal to amend article 12 of the Commission's Statute by substituting the words "European Office of the United Nations at Geneva" for the words "Headquarters of the United Nations". Such an amendment should eliminate difficulties in the future.

3. Mr. LIANG (Secretary to the Commission) observed that it would be desirable for members of the Commission to place on record the reasons for making such a change, even though they had already been fully discussed in private meeting. The General Assembly would then be in a better position to judge the proposal on its merits.

4. Mr. FRANÇOIS (Special Rapporteur) observed that one of the arguments in favour of Geneva was the existence of an excellent legal library with admirable facilities in the Palais des Nations. The legal library at Headquarters was far less complete than that in Geneva.

5. The CHAIRMAN agreed that the library at the European Office was immeasurably superior to that at Headquarters. The only other comparable library was that at The Hague.

6. Mr. AMADO said that the library at Geneva was chiefly remarkable for its collection of legal works in the French language.

7. Sir Gerald FITZMAURICE considered the moral atmosphere of Geneva more conducive to the work of a technical body of experts who did not represent their governments and whose task it was to examine legal questions without direct reference to political considerations. It was far better, therefore, for the Commission to meet away from Headquarters.

8. Faris Bey el-KHOURI agreed that it was preferable that the Commission should not meet in a place which was inevitably a political centre.

9. Mr. HSU said that the Commission should give some thought to one drawback to Mr. García Amador's proposal. It would mean that sessions would have to take place in the spring, thus making it impossible for members with academic responsibilities to attend. However, the advantages perhaps outweighed the disadvantages and he would support the proposal in the belief that it offered the only way of avoiding friction in the future.

10. The CHAIRMAN pointed out that the time of the session was a secondary consideration which might be settled in accordance with the Commission's wishes once the main principle had been accepted by the General Assembly.

11. Mr. EDMONDS said that, although he had not been a member of the Commission at the time when it had met in New York, he had attended the previous year's session in Paris and was therefore in a position to make comparisons. He had been greatly impressed by the facilities provided by the European Office and by the scholarly atmosphere of Geneva, and considered that it would be most valuable if the General Assembly would approve the proposed revision of the Statute.

12. Mr. SCELLE fully endorsed all that had been said by other members of the Commission.

13. Mr. SALAMANCA thought that New York could offer comparable library facilities to those of Geneva but agreed that those facilities were more accessible to the Commission in Geneva and that it ought to meet in the more tranquil conditions of the Palais des Nations, away from the turmoil of New York.

Mr. García Amador's proposal for the amendment of article 12 of the Statute was adopted unanimously.

14. Mr. GARCÍA AMADOR suggested that a summary of the discussion on his proposal be inserted in the Commission's report, since a bare reference to the summary records would not suffice.

Date and place of the eighth session (item 8 of the agenda)

(resumed from the 308th meeting)

15. Mr. LIANG (Secretary to the Commission) pointed out that the action taken on Mr. García Amador's proposal did not affect the Commission's decision[1] concerning the date and place of the eighth session, since that would have to be settled before the revision of the Statute came up in the General Assembly.

[1] 308th meeting, para. 3.

16. He had informed the Secretary-General of the Commission's preliminary decision to hold its eighth session at the European Office for ten instead of eight weeks in order to complete its work on the régime of the high seas, the régime of the territorial sea and related problems within the time-limit laid down in General Assembly resolution 899 (IX). He had also reported to Headquarters that the Commission thought that it would not be incompatible with General Assembly resolution 694 (VII), concerning the programme of conferences, for the Commission's session to overlap slightly with that of whichever functional commission of the Economic and Social Council would be convened at Geneva in April 1956. He had just received a telegram from Headquarters, signed by the Under-Secretary for Conference Services, Mr. Victor Hoo, and the Legal Counsel, Mr. C. Stavropoulos, stating that as in previous years, the Secretary-General was in favour of the Commission's meeting at Headquarters for budgetary reasons and for reasons of principle. A session at Geneva involved an additional estimated expenditure of 18,500 dollars and was subject to approval by the General Assembly. It further stated that it would be desirable to avoid any overlapping even with a functional commission and that a longer session would require supplementary estimates.

17. As in previous years, the Commission must now place on record its final decision following that consultation with the Secretary-General.

18. Mr. AMADO said that he held the office of Secretary-General and its present incumbent in great respect, but Mr. Hammarskjold had in some measure forfeited his respect by suggesting for financial reasons, which after all were the concern of the governments themselves, that the Commission, which was a body of learned men, could do its intellectually highly exacting work at the height of the summer in New York. He could only deplore such an astonishing lack of discernment, since though he had the greatest apprecation for the lively and cosmopolitan atmosphere of New York, that could be no compensation for its trying summer climate.

19. Mr. SANDSTRÖM said that, without wishing to defend the Secretary-General, he wanted to point out that the telegram from Headquarters simply meant that the Secretariat was unwilling to assume responsibility for endorsing the Commission's preliminary decision because it involved financial considerations.

20. Mr. AMADO considered that, the question of cost apart, there were weighty reasons for adhering to the previous decision concerning the time and place of the eighth session.

21. Sir Gerald FITZMAURICE said that it was particularly important to emphasize that a session of ten weeks was proposed, because the Commission would not be able to accomplish the task given it under General Assembly resolution 899 (IX) in less than ten weeks.

22. The CHAIRMAN proposed that the Commission take note of the telegram dated 13 June received from Headquarters but that, in the light of all the considerations involved, it maintain its preliminary decision taken at the 308th meeting that the eighth session be held at Geneva for ten weeks beginning on 23 April 1956.

It was so agreed.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*resumed from the 310th meeting*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*resumed from the 310th meeting*)

Article 3 [3]: Breadth of the territorial sea
(resumed from the 310th meeting)

23. The CHAIRMAN invited the Commission to continue its consideration of Mr. Amado's proposal, as amended at the previous meeting.

24. Faris Bey el-KHOURI asked that further discussion of Mr. Amado's proposal [2] be deferred until the amended text had been circulated in writing.

It was so agreed.

25. The CHAIRMAN then invited the Commission to take up Mr. Zourek's proposal.[3]

26. Mr. ZOUREK explained that he had sought to formulate principles which might form the basis of an article for inclusion in the draft. He had tried to take into account both the principle that the coastal State exercised jurisdiction over the territorial sea, and the principle of the freedom of the seas.

27. Paragraph 1 of his text derived from the fact that the breadth of the territorial sea had not been fixed by international law.

28. The CHAIRMAN observed that Mr. Amado, without fixing the breadth, had set a maximum limit.

29. Mr. SANDSTRÖM pointed out that a limit was laid down, albeit in very vague terms, in paragraph 3 of Mr. Zourek's text; but without knowing precisely what it would be, he found it difficult to accept the principle contained in paragraph 1.

30. Mr. ZOUREK replied that the reason why he had not laid down any criteria for delimiting the territorial sea in paragraph 3 was in order to facilitate the Commission's work, which must be carried out in stages. If agreement could not be reached on a spatial limitation, it would later be possible to see whether some kind of objective criteria could be established.

31. Mr. SCELLE drew attention to the fact that in the Fisheries Case the International Court of Justice had found that Norway's delimitation of the fisheries zone was "not contrary to international law".[4] It could

[2] 309th meeting, para. 14.

[3] 310th meeting, para. 1.

[4] *I.C.J. Reports 1951*, p. 143.

therefore be held *a contrario* that there was a rule of international law concerning the breadth of the territorial sea, and he could not accept the affirmation of some members that it did not exist. The court's finding showed that States were free to fix the limits of their territorial sea, but that if challenged by another State or States, only an international judicial organ could judge whether or not the claim was a violation of international law.

32. Mr. FRANÇOIS (Special Rapporteur) asked whether in Mr. Zourek's view other States were bound to respect the coastal State's supposed right to fix the breadth of its territorial sea.

33. Mr. ZOUREK replied that that question must be settled by reference to paragraph 3, which, if the Commission so wished, could specify the criteria for delimitation in order to prevent arbitrary action by States.

34. Sir Gerald FITZMAURICE said that Mr. Zourek was perhaps seeking to enunciate certain principles which might ultimately be found acceptable; as at present expressed, however, the text was ambiguous. Paragraph 1 taken by itself suggested that the rights of the coastal State were absolute as far as the delimitation of its territorial sea was concerned, but in the Fisheries Case the Court had drawn a clear distinction between the process of delimitation, which must be carried out by the coastal State, because it had the necessary knowledge, and the validity of the limit claimed vis-à-vis other States, which could only be determined in accordance with international law. The coastal State's right was therefore not absolute, but that did not clearly emerge from paragraph 3; from paragraph 3 it might be inferred that coastal States were free to delimit their territorial sea as they pleased, although at some future date objective criteria might be laid down. He could not for those reasons support the text in its present form.

35. Mr. AMADO considered that like Mr. Krylov's proposal, paragraph 1 of Mr. Zourek's text was an admission of failure to which the Commission could turn if all hope of reaching agreement were finally abandoned. Lamentable as it was that certain States should claim a 200-mile limit, the Commission would do well to bear in mind the relative size of, for example, the Pacific Ocean and the Mediterranean Sea, and approach the issue in a more realistic spirit.

36. Mr. SCELLE asked whether Mr. Zourek would be prepared to accept the insertion of the word "provisionally" after the words "to fix" in paragraph 1, which would thus correspond more closely to the actual situation, in which States fixed a limit, but could then be challenged before an international tribunal. There was no reason why there should not be an indefinite number of disputes similar to the Fisheries Case. If the claims of a coastal State, on the other hand, were not challenged it would eventually acquire a right by prescription or by historic title to the limit it had chosen for its territorial sea. In such matters the Commission would be well advised to seek guidance from the municipal law of civilized States.

37. Mr. SALAMANCA believed that Mr. Scelle, in moving his amendment, had brought out the crucial issue whether the delimitation of the territorial sea lay within the domestic jurisdiction of States. It would seem that the answer to that question must be in the affirmative if no objective criterion could be found, in which case the Commission would have to fall back on Mr. Krylov's proposal. However, that issue should be the last to be discussed, and quite apart from reasons of principle, he would therefore be unable to vote in favour of Mr. Zourek's text at the present stage.

38. Sir Gerald FITZMAURICE said that theoretically Mr. Scelle was perfectly correct, but in practice his thesis could be most dangerous because a State fixing a certain limit might, when challenged, refuse to appear before an international tribunal and continue to enforce its claim by, for example, arresting foreign fishermen. After a certain length of time it might then affirm that it had acquired a prescriptive right to a certain belt of territorial sea. Other States would be placed in the greatest difficulty since they would be reluctant to create friction by escorting their fishing vessels and laying themselves open to accusations of using force. Mr. Salamanca was perfectly correct in arguing that the fundamental issue was whether it initially lay with the coastal State to claim whatever limit it pleased. In his opinion the greatest care must be taken not to suggest that delimitation was at the outset a matter of domestic jurisdiction since it had an international as well as a national aspect, seeing that every claim derogated from the common use of the high seas.

39. Mr. SCELLE observed that Sir Gerald Fitzmaurice's practical objection held good for any challenge to an occupation of *res nullius*, the sole difference being that disputes about the limits of the territorial sea were likely to be far more frequent, and in the absence of any international jurisdiction would lead to friction.

40. Faris Bey el-KHOURI said that there seemed to be some inconsistency between paragraphs 1 and 3 of Mr. Zourek's proposal, inasmuch as the former recognized the coastal State's right to fix the breadth of its territorial sea in the light of its requirements, whereas the latter imposed some limitation on that right. Furthermore, the proposal provided no safeguard for the freedom of the seas, which would be menaced by arbitrary and capricious claims. Clearly some international organ was required to bear the responsibility for the protection of *res communis* and to determine whether claims for extension beyond the uniform minimum were justified. He was therefore unable to vote for Mr. Zourek's proposal unless it were recast in such a way as to provide, firstly, for a uniform minimum limit of three or four miles, since there was no international practice authorizing an extension up to 12 miles, and secondly, that claims beyond that limit should be submitted to the International Court of Justice, whose decisions would be binding and generally applicable. He favoured such a function being entrusted to the Court rather than to a new organ set up within the United Nations.

41. Mr. GARCÍA AMADOR said that even with Mr.

Scelle's suggestion to qualify the coastal State's right as provisional, Mr. Zourek's proposal went too far. At first sight, it might appear that it was analogous to the provision adopted by the Commission in connexion with the coastal State's right in the matter of the conservation of fisheries. There was, however, a fundamental difference between the article on fisheries and the provision proposed by Mr. Zourek. In the provision on fisheries, the coastal State's right had been made conditional on the observance of certain very clearly specified criteria: those criteria would enable an arbitration court to solve any disputes that might arise over the coastal State's rights. In Mr. Zourek's provision, however, no conditions or limitations were laid down and any tribunal that was set up would not have the benefit of any criteria on which to base a judgement as to whether the coastal State's claim to a particular breadth of the territorial sea was justified or not. In fine, Mr. Zourek's proposal amounted to nothing more than leaving the delimitation of the territorial sea to the discretion of the coastal State without any safeguard against possible arbitrary action by its authorities.

42. Mr. ZOUREK stressed that his proposal constituted an indivisible whole. Paragraph 1, which acknowledged the coastal State's right to fix the breadth of its territorial sea, had to be construed in the light of paragraph 3, which stated that it was "essential to lay down objective criteria for the exercise of the right in question, in order to preclude any arbitrary measures".

43. The present state of international law was that the coastal State was free to fix the breadth of its territorial sea, provided arbitrary measures were avoided. The so-called three-mile rule did not constitute a valid principle of international law limiting the sovereignty of coastal States to that distance. As he had explained in a previous statement, there had always been States—even in the 19th century—which practised a different rule.

44. Moreover, he did not think there was any great urgency for laying down very strict limits to the breadth of the territorial sea in terms of distance from the coast.

45. In the three principles he proposed as a basis for the drafting of article 3, he had endeavoured to reconcile the coastal State's right with the necessity to protect the freedom of the high seas.

46. Mr. GARCÍA AMADOR, after pointing out that Mr. Amado's proposal as amended at the previous meeting had now been circulated in writing, said that that proposal had to be voted on before Mr. Zourek's. If paragraph 2 of Mr. Amado's amended proposal were adopted, the Commission would vote against taking any decision on the question of the proper extension of the territorial sea. Such a formulation excluded all other proposals, which expressed a judgement on that very question.

47. Mr. ZOUREK said he did not press for his own proposal to be voted on at the present stage.

48. Mr. SALAMANCA requested that the two paragraphs of Mr. Amado's proposal be voted upon separately.

49. Mr. ZOUREK proposed that the term "traditional" be deleted from paragraph 1.

Mr. Zourek's amendment was rejected by 6 votes to 4, with 3 abstentions.

Paragraph 1 of Mr. Amado's amended proposal was adopted by 8 votes to 2, with 3 abstentions.

50. Mr. GARCÍA AMADOR suggested that the last phrase in paragraph 2 be amended so as to bring it into line with the clause introduced by Sir Gerald Fitzmaurice reading "without taking any decision as to the question of the proper extension of the territorial sea". If the Commission were to state—as at present suggested—that the extension of the territorial sea beyond twelve miles was not justified, then it would be taking a decision as to the question of the proper extension of the territorial sea. What the Commission ought to do was simply to state the fact that the practice of a number of States had extended the territorial sea to as much as twelve miles, without making any pronouncement as to the legal validity of such extension.

51. Mr. AMADO said it was customary to discuss the breadth of the territorial sea as though its extension constituted nothing more than a privilege or an advantage to the coastal State. In fact, the possession of a territorial sea implied duties and obligations as well as privileges and advantages, and the extension of their territorial sea might well prove more of a burden than anything else to the States which were endeavouring somewhat unwittingly to extend their maritime domain.

52. The CHAIRMAN, speaking as a member of the Commission, said that in his interpretation, paragraph 2 of Mr. Amado's proposal implied that any extension of the territorial sea beyond twelve miles was contrary to international law, whereas the validity of an extension of the territorial sea beyond three miles (but to a distance less than twelve miles) was, however, a matter upon which the Commission did not take any decision.

53. Mr. HSU agreed with the Chairman. If the Commission had not been endeavouring to limit the breadth of the territorial sea, but merely stating the facts regarding State practice, then it would have had to state that distances up to 200 miles had been claimed by certain States. But the Commission was not merely stating facts as they had occurred. The Commission was laying down a definite rule to the effect that no State should go beyond twelve miles.

54. Mr. SCELLE said the claims to two hundred miles of territorial sea were so very recent that they could not be described in any sense as part of State practice. State practice had to be comparatively ancient in order to give birth to a rule of law. Distances up to twelve miles had been the subject of State practice for quite a considerable time, and the Commission would be justified in referring to such practice.

55. With regard to the words *ne justifie pas* ("does not justify" in the English text), he would prefer the state-

ment that international practice *ne comporte pas* the extension of the territorial sea beyond twelve miles.

56. Mr. GARCÍA AMADOR said that, under Article 38, paragraph 1, sub-paragraph b, of the Statute of the International Court of Justice, a general practice accepted as law constituted international custom and as such was part of international law. If the Commission were to state that international practice did not justify the extension of the territorial sea beyond twelve miles, it would be making a legal pronouncement and adopting the twelve-mile limit as part of international custom and hence of international law.

57. Sir Gerald FITZMAURICE said paragraph 2 merely registered the fact that the practice of States did not go beyond twelve miles. It definitely ruled out as invalid any claim to more than twelve miles, but it made no pronouncement on the validity of claims between three and twelve miles.

58. Faris Bey el-KHOURI said that in his view international practice ruled out all claims in excess of three nautical miles.

59. Mr. AMADO said his proposal made it clear that the territorial sea did not extend beyond twelve miles. It did not, however, give any guidance on claims to distances between three and twelve miles.

60. Mr. LIANG (Secretary to the Commission) said Mr. Scelle's proposal to substitute the words *ne comporte pas* for the term "does not justify" would obviate the Commission's pronouncing a judgement with regard to the extension of the territorial sea. In the English text, the same idea could be conveyed by amending the final phrase to read: "any extension of the territorial sea beyond twelve miles is not a part of international practice". By stating the position in those terms, the Commission would avoid the theoretical problem of deciding whether such international practice constituted international custom.

61. Mr. AMADO pointed out that international practice did not itself constitute international law. International practice blazed the trail for the progress of international law.

62. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "international practice" be replaced by the words "international law".

Mr. Spiropoulos' amendment was adopted by 6 votes to 3, with 4 abstentions.

63. The CHAIRMAN then put to the vote Mr. Amado's proposal as a whole and as amended to read as follows:

"1. The Commission recognizes that international practice is not uniform as regards traditional limitation of the territorial sea to three miles.

"2. The Commission, without taking any decision as to the question of the proper extension of the territorial sea, considers that in any case international law does not justify the extension of the territorial sea beyond twelve miles."

Mr. Amado's proposal was adopted by 6 votes to 1, with 6 abstentions.[5]

64. Mr. ZOUREK said he did not press for a vote on his own proposal.

65. Mr. HSU provisionally withdrew his proposal for article 3, while reserving the right to resubmit it at a later stage.

The meeting rose at 1 p.m.

[5] See *infra*, 315th meeting, para. 79.

312th MEETING

Wednesday, 15 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. Mr. EDMONDS explained that he had voted against Mr. Amado's proposal at the previous meeting[1] because it could reasonably be interpreted as meaning that,

[1] 311th meeting, para. 63.

whereas any claims to a territorial sea of more than twelve miles were contrary to international law, claims to less than that distance were not.

2. For the reasons he had given in the course of the discussion, he considered that there was no rule recognized by international law other than the three-mile rule.

3. He could not, therefore, accept the implication that extensions of the territorial sea up to twelve miles were not contrary to international law, as Mr. Amado's proposal appeared to suggest. In the London *Times* of that morning[2] the following comment on the resolution voted by the Commission had appeared:

> "This was interpreted as meaning that extensions beyond the twelve miles would be contrary to international law, but that increases up to that limit would not be."

That such was not just an outside interpretation was shown by the fact that Mr. Hsu had withdrawn his proposal,[3] under which the Commission would recognize the coastal State's right to extend its territorial sea up to a limit of twelve nautical miles from the base line. Clearly, several members of the Commission interpreted the resolution voted at the previous meeting in the sense which he had indicated.

4. The CHAIRMAN said that the resolution voted at the previous meeting left no doubt whatsoever that any claims to more than twelve miles were contrary to international law. The question, however, of claims to between three and twelve miles remained an open one, and was the subject of the specific reference: "The Commission, without taking any decision as to the question of the proper extension of the territorial sea..."

5. Sir Gerald FITZMAURICE agreed with the Chairman's interpretation. If Mr. Edmonds' interpretation had been the correct one, he (Sir Gerald Fitzmaurice) would have voted against the resolution.

6. Mr. GARCÍA AMADOR explained that he had voted against the second paragraph of Mr. Amado's proposal firstly because it stated that international law did not recognize the extension of the territorial sea beyond twelve miles. It could be inferred from that—*a contrario*—that extensions up to twelve miles were valid under international law.

7. He had voted against that paragraph secondly because it obviously lent itself to several interpretations and he did not consider it appropriate for the Commission to adopt—on a matter of such vital importance as the breadth of the territoral sea—a resolution which was not construed in the same manner by all members of the Commission.

8. The CHAIRMAN suggested that the matter could be clarified by voting an interpretative resolution to the effect that the adoption of Mr. Amado's proposal left open the question of the breadth of the territorial sea.

9. Mr. AMADO said he had never aimed at solving single-handed the problem which had baffled the greatest legal minds in the past and on which The Hague Codification Conference of 1930 had foundered. The purpose of his resolution had been a more modest one: while acknowledging that State practice was not uniform with regard to the traditional three-mile rule, it also acknowledged the fact that a certain number of States claimed distances up to twelve miles.

10. The validity or otherwise of the various claims to four, six, or twelve miles would be determined in each case by decisions of the appropriate international courts which would build up a case-law on the subject.

11. Mr. LIANG (Secretary to the Commission) pointed out that interpretative resolutions could be dangerous. In that particular instance, any statement by the Commission that the question of the breadth of the territorial sea remained entirely open would not accurately reflect the meaning of the resolution adopted at the previous meeting. It was true that that resolution had left open the question of the validity of claims to more than three but less than twelve miles, but the Commission had taken a very clear stand on claims to more than twelve miles.

12. Mr. FRANÇOIS (Special Rapporteur) agreed with Mr. Liang. The only matter left open by the adoption of Mr. Amado's proposal was the validity of claims to more than three but less than twelve miles.

13. Any doubts concerning the interpretation of the Commission's resolution would be resolved once the Commission came to discuss his own proposal for article 3.[4]

14. He had little to add to his previous remarks on the subject of article 3 except in connection with Faris Bey el-Khouri's suggestion that any judgement of the International Court on the subject of the breadth of the territorial sea should be valid *erga omnes*. According to the Statute of the International Court, its decisions were valid only as between the States parties to the dispute. Faris Bey's suggestion therefore involved certain difficulties.

15. Mr. HSU said that the Special Rapporteur's proposed article 3 was no more than a very ingenious defence of the three-mile limit. Except for the case referred to in the second paragraph, where a State which claimed a breadth greater than three miles would be under an obligation to acknowledge a similar claim by other States, Mr. François' proposal laid down that explicit consent by other States would be necessary for the recognition of the coastal State's claim to more than three miles. Those provisions were not wide enough to satisfy many States in the Far East and in Latin America which, although some of them—like his own country, China—had previously adopted the three-mile limit, now

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[2] *The Times*, Wednesday, 15 June 1955, p. 5, column 2.

[3] 311th meeting, para. 65.

[4] 310th meeting, para. 3.

desired to extend their territorial sea beyond three miles, partly in order to defend themselves against subversive activities and partly in order to protect their small fishery industry against ruinous competition by well-organized foreign fishing concerns. The remedy suggested by the Special Rapporteur's draft was not adequate because States which rested on the three-mile rule would not in any circumstances agree to the extension of the territorial sea by the States he had referred to.

16. Mr. SANDSTRÖM said that the Special Rapporteur's proposed article 3 corresponded exactly to the present state of international law on the subject of the breadth of the territorial sea. The proposal by Mr. Amado which the Commission had adopted seemed more appropriate for the comment to the article.

17. Mr. GARCÍA AMADOR said he approved in principle of the Special Rapporteur's proposed article 3. He did not agree, however, to the somewhat vague reference to "historical rights". That term provided only a subjective criterion, the application of which would depend upon the judgment of the State concerned. Before recognizing a claim to extension of the territorial sea beyond three miles it was essential to lay down certain objective criteria by means of which an international tribunal could decide whether the extension in question had some valid foundation or not. A reference to important social or economic considerations would be preferable to a reference to "historical rights".

18. Faris Bey el-KHOURI said the Special Rapporteur's draft contained very useful indications for the purpose of adjudging the validity of claims to a territorial sea of more than three, but less than twelve miles. He did not agree, however, to the second part of proviso 1 in the second paragraph, which suggested that if two States were in agreement on the extension of their territorial seas, their respective claims would thus be somehow validated. The sea was the common property of all nations and the agreement of two or more States was not sufficient to enable them to partition it. The idea of a reciprocal agreement between two States could only be entertained in cases where the dispute concerned the interests of those two States only.

19. The high seas, as public property common to all nations, required a guardian in the shape of an international organ.

20. Mr. AMADO said that the Special Rapporteur's proposed article 3 did no more than recognize the three-mile limit pure and simple and ran counter to the resolution which the Commission had adopted on his (Mr. Amado's) proposal at the previous meeting.[5] That resolution constituted a statement of fact — namely, that international practice was not uniform with regard to the limitation of the territorial sea to three miles; it further stated that international law did not recognize the extension of the territorial sea to distances greater than twelve miles. The breadth of the territorial sea was a subject on which international law was undergoing a process of evolution and the Commission could not say anything more about it than it had said in the resolution adopted at the previous meeting.

21. If the Commission were to adopt the Special Rapporteur's proposed article 3 it would simply be reverting to the three-mile rule, which the Commission had already declared did not constitute a uniform international practice.

22. The CHAIRMAN agreed with Mr. Amado that the Special Rapporteur's draft article 3 was simply a recognition of the three-mile rule. The exceptions which it appeared to lay down—explicit acceptance by other States, or a judicial decision on the point, or even the notion of reciprocity—were so obvious as hardly to need stating.

23. He recalled that at the 1930 Codification Conference he had been in favour of the three-mile rule. Subsequently, his own country, Greece, had adopted a distance of six miles as the breadth of its territorial sea, probably in order to bring it into line with the distance adopted by other Mediterranean countries. It was clear that, under the Special Rapporteur's draft article 3, Greece would have no remedy if a State adhering to the three-mile rule were to dispute its claim.

24. The Special Rapporteur's proposal amounted to acknowledging a claim by a coastal State to a distance of more than three miles only when other States were in agreement. But what was required was a rule that would be applicable without the necessity of explicit agreement by non-coastal States.

25. Mr. LIANG (Secretary to the Commission) drew attention to the fact that proviso 2 in the second paragraph of the Special Rapporteur's proposed article 3[6] was drafted in the past tense in English, in the present tense in French and in the future tense in Spanish. Such drafting differences should be removed.

26. Going on to discuss the compatibility or otherwise of the Special Rapporteur's proposed article 3 with Mr. Amado's proposal as adopted by the Commission, he pointed out that the inclusion of Sir Gerald Fitzmaurice's amendment "without taking any decision as to the question of the proper extension of the territorial sea" had left no doubt as to the fact that claims to more than three, but less than twelve miles, remained an open question; only claims beyond twelve miles were condemned as contrary to international law.

27. In the Special Rapporteur's proposed article 3, the three-mile rule appeared as the fundamental one. It was said that any claim to more than three miles would only be recognized if certain particular conditions were fulfilled. If the Special Rapporteur's proposal were adopted by the Commission, it would imply that the Commission had expressed an opinion in favour of the three-mile rule, thereby contradicting the resolution adopted at the previous meeting,[7] which stated that international practice was not uniform with regard to that rule.

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[5] 311th meeting, para. 63.

[6] 310th meeting, para. 3.

[7] 311th meeting, para. 63.

28. Mr. SCELLE said the Special Rapporteur's proposal was a progressive one. He did not, however, approve of the phrase in proviso 1 of paragraph 2: "or claim an equal or greater breadth for their own territorial sea". A State might have good grounds for claiming a territorial sea of more than three miles for itself, and yet be justified in disputing another State's claim to more than three miles, because it did not rest upon the same good grounds.

29. He therefore proposed that the phrase in question be deleted and replaced by the following: "or have made a declaration accepting the distance claimed by the State concerned".

30. Such a provision would be in line with the Permanent Court of International Justice's ruling in the eastern Greenland case to the effect that a declaration by a Minister for Foreign Affairs on behalf of his government was binding upon the country to which the Minister belonged.[8] Clearly, a non-coastal State would be under an obligation to recognize the territorial waters fixed by the coastal State, not only where treaty obligations had been assumed in the matter but also where it had—through its Minister for Foreign Affairs—accepted in a declaration the distance claimed by the coastal State.

31. With regard to proviso 2, he preferred in the French text the term *parties jointes* rather than *parties en cause*. It was not necessary for a State to be a party in a particular dispute for the decision to be binding upon it; it was enough that the State should have intervened in the court proceedings. In fact, provisions might be made in proviso 2 also for the case where a State, even if not a party to the proceedings, accepted by declaration the decision of the Court. Such a system would enable the decisions of the International Court on the question of the breadth of the territorial sea to obtain the widest possible validity.

32. The ideal solution would be a supra-national system of expert examination and arbitration to determine whether a claim to a particular breadth of territorial sea was legitimate or not. Unfortunately, such a system was not practicable at the present stage of development of international relations. The next best course was to make provision for the voluntary acceptance, by States that were not parties to the proceedings, of decisions by the International Court of Justice.

33. Mr. EDMONDS enquired whether the words "they have assumed treaty obligations in the matter" did not cover all cases where a State accepted the particular breadth of territorial sea claimed on behalf of the coastal State.

34. Mr. SCELLE said that the term "treaty obligations" implied the signature of a document following a particular procedure. As distinct from that, there was the case—for which he suggested provision should be made—of the unilateral acceptance by a State of the equally unilateral pronouncement of the coastal State in respect of its territorial sea.

35. Mr. ZOUREK said that the Special Rapporteur's proposed article 3 did not correspond to the present state of international law. Its purpose was simply to consecrate the three-mile rule, whereas it was incumbent upon the Commission to acknowledge that international law did not contain any rule regarding the breadth of the territorial sea. In the absence of such a rule, the coastal State was competent to fix the breadth of its own territorial sea. Such had been the opinion expressed by many States in their replies to the Preparatory Committee for the 1930 Codification Conference. Thus, the Swedish Government had replied as follows: "The Swedish Government is of the opinion that, failing any international agreement determining the breadth of territorial waters, each State should itself fix within reasonable limits the breadth of its own territorial waters."[9]

36. The failure of the 1930 Conference and the replies of governments following the Commission's 1954 draft were conclusive evidence that the so-called three-mile rule did not enjoy any general measure of acceptance on the part of States. It was sufficient to note that out of 71 States having a coast-line, only 20 adhered to the three-mile rule, and out of those 20, two claimed greater distances for certain specific interests such as fisheries. It was unreasonable to suppose that a rule practised by only 18 States could be imposed on more than 50 other maritime States.

37. He was not impressed by the argument that three miles represented the distance of normal vision. In the sixteenth century, in both France and England, the criterion of maximum distance of vision had given rise to a rule based on seven leagues—21 nautical miles.

38. The Special Rapporteur's draft made reference to "historical rights"—a term which was unduly vague. Besides, such a notion would be unfair to States that had only recently appeared in the international community and concerning which it could be alleged that they did not possess any historical rights.

39. A text such as that proposed by the Special Rapporteur would gain the approval only of that handful of States which already practised the so-called three-mile rule. It would be most unwise to work on the assumption that States that did not adhere to the three-mile rule—who constituted the majority—would abandon their views.

40. Mr. SALAMANCA recalled that, by the resolution adopted at the previous meeting, the Commission had acknowledged that international practice was not uniform as regards limitation of the territorial sea to three miles.

41. That resolution was now being tacitly contradicted by the Special Rapporteur's proposed article 3, which was a consecration of the three-mile rule.

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[8] Publications of the P.C.I.J., Judgment of April 5, 1933. *Judgments, Orders and Advisory Opinions*, Fascicule No. **33**, p. 71.

[9] League of Nations publication, *V. Legal, 1929.V.2* (document C.74.M.39.1219.V), p. 33.

42. According to the Special Rapporteur's draft, any coastal State wishing to extend its territorial sea beyond three miles would have to negotiate with other States. And those States could only be the twenty States which adhered to the three-mile rule and which included all the great maritime powers. Those powers were most unlikely to accept such claims by coastal States.

43. The point of view of the great maritime powers was certainly worthy of respect, but equal attention had to be paid to claims by other States which had their own problems.

44. He recalled that he had favoured Mr. Amado's original proposal; he had, however, abstained from voting on the final resolution because of the substitution of the term "international law" for "international practice". He had been in favour of framing the resolution so as simply to set out the existing state of affairs in connexion with the breadth of the territorial sea.

45. Mr. SCELLE said that the Special Rapporteur had never claimed that the three-mile rule was accepted by everybody. His proposal for article 3 merely placed on record that that distance was a necessary minimum.

46. All the difficulties which the Commission was facing were due to the concept of sovereignty: the Commission had unfortunately accepted the notion that the coastal State exercised sovereign rights over the whole extent of its territorial sea. That concept of the territorial sea made it difficult, if not impossible, to recognize an extension beyond three miles. The best solution to the problem raised by the needs of coastal States was to allow those States to proclaim contiguous zones for certain particular needs, such as customs and health inspection. As for fisheries, in its draft articles on the conservation of fisheries the Commission had adopted the concept of a contiguous zone, although the actual extent of the zone had not been defined in terms of a fixed distance.

47. Sir Gerald FITZMAURICE said that, following Mr. Zourek's intervention, he in turn wished to expose the fallacies in the arguments adduced against the proposition that the three-mile limit represented the correct rule of international law. There had been a trend towards progressive liberalization some time towards the end of the seventeenth century and the principle of the marine league had been applied for the last century and a half —a period of time which surely sufficed for the establishment of a rule of international law. Indeed he would venture to suggest that few international rules had such a long history. Any serious departure from that principle had only begun since the end of the First World War and it was significant to note that at the Conference for the Codification of International Law in 1930 only five or six States had claimed as much as six miles. The facts did not bear out Mr. Zourek's contention that the three-mile rule had only been applied by a small group of States. In reality its application during the nineteenth century and the first fifteen or twenty years of the present century had been quasi-universal and virtually unchallenged.

48. It was yet more fallacious to argue that though the three-mile rule had been applied by the largest single group of States it was not supported by a far greater number, since even if that contention were valid juridically speaking, there was no larger group upholding any other distance. The fact that many States did not adhere to the three-mile rule was no ground for claiming that it was not the correct one.

49. It was generally agreed that the question of the breadth of the territorial sea was governed by international law, which imposed limits on the breadth that could properly be claimed by States. If that were the case, some precise spatial limit—until comparatively recently the marine league—must be imposed. A parallel could be found in internal legislation restricting the maximum height of buildings. Anyone seeking to show that that particular restriction no longer existed must prove that it had been replaced by another, otherwise no limitation at all would remain. But the three-mile rule had certainly not been superseded by another, because there was no international agreement. Consequently the only possible juridical conclusion was that the three-mile rule, which unquestionably had been the rule at one time, was still valid. Otherwise it must be admitted that international law no longer governed the breadth of the territorial sea and imposed no limitation.

50. In the light of the foregoing considerations he supported the Special Rapporteur's text, which was correct in laying down that in the absence of another rule the three-mile rule still held good, while not excluding the possible validity of individual claims to greater distances.

51. He agreed to a great extent with what Mr. Scelle had said about sovereignty and the contiguous zones. It was perfectly true that the whole difficulty with regard to the delimitation of the territorial sea lay in the fact that it involved a claim to complete dominion over a large area of the seas. The principle of contiguous zones, on the other hand, was a just one because it recognized that the coastal State might need to exercise special rights, as distinct from complete sovereignty, in a particular area outside the territorial sea proper. Thus a balance was preserved between the general rights of all States over what still remained a portion of the high seas and the rights of the coastal State over a comparatively narrow territorial sea, coupled with reasonable recognition of its requirements in the contiguous zones. If the draft articles on fisheries were adopted, the legitimate requirements of States would be met and they would no longer have to put forward excessive claims in respect of the territorial sea for the protection of fishery interests.

52. Mr. FRANÇOIS (Special Rapporteur) said that some members were quite mistaken in thinking that the purpose of his text was to reintroduce the three-mile rule in a disguised form. He was perfectly aware that it was not acceptable to all States and had sought to find some common ground of agreement in an effort to attract the widest measure of support. He accordingly believed that the Commission should accept a minimum breadth of three nautical miles which States could "lawfully claim

against all other States": words which had perhaps been overlooked in the discussion. That should be expressly stated. However, he had not excluded the possibility of States claiming a wider belt, though that did not necessarily imply recognition by other States. He had thus followed the International Court of Justice in the Nottebohm Case [10] by drawing a distinction between the right of States to take certain measures and the obligation on others to recognize the effects of those measures.

53. Any difference between States about a limit beyond three miles should be dealt with by the usual procedure for the peaceful settlement of disputes. He had not provided for compulsory arbitration, not wishing to go beyond what was strictly necessary in order to make the text acceptable. He had therefore left the greatest possible degree of freedom to States.

54. He had no desire to prevent States from claiming a limit beyond three miles and regarded the maximum limit of twelve miles laid down in Mr. Amado's text as perfectly compatible with his own proposal. Nevertheless that maximum limit had given rise to misunderstandings even in the Commission itself and in view of Mr. Amado's own explanation of his purpose it might perhaps be wise to make clear in his (the Special Rapporteur's) text that any extension to over three but not more than twelve miles need only be recognized by other States if certain conditions were met.

55. Though his use of the expression "historical rights" had been questioned he still considered it perfectly appropriate because it clearly meant claims which had been recognized by the international community. Whether in fact a historical right existed was a quite separate issue.

56. He could not agree with Faris Bey el-Khouri that findings of the International Court of Justice in cases concerning the breadth of the territorial sea should be valid *erga omnes*, but a proviso might be added on the lines suggested by Mr. Scelle to the effect that States not parties to the case could by a separate declaration accept the decision. On the other hand, there seemed no need to make any express reference to general tacit acceptance of a claim, since in such cases no disputes would arise.

57. He would not have any objection to the other modifications suggested by Mr. Scelle, which were mainly of a drafting character, but must insist on the substance of his proposal being preserved.

58. The CHAIRMAN, speaking as a member of the Commission, pointed out that a special clause was required conferring upon the judicial authority which was to examine disputes arising from delimitation of the territorial sea the right itself to fix the limit in cases where the claims of the coastal State were found to be contrary to international law. Without such a clause the judicial authority would be powerless. If that proposition were accepted the Commission would have to decide on the criteria to be applied by the tribunal.

59. Mr. AMADO hoped that the Commission would give every attention to the important point raised by the Chairman, since the fact must be faced that States were most reluctant to submit any question directly involving their sovereignty to an international tribunal.

60. Although he admired the skilful manner in which the Special Rapporteur had drafted his text, he could not agree that it amounted to the same thing as his own. For example, in his first paragraph the Special Rapporteur sought to obtain endorsement of the three-mile rule, but that was quite a different thing from stating that "international practice is not uniform as regards traditional limitation of the territorial sea to three miles". In that connexion he had his doubts about the Chairman's amendment [11] whereby the word "practice" had been replaced by the word "law" in his (Mr. Amado's) text, since he was far from convinced that the changed text did not conflict with the facts.

61. The argument put forward by Mr. Scelle concerning contiguous zones was more suitable for laymen than a body of jurists and there was little purpose in trying to argue away the fact that within the territorial sea the sovereignty of the coastal State was sacrosanct.

62. Mr. HSU did not consider the fact that the largest single group of States adhered to the three-mile rule in any way weakened the force of other claims; Sir Gerald Fitzmaurice's analogy concerning limitations on the height of buildings was also not very pertinent because it was drawn from municipal law. On the international plane, where there was no sovereign legislative authority, practice was important, particularly when it involved departure from a rule.

63. In the absence of any concrete proposal it was difficult to perceive the force of the argument concerning contiguous zones. The Special Rapporteur had not touched upon the important question as to whether the text met the actual needs of States. In his own opinion it failed to do so for the following reasons: it took no account of the lack of uniform practice concerning the breadth of the territorial sea; it did not give enough weight to claims beyond three miles and to the fact that the territorial sea was delimited by each coastal State for itself; it ignored the concession made by members of the Commission who did not accept the three-mile rule in supporting the maximum limit of twelve miles laid down in Mr. Amado's proposal; it ran counter to the spirit in which the Commission had approached the problems of the continental shelf and the conservation of the living resources of the sea, when the claims of the coastal State had been given fullest consideration; it was not just to States which had refrained from claiming greater extensions of the territorial sea in the belief that the Commission would arrive at some equitable solution; finally, it would make for unnecessary friction.

64. He deplored the fact that the former colonial powers who had introduced the three-mile rule in certain countries of the Far East should now disclaim all

[10] *I.C.J. Reports 1955*, p. 4.

[11] 311th meeting, para. 62.

responsibility for the protection of thos countries' interests. He would appeal particularly for support from the United States which was usually so liberal but which now appeared to have taken a rigid stand on the three-mile rule.

65. Mr. LIANG (Secretary to the Commission) said that without expressing any views on the relative merits of the Special Rapporteur's and Mr. Amado's texts, he wished to point out that the Special Rapporteur had raised an extremely important question, namely, the distinction between the rights which might be asserted by the coastal State and the obligation on others to recognize them. He was not sure whether there could be such a hiatus in the correlation between rights and duties.

66. Mr. KRYLOV said that Mr. Amado's excellent statement would enable him to be brief. In his opinion the Special Rapporteur's text and that of Mr. Amado were virtually irreconcilable, since the first took as its starting-point a three-mile rule from which all other rights and obligations flowed, whereas the latter recognized the possibility of other limits. In view of the limited number of States which in fact adhered to the three-mile rule, he was unable to see how the Special Rapporteur could defend his proposition. The Commission would do well to examine existing practice rather than to delve back into history, and he therefore urged it to adopt a more practical standpoint.

67. Referring to the point raised by Faris Bey el-Khouri, he said that the Commission would be transgressing the terms of its Statute if it sought to grant legislative power to the International Court of Justice.

Further discussion of article 3 was adjourned.

The meeting rose at 1.5 p.m.

313th MEETING

Thursday, 16 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1-2. Mr. EDMONDS said that the Commission should always bear in mind that its task was to codify and formulate principles of international law. As he saw it, the three-mile limit had been the rule for many years and had been applied by maritime States owning 90 per cent of the world's shipping. In the circumstances the three-mile rule had all the weight of authority behind it and any other limit was a deviation. The American Institute of International Law, in formulating United States law, had consistently upheld the three-mile limit while admitting that certain countries had departed from the established rule. It was also an old rule of international law that the high seas were *res communis* for use by all without restriction or restraint. The régime of the territorial sea was an encroachment upon that freedom and should be strictly circumscribed by the rules which had been applied for many years.

3. No municipal court was guided in rendering judgement by motives of generosity and he had, therefore, been surprised by Mr. Hsu's appeal at the previous meeting that the Commission adopt a generous attitude in giving away what was the property of all nations and by his references to the attitude of former colonial powers. Political considerations should not be allowed to enter into the Commission's discussions, and its members did not sit as representatives of their governments. The attribution of political motives was, therefore, out of place. All that he had sought to do, bearing in mind the Commission's function, was to expound what he believed to be the principles of law.

4. Mr. HSU explained that his remarks had not been directed against the United States of America, which had been the most liberal of the colonial powers in the Far East. He had merely sought to show that the relics of colonialism militated against change in international law.

5. If, as Mr. Edmonds seemed to think, the Commission's sole function was to restate the law, then it should not go outside existing rules. Indeed such work could have been accomplished by any academic institution, whereas the Commission had been set up in order to fulfil the more important task of making good omissions and developing existing law.

6. Mr. EDMONDS pointed out that he had described the Commission's task as one of codification and formulation of international law.

7. Sir Gerald FITZMAURICE said that he had assumed Mr. Hsu's remarks at the previous meeting to be of a general and abstract character. He could assure him that the United Kingdom—and the same was probably true of any other power which had held any position in the Far East—had never contemplated relinquishing its responsibilities and leaving the countries concerned to suffer the consequences of its departure without assistance.

8. Turning to the question of historic rights, which had an important bearing on the Special Rapporteur's proposal,[1] he said that in the course of a private conversation, he had ascertained that there was no substantial difference of view between himself and the Secretary, who had made some comments on the subject at the previous meeting. The issue in the Anglo-Norwegian Fisheries Case[2] had not hinged upon the question of historic waters but on whether Norway possessed an historic right to apply a certain system of delimitation. The International Court had found that the system was not contrary to international law and after considering the historical aspects of the question had established that Norway could, on historical grounds, apply a system somewhat different from the usual one, not because it had been applied for a long time, but because it had raised no objections on the part of other States and had thus received tacit acquiescence. Much had therefore turned on the question of knowledge and the United Kingdom's affirmation that it had had no knowledge of the system and therefore could not be held to have acquiesced in it had been rejected. The Court had adopted an extremely liberal view of the circumstances in which other States must be deemed to have knowledge of the coastal State's claim as well as of the circumstances in which they must be held to have acquiesced. Accordingly, if the Court took the same line in similar cases which might come before it in the future, it should not be too difficult for countries to establish their historic rights.

9. Mr. SANDSTRÖM could not agree with the Secretary that there was a contradiction between the Special Rapporteur's text and paragraph 2 of the resolution which had already been adopted on the proposal of Mr. Amado,[3] since the latter represented only a first step in clearing the ground. The Commission, as far as he had understood, had never intended to stop there. The Special Rapporteur had accordingly proceeded to give more concrete form to the expression of opinion contained in Mr. Amado's text, and even Mr. François' proposal would not necessarily be the last word, for he had already announced the possibility of adding a provision concerning the competence of the international organ called upon to pronounce on the legitimacy of claims. The final outcome of the Commission's discussion would depend on the functions to be given to that organ.

10. Mr. LIANG (Secretary to the Commission) agreed with Mr. Sandström that the Special Rapporteur's text took the Commission a step further. When pointing to a slight discrepancy between the two texts at the previous meeting, he had assumed that the essential elements in Mr. Amado's draft, notably the perfectly definite provision contained in the latter part of paragraph 2, might be incorporated in Mr. François' proposal which could form one of the articles in the draft. Given that the two texts were designed to serve a different purpose their amalgamation involved more than a question of drafting, however, and the Commission would do well to define its position with regard to that of the Special Rapporteur.

11. Mr. FRANÇOIS (Special Rapporteur) in reply to Mr. Hsu's remarks at the previous meeting, said that his text provided no solution for the hypothetical case of a country's refusing to recognize an extension beyond the three-mile limit and to submit the dispute to arbitration. He would like to make it perfectly clear that far from claiming to have provided a final solution of the whole problem of the breadth of the territorial sea he had only sought in his proposal to reflect the disagreement in the Commission. The three-mile rule alone had been generally recognized as binding on all other States, and he had therefore mentioned it in his text; any extension beyond that distance must obtain the sanction of an independent judicial authority if its recognition were to be obligatory on other States. His text contained nothing new and was entirely realistic; it differed from that of Mr. Amado only as regards presentation.

12. The suggestion had been made that in disputed cases he had intended the International Court or the arbitral tribunal to determine solely whether treaty obligations or claims to an equal or greater breadth existed; that was not the case: as he saw it, the judges or arbitrators would have to examine the substance of the coastal State's claim and decide whether it was based on valid grounds.

13. He did not think that either Mr. Hsu or Mr. Zourek had provided a solution which would be acceptable to the Commission. In the unlikely event of the latter's proposal being adopted, each coastal State would be free to fix its territorial limit and other States would have to recognize that limit, as long as agreement could not be reached on any objective criteria. He also thought his own proposal (A/CN.4/93) for the establishment of an international organ within the United Nations with the power to render binding decisions in disputed cases relating to delimitation of the territorial sea had very little chance of winning support. In the circumstances he had concluded that there was no way out but to present a text of the kind he had put forward. If it were adopted Mr. Amado and himself might try and draft a single text which could perhaps command the support of the majority of the Commission.

[1] 310th meeting, para. 3.

[2] *I.C.J. Reports 1951*, p. 116.

[3] 311th meeting, para. 63.

14. Mr. ZOUREK, in reply to Sir Gerald Fitzmaurice's last statement at the previous meeting, said that he had not wished to minimize the importance of the group of States adhering to the three-mile limit but only to contest the assertion that that rule had to all intents and purposes been universally recognized. Even during the period when Sir Gerald claimed that it had been unchallenged the Scandinavian States had applied a four-mile limit and the Latin American States a six-mile limit. However, the purely numerical question was clearly not of decisive significance, since States adhering to the three-mile limit were now in a minority and the rest were divided.

15. Sir Gerald Fitzmaurice had argued that if the three-mile rule were not accepted as the correct one, the inevitable conclusion must be that the breadth of the territorial sea was not governed by international law, and that was precisely his (Mr. Zourek's) opinion.

16. It was clear that the Special Rapporteur's text was quite different in spirit from that of Mr. Amado since it embodied the three-mile rule while providing a slight consolation to States which applied another limit by allowing that extensions could be recognized if sanctioned by an arbitral decision or the assumption of treaty obligations by other States. That proviso was of course quite inadequate and moreover tended to degrade any limit in excess of three miles, apart from cases of historic title to four miles, to the status of a mere claim. In other words States were being asked to accept the three-mile limit coupled with a promise that extensions could be examined. Such an approach was of course entirely unrealistic as States were most unlikely to entertain any proposition which might threaten their sovereignty, and it must be remembered that the territorial sea reflected certain requirements which were important to the life and economy of States. The Commission should accordingly not deceive itself about the possibility of the Special Rapporteur's proposal being accepted by governments. Furthermore, the proposal nullified the Commission's decision to adopt Mr. Amado's text, which admitted the legitimacy of extensions up to twelve miles. That text, however, would remain nothing but a pious wish if the Special Rapporteur's proposal were adopted, whereby extensions beyond three miles would be subject to the consent of other States; for such consent would probably not be forthcoming once the three-mile rule had been declared the rule of international law.

17. Mr. FRANÇOIS (Special Rapporteur) said that there had been some misunderstanding if Mr. Zourek supposed that the Commission, in adopting Mr. Amado's text, had recognized the legitimacy of any extensions beyond three miles but not over twelve.

18. Mr. ZOUREK explained that he had not wished to imply that "any" extension up to twelve miles was recognized.

19. Mr. AMADO reaffirmed that it was the primary duty of States to protect the interests of their peoples. The generous and altruistic State was a figment of the imagination of Utopians; jurists should keep their feet on the ground appraising any given situation coolly and without emotion. He had not set himself the task of trying to solve the problems of the world, but had been guided by the irrefutable fact that certain countries adhered to the three-miles limit and were not likely to abandon it, and that the others claimed sovereignty over a twelve-mile belt. No amount of legal casuistry would alter that situation, and he doubted whether the Commission could go much beyond the resolution adopted at the 311th meeting (para. 63), or whether the Special Rapporteur's proposal and that resolution were compatible.

20. The CHAIRMAN, speaking in his personal capacity, suggested that the Special Rapporteur's text might be somewhat softened down and rendered more flexible if the first paragraph laying down the three-mile rule were deleted and the opening words of the second paragraph were replaced by the following text:

> "Whatever may be the breadth of the territorial sea according to (contemporary) international law, and subject to any historical rights which a State may claim regarding the extent of its territorial sea, other States are under an obligation to recognize a breadth of territorial sea exceeding three nautical miles if:"

Provisos 1 and 2 would remain unchanged.

21. Mr. KRYLOV said that the Chairman's important proposal should be circulated in writing as quickly as possible.

22. Mr. HSU said that the Special Rapporteur's reply to the question he had put at the previous meeting had failed to take into account that the recalcitrance of a single State might obstruct progress in a whole region and cause great hardship. However, since States were actuated entirely by self-interest, it would perhaps be wise to leave it to them to settle the whole question of delimitation, as was implied in paragraph 3 of Mr. Amado's original proposal.[4]

23. Faris Bey el-KHOURI, replying to Mr. Zourek's contention that no State would brook interference with its souvereignty, pointed out that limiting the breadth of the territorial sea did not constitute such interference but was merely a kind of interdict, to prevent States from claiming a right to encroach upon the *res communis*.

24. In view of recent developments, and particularly the claims made by certain Latin American countries such as Ecuador, which had submitted a memorandum on the subject to the Commission, reference to "historical rights" was insufficient and he therefore proposed that those words be followed by the words "or national necessities" in the first paragraph of the Special Rapporteur's text. He also proposed the insertion of the words "up to a maximum of twelve miles" after the words "greater breadth", which would bring the text into line with that adopted at the 311th meeting (para. 63). That proviso was necessary because,

[4] 309th meeting, para. 14.

although the three-mile rule had obtained universal recognition, certain States did claim a greater extension and it was essential to secure agreement on the text, otherwise coastal States would act unilaterally and international friction would inevitably result. However, any extensions beyond three miles should receive the sanction of the International Court or any other international organ to which the function of adjudicating disputed cases was assigned. He therefore proposed that the second paragraph of the Special Rapporteur's text be amended to read:

> "Other States are under an obligation to recognize territorial waters fixed by the coastal State up to a maximum of twelve miles provided that such extension is recognized as legitimate by an international organ established for this purpose in the framework of the United Nations or by the International Court of Justice."

25. Mr. AMADO, referring to the question of national necessities, said that he had just received a paper written in defence of the 200-mile limit by Mr. García Sayan, who had been responsible for the Peruvian Declaration of 1947.[5] States were seeking to protect certain interests while forgetting the real nature of the territorial sea.

26. Mr. HSU supported Faris Bey el-Khouri's amendments to the first paragraph but hoped that some more precise term might be found for "national necessities".

27. Replying to a question by Mr. SALAMANCA, the CHAIRMAN said there was little difference of substance between the Special Rapporteur's proposal and his own amendment. The main purpose of his amendment was to dispel the impression which appeared to exist that the Special Rapporteur's proposal was purely and simply the consecration of the three-mile rule.

28. Mr. FRANÇOIS (Special Rapporteur) accepted the Chairman's amendment because it brought out that his proposal did not amount in substance to a disguised plea in favour of the three-mile rule.

29. Mr. SALAMANCA said that, to his mind, the Special Rapporteur's proposal—with or without the amendment which he had just accepted—was incompatible with the resolution adopted at the 311th meeting on the proposal of Mr. Amado.

30. Mr. KRYLOV agreed that the Special Rapporteur's proposal was not compatible with that resolution, by which the Commission had already decided that any extension of the territorial sea up to a distance of less than twelve miles was permissible under international law. If the Special Rapporteur's proposal were now adopted, the Commission would be considering the three-mile rule as the only one accepted by international law.

31. It was essential for the Commission to take a vote on the question whether or not it considered the three-mile rule as part of international law. He felt sure, for his part, that the majority of the Commission would answer that question in the negative.

32. It was desirable for the Commission to arrive at some internationally agreed definition of the breadth of the territorial sea, but failing that, the next best course was for the Commission to proclaim that States had the right to delimit their own territorial sea.

33. Mr. AMADO said that the initial words of the Chairman's amendment to the Special Rapporteur's text ("Whatever may be the breadth of the territorial sea ...") were perhaps not quite adequate. Possibly what was intended was rather a phrase along the following lines: "The Commission, finding itself unable to formulate a uniform criterion regarding the proper extension of the territorial sea...;"

34. For his part, he did not approve of the text of article 3 which was being proposed. He felt that the Commission could go no further than it had gone at its 311th meeting, when adopting his (Mr. Amado's) proposal. By that decision, the Commission had stated the present position with regard to the claims to a territorial sea of between three and twelve miles. It had said as much as was possible by declaring that any extension beyond twelve miles was not in conformity with international law.

35. He urged the Commission not to define the position any more closely, in view of the fact that the urgent needs of States were compelling them to take action in the matter of the breadth of the territorial sea. He felt very strongly that those States which were endeavouring to extend their territorial sea were doing so largely in view of their fishing interests and problems. He suggested that the Commission's draft articles on the conservation of fisheries should be given as wide publicity as possible, so that those States might be reassured regarding their interests; that might possibly modify their attitude with regard to the extent of the territorial sea.

36. Mr. SCELLE said that the resolution adopted on Mr. Amado's proposal did not imply that States were entirely free to extend their territorial sea to any distance between three and twelve miles. The resolution did not solve the question of the validity of such claims and only ruled out those in excess of twelve miles.

37. For his part, he (Mr. Scelle) felt that a distance of twelve miles was perhaps not the real criterion of validity. A State having valid reasons for it might perhaps be entitled to claim more than twelve miles; on the other hand, a claim to less than twelve miles (but more than three) might well be illegitimate because there was no justification for it.

38. He requested that provisos 1 and 2 in the Special Rapporteur's text of article 3, as now amended, be voted separately. He disapproved of the final phrase of proviso 1, which was based on a somewhat artificial concept of reciprocity. According to it, a State which was justified in claiming a territorial sea of more than three miles would be obliged to recognize a similar claim

[5] See text in *Laws and Regulations on the Régime of the Territorial Sea* (United Nations publication, Sales No.: 1957.V.2), pp. 38–39.

by some other State. But it might well be that that other State had no justification whatsoever for claiming more than three miles—in which case there was no reason why a State which had validly adopted a greater distance than three miles should be obliged to recognize an unfounded claim. Instead he suggested that there should be a proviso to the effect that a State was under an obligation to recognize the territorial sea fixed by the coastal State at a greater breadth than three miles, if it made a unilateral declaration accepting the coastal State's claim.

39. In spite of its imperfections, the Special Rapporteur's proposed article 3 constituted genuine progress.

40. Mr. GARCÍA AMADOR said the Special Rapporteur's text did not exclude the possibility of a territorial sea of more than three miles; it merely laid down that such a claim could only be validly made under certain circumstances.

41. The impression existed both within and without the Commission—the latter as shown by the article from the London *Times* quoted by Mr. Edmonds at the previous meeting[6]—that, by its resolution adopted on the proposal of Mr. Amado, the Commission had accepted the idea that a State could validly extend its territorial sea to more than three miles and less than twelve.

42. In view of that impression, it was essential that the Commission should lay down the conditions under which a State could properly extend its territorial sea beyond three miles and expect other States to recognize its claim.

43. The Special Rapporteur's proposal could satisfy that requirement provided it was amended to meet the following criticisms. First, the reference to "historic rights" was too vague; besides, it was concerned with the past and could not be of assistance where new situations arose. A more precise formulation would be to make reference to national necessities of an economic, social or political character. That idea was contained in the opening phrase of Faris Bey el-Khouri's amendment to the first paragraph.

44. Secondly, the reference in proviso 1 to treaty obligations was quite superfluous. It was obvious that, if a State entered into a treaty undertaking to recognize the territorial sea of another State, it would have to abide by the treaty it had signed.

45. Thirdly, he agreed with Mr. Scelle in disapproving of the superficial notion of reciprocity embodied in the final phrase of the same proviso. A State might be justified in claiming more than three miles for its territorial sea without being obliged to recognize similar claims by other States which were not based on historical grounds or national necessity.

46. Fourthly, proviso 2, in its reference to the International Court of Justice, merely provided for respect for judicial decisions. What was required, however, was a reference to the necessity of judicial intervention—or compulsory arbitration—in all future disputes over the breadth of the territorial sea. Such a system would be in line with the one adopted by the Commission in its articles on fisheries.[7] There was some analogy between the two situations, in that both the conservation of fisheries and the delimitation of the territorial sea were concerned with the extension of the State's jurisdiction into the high seas. For those reasons, he approved of Faris Bey el-Khouri's amendment to proviso 2 inasmuch as it referred to the International Court's competence.

47. Mr. SALAMANCA said the Special Rapporteur's intention was to lay down a uniform rule and the text which he proposed for article 3 made it clear that States were not free to extend their territorial sea beyond three miles.

48. Sir Gerald Fitzmaurice had suggested that because the three-mile rule was uniform among a certain number of countries, that fact made the marine league a rule of international law. In making that suggestion his criteria, however, were presumably qualitative, but as lawyers the members of the Commission would know that a rule of international law required a quantitative criterion; only such a criterion would give the rule a universal validity based on general acceptance and reciprocity. Important as they were, the States adhering to the three-mile rule represented a minority of the States of the world. Indeed, in the General Assembly, they numbered only fifteen — i.e., only a quarter of the membership of the United Nations.

49. The so-called three-mile rule had made its appearance well after the discovery of America, and it was a historical fact that that rule had been imposed by force by those great maritime States which claimed it now to be a rule of law.

50. At The Hague Conference for the Codification of International Law in 1930, it had been clearly demonstrated that the three-mile rule did not enjoy general acceptance. In the words of Professor Gilbert Gidel —the great authority on the international law of the sea—the so-called three-mile rule had been utterly defeated at that conference *(La prétendue règle des trois milles a été la grande vaincue de la Conférence)*. Professor Gidel added that in future, it would be impossible to speak of the three-mile rule as constituting a norm of positive international law.[8]

51. It was now a quarter of a century since The Hague Codification Conference had taken place. The three-mile rule, which had not been accepted as part of international law in 1930, could still less be so described 25 years later. After 1930 a great majority of States had departed from the three-mile rule, fixing the limit of their territorial sea at 4, 6 or 12 miles. Despite that

[6] 312th meeting, para. 3.

[7] 305th meeting, para. 88.

[8] G. Gidel, "La Mer Territoriale et la Zône Contigüe", *Recueil des Cours de l'Académie de droit international*, vol. 48 (1934), p. 193.

undeniable fact the Special Rapporteur and some members of the Commission were trying to impose the three-mile rule, thereby granting to countries which applied the three-mile limit the privilege of objecting to any other distance. In that way, the countries adhering to the three-mile limit would be the rulers of the seas. On the basis of the proposal presented by the Special Rapporteur, any other breadth of the territorial sea would be a precarious one, unless recognized by all the countries adhering to the three-mile rule. A principle of international law could not be established by taking into consideration only the point of view of the minority as against the majority, even if the majority did not adhere to a uniform breadth of the territorial sea but claimed 4, 6 or 12 miles. Should the Commission decide in favour of the three-mile rule, it would go beyond its powers of codification and under-estimate the political factors which were dominant in the world and in the General Assembly.

52. The resolution voted by the Commission at its 311the meeting (para. 63) on the proposal of Mr. Amado was totally incompatible with the text the Special Rapporteur proposed for article 3. The merit of that resolution lay precisely in its somewhat vague terms. By stating the facts as they really were, it went as far as the Commission could possibly go in the matter of defining the breadth of the territorial sea. The Special Rapporteur's proposed text, on the other hand, endeavoured to lay down as a norm of international law a rule which was only accepted by a minority of States. The fact that that minority included many of the larger maritime powers did not exclude the fact that they were outnumbered in the General Assembly by three to one—a fact which the Commission could not afford to ignore when considering the fate of its draft articles on the territorial sea.

53. It was true that the Commission was a technical body composed of members who did not represent their countries. But just as it could not afford to ignore political considerations which were bound to loom large during future discussion of its draft articles in the General Assembly, the Commission had also to bear in mind that its members were chosen with a view to geographical representation. For his part, he (Mr. Salamanca) felt it his duty to point out that in the whole of the Spanish-American world, comprising nineteen sovereign States, only two or three adhered to the so-called three-mile rule.

54. The Latin-American States which were claiming a greater breadth for their territorial sea were doing so on the ground of needs which had become manifest only recently—long after the so-called three-mile rule had been imposed by force by certain important maritime powers.

55. He urged the Commission, now that it had voted the resolution proposed by Mr. Amado, to adopt the wise course of not attempting any further elucidation of the question of the breadth of the territorial sea. If the Commission were to avoid such attempts, it would still be open to it to renew its discussions at its next session and perhaps arrive at a more precise formulation in the matter.

56. He therefore formally proposed that further debate on the item under discussion be deferred until the next session and that the Commission should not discuss any other proposal on article 3.

57. The CHAIRMAN said that under rule 117 of the rules of procedure of the General Assembly (A/3660)[9] two members could speak in favour of, and two against, the motion which had been proposed by Mr. Salamanca.

58. Mr. GARCÍA AMADOR recalled that he had been in favour of postponing discussion of article 3 before the resolution proposed by Mr. Amado had been voted on by the Commission. For the reasons which he had given at a previous meeting[10] he had felt that the Commission would have done well to defer consideration of the breadth of the territorial sea until the draft articles on fisheries had been submitted to States and their reactions thereto had become known.

59. The adoption of the resolution proposed by Mr. Amado had altered the situation completely. The Commission had taken a stand which was liable to give the impression that it had acknowledged the validity of claims to a territorial sea of more than three, but less than twelve, miles. It was no longer possible for further discussion to be deferred, unless the decision to defer further discussion subsumed also the principles embodied in the resolution proposed by Mr. Amado.

60. Sir Gerald FITZMAURICE pointed out that that resolution had been voted and could therefore not be affected by a decision to defer further discussion.

61. Mr. LIANG (Secretary to the Commission) said that the resolution proposed by Mr. Amado would always remain on the record now that it had been adopted. However, the Commission could well decide to defer further discussion of the whole question of the breadth of the territorial sea; and since the principles expressed in the resolution bore on that question, they would, in that sense, be reserved for further discussion too.

Mr. Salamanca's proposal to defer further discussion of the question of the breadth of the territorial sea was rejected by 8 votes to 4, with 1 abstention.

62. Mr. AMADO felt that, in substance, the Special Rapporteur's proposals were not altogether incompatible with the resolution adopted at the 311th meeting, following his (Mr. Amado's) proposal.

63. There was indeed a difference between his system and that of the Special Rapporteur in that he (Mr. Amado) proposed to leave the matter of claims to a territorial sea of more than three, and less than twelve miles to be elucidated by State practice, and perhaps future arbitral awards and judicial decisions. The Special Rapporteur, on the other hand, was attempting in his text to lay down some precise rules with regard to the validity of such claims.

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[9] United Nations publication, Sales No.: 1957.I.24.

[10] 308th meeting, paras. 67–69.

64. For his part, he (Mr. Amado) felt that it would not be altogether realistic for the Commission to go any further than it had already gone.

65. Mr. GARCÍA AMADOR proposed that the Commission take a vote on the fundamental principles underlying Faris Bey el-Khouri's proposals. The two main principles were: firstly, the recognition of national interest as a justification equal in importance to historical rights; and, secondly, the provision for the jurisdiction of the International Court of Justice.

66. Sir Gerald FITZMAURICE gave notice of his intention to speak on Faris Bey el-Khouri's proposals (see para. 24 above) as soon as he had an opportunity to study them more closely.

Further discussion of article 3 was adjourned.

The meeting rose at 1 p.m.

314th MEETING

Friday, 17 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. Mr. SANDSTRÖM proposed the following text for article 3:

"Subject to any historic rights which a State may claim over a greater breadth, the breadth of the territorial sea which a State can lawfully claim against all other States is three nautical miles.

"Other States are under an obligation to recognize territorial waters fixed by the coastal State at a greater breadth than that laid down in the foregoing paragraph only if

"1. They have assumed treaty obligations in the matter, or claim an equal or greater breadth for their own territorial sea,

"2. As a result of a dispute referred to the International Court of Justice, the Court recognizes that the claim of the coastal State is based on a historic right or justified by the legitimate requirements of that State."

2. The only difference between that text and the one proposed by the Special Rapporteur[1] was an amendment to proviso 2 in the second paragraph. The change was intended to specify that it was for the International Court of Justice to adjudge on the question whether a coastal State's claim was based on a historic right or justified by its legitimate requirements.

3. Sir Gerald FITZMAURICE said he could not accept Faris Bey el-Khouri's amendments[2] to the text proposed by the Special Rapporteur because of the reference therein to "national necessities".

4. The Commission had already recognized the coastal State's claim to reasonable fishery conservation rights. It had also recognized its special rights, in the contiguous zone. Given those two sets of rights, there was no necessity whatsoever for a State to make a claim to sovereignty in the sea off its coasts beyond three miles.

5. With a very few possible exceptions, no national necessity could be quoted which was not already taken care of by fishery conservation rights and by the contiguous zone as defined by the Commission.

6. An excellent illustration was provided by the Norwegian fisheries dispute. If ever there had been a case where a country could claim national necessities it was Norway. That was apparent from the judgment of the International Court of Justice; it was even clearer if one referred to the pleadings presented on behalf of the Norwegian Government in that dispute. And yet Norway had made a claim only to four miles of territorial sea and, in doing so, had based that claim not on national necessities but on long-standing historical usage. Iceland provided another example of genuine national necessities in spite of which the claim was to four miles, based on long-standing historical usage.

[1] 310th meeting, para. 3.

[2] 313th meeting, para. 24.

7. There was no justification whatsoever for countries far more prosperous than Norway and Iceland claiming six or even twelve miles of territorial waters on the pretext of so-called national necessities. In the vast majority of cases where extensive claims were made, the countries making them were in no different position from other countries which refrained from doing so.

8. The analysis of the actual history of claims showed that most of them were merely imitative. It was some thirty years since one or two Mediterranean countries —certainly not more than two—had claimed a territorial sea of six miles. Other Mediterranean States had followed suit so as not to be left at a disadvantage. At a previous meeting[3] the Chairman had mentioned the case of his own country, Greece, which had originally been quite satisfied with the three-mile rule but, upon other Mediterranean States claiming six miles, had done the same in order to avoid being placed in an inferior position with regard to foreign fishermen in the waters lying between three and six miles from the coasts of Greece. In most cases the countries which claimed more than three miles did so simply because they imagined they would be placed at a disadvantage if they did not imitate claims made by other States. More often than not it was a matter of prestige.

9. It was a complete illusion to think that the question of the three-mile rule was somehow linked with a country's prosperity. All countries had coastal populations which depended exclusively on fishing for their livelihood. France was by many standards a wealthy country; but large sections of the population of Brittany and Normandy were completely dependent on fishing for their livelihood. The same was true of the United Kingdom—in many ways a prosperous country—where considerable numbers of people in south-west England, on the east coast and in Scotland and Northern Ireland were completely dependent on fisheries so that, if a diminution of stocks were to occur, their livelihood would be very seriously affected.

10. In reply to the suggestion that in certain wealthy countries the fishing industry was organized on a capitalist basis, he stressed that not only was line fishing in use in all countries—even the so-called wealthy countries—but that trawling too was not necessarily a capitalist enterprise. Some owners possessed only one or two trawlers; very often a single trawler was owned by several partners. The fishing industry in all countries was largely a small-man business.

11. There was no national necessity that could justify the extension of the coastal State's sovereignty over nine or twelve miles of sea instead of the normal three. The concept of the contiguous zone for customs control was based on a real necessity for the protection of the financial and economic interests of a State. That concept, together with the coastal State's power to enact measures for the conservation of fisheries, took care of all genuine needs.

12. It was true that Faris Bey coupled his suggestion with a reference to the International Court of Justice, but that reference did not really advance the matter very much. The Court, when it came to decide upon a dispute, would be in a quandary as to the criteria upon which to assess national necessities. National necessities did not constitute a legal conception.

13. In the articles which the Commission had adopted on the conservation of fisheries, certain objective criteria had been laid down, adherence to which was necessary in order to justify the coastal State's unilateral action. It connexion with the important matter of the breadth of the territorial sea, it was now suggested that the coastal State's freedom of action should be made subject to no criteria at all. For to make a reference to mere national necessities was to introduce a method which would allow countries to claim virtually what they liked.

14. Mr. HSU said that his plea on behalf of the small man who was being ousted by the larger fishery concerns was just as much a plea for the small fishermen in the wealthy countries as in any other.

15. It was necessary for the advocates of the three-mile rule to understand that some concessions were necessary to the countries which really needed some extension of the territorial sea. In the Far East, there was a real need which constituted a good and valid reason for the extension of the territorial sea beyond three miles; the need arose in respect of fishing, but was not covered by the right of the coastal State to adopt fishery conservation measures under certain conditions.

16. He admitted it was difficult to define national necessities. A much better expression was that of "legitimate requirements", which was used by Mr. Sandström in his proposal. Such a formula could quite well serve the purpose, as its interpretation could safely be left to judges or arbitrators.

17. Mr. SANDSTRÖM said that by "legitimate requirements" was meant primarily the coastal State's need for fish as food. For the satisfaction of those needs, a distance of three miles was often far too small, if beyond that distance fishermen of foreign States were carrying on their activities.

18. It was obvious that the Commission could not adhere uncompromisingly to the rigid three-mile rule, even if it were made subject to exceptions by virtue of historic rights. Some concessions were necessary in favour of the countries claiming more than three miles.

19. Mr. SCELLE said Sir Gerald Fitzmaurice's arguments were irrefutable. They constituted an able plea in favour of preserving the high seas for the use of all men—a principle which was one of the foundations of international society, and not only of international law.

20. But while national necessities could not justify any extension of the territorial sea beyond the three-mile limit, he understood Sir Gerald Fitzmaurice to be in agreement with him regarding the question of contiguous zones.

[3] 312th meeting, para. 23.

21. The problem of the conservation of fisheries was independent of that of the territorial sea, as conservation measures could be adopted at any distance from the coast.

22. One of the reasons leading to excessive claims regarding the extent of the territorial sea was the fact that the Commission had acknowledged the coastal State's right of sovereignty and property over the continental shelf. It was inevitable that claims to sovereignty and ownership of the continental shelf would lead to claims to sovereignty over the waters above the continental shelf.

23. A much better course would have been to follow the method employed in municipal law and consider the rights of the coastal State as no more than concessions on what was public domain. With such a system, the only problem which would arise would be that of ensuring that concessions were not detrimental to the freedom of the high seas—a problem which was not too difficult for the competent judge or arbitrator to solve in each specific case.

24. Two prejudices had been responsible for a great deal of confusion and it was desirable that the Commission should rid itself of them. The first was the assumption that the breadth of the territorial sea had to be the same for all States. That such an assumption was at the back of everyone's mind was shown by the fact that all members of the Commission spoke of the territorial sea (in the singular). In actual fact, there was not the same justification for the territorial seas of all the various States, and there was no reason why they should all be of exactly the same breadth. The second unfortunate prejudice concerned the concept of sovereignty. It should have been clear to all that sovereignty over the territorial sea could not possibly be of the same nature as sovereignty over land territory. Irrefutable evidence of that was provided by the fact that not only foreign merchantment but even foreign warships were entitled to right of passage through the territorial sea; in other words, the armed forces of foreign States had the right to go through the territory over which the so-called sovereignty of the coastal State was exercised. He would not, however, quarrel about words; it mattered little whether the term "sovereignty" were used. The reference was in any case to jurisdiction or competence over a series of matters. And that competence differed where sea and land were concerned.

25. The only answer to the problem with which the Commission was faced was to make provision for contiguous zones constituting encumbrances or encroachments on the high seas for specific purposes and for the benefit of the coastal State. What was required was not a single zone but several contiguous zones, each one for a particular purpose. If a single contiguous zone were laid down for all purposes, that would be tantamount in effect to an extension of the territorial sea.

26. The system of contiguous zones had to be coupled with provisions for an international authority or, failing such authority, for compulsory arbitration or, again, for the jurisdiction of the International Court of Justice on all disputes that might arise in connexion with those zones. Such a provision would constitute an indispensable safeguard.

27. Sir Gerald FITZMAURICE recalled that the Commission had already adopted a provision for a contiguous zone of not more than twelve miles for purposes of customs, sanitation and fiscal control. The Commission had also adopted articles on the conservation of fisheries, which contained provisions for the benefit of the coastal State. It was on that basis that the Commission had to discuss the breadth of the territorial sea.

28. The CHAIRMAN proposed to the Commission, in accordance with rule 75 of the rules of procedure of the General Assembly (A/3660), that the list of speakers be declared closed and that speeches be limited to five minutes.

It was so agreed.

29. Faris Bey el-KHOURI, referring to Sir Gerald Fitzmaurice's remarks on the term "national necessities", said that those words referred primarily to the provision by a State for its people of those "adequate means of subsistence and opportunities for economic development" referred to in a memorandum from the Legation of Ecuador transmitted to the Commission on 5 June 1955 by His Excellency Ramón Vintimilla Ramírez, the Minister of Ecuador in Switzerland. He (Faris Bey) had included the words in question in his proposal because he felt that a reference to historical rights was not sufficient to meet all legitimate needs.

30. It had to be remembered that many States had no geographical continental shelf. In order to provide food for their peoples they required to exercise a certain monopoly in respect of the resources in an area of sea somewhat greater than that enclosed by the traditional three-mile rule. The concept of the contiguous zone did not meet that particular requirement any more than the articles on the conservation of fisheries, for neither one nor the other gave the coastal State a monopoly of fishing in the areas concerned. No such monopoly could be legally established outside territorial waters, and it was clear that some concession with regard to the breath of the territorial sea would have to be made to satisfy the needs of the countries he was referring to. The best course for the Commission was the following:

(1) To grant recognition to claims based on national necessities up to a maximum of twelve miles from the coast. Such a system would enable the Commission's draft to obtain the support of many States which did not abide by the three-mile rule;

(2) To lay down a procedure whereby any State claiming more than three miles of territorial waters should be required to make a declaration to that effect and notify it to the Secretary-General of the United Nations for circulation among all States: those States which did not reply within a specified period would be considered as having accepted the declaration; States contesting the claim made by the coastal State would,

ipso facto, become parties to proceedings before the International Court of Justice to judge upon the dispute between them and the coastal State.

31. Finally, he would favour the formal adoption of four miles instead of three as the minimum territorial sea, which had to be recognized by all States.

32. Mr. AMADO said it was not the Commission's role to parcel out the sea among States. The Commission could only recognize facts. It was a fact that the three-mile rule—a rule which had stood for centuries—received the acceptance of many important maritime States bordering on the narrow seas. It was also a fact that a tendency had grown to extend the territorial sea beyond three miles. That international practice was in the process of transformation into a rule of international law—a rule which was as yet rather ill-defined. With the utmost goodwill in the world, the Commission could not give shape to a more definite rule because it could only codify reality, and reality was created by life.

33. He reiterated that the Commission could go no further than it had gone in adopting his own proposal.[4] He would oppose any other proposals on the breadth of the territorial sea.

34. Mr. HSU agreed that wiser statesmanship during the past thirty years would have no doubt avoided the problems with which the Commission was now faced. Unfortunately, it was too late to hold back the tide.

35. Like Mr. Scelle, he had opposed the idea of recognizing the coastal State's sovereignty over the continental shelf. The Commission, however, had accepted that idea. It had more recently granted the coastal State a greater say in the matter of high seas fisheries. It was surely in line with those developments to admit also the extension of the territorial sea, within reasonable limits, beyond the three miles.

36. Finally he stressed that, contrary to what Sir Gerald Fitzmaurice had suggested, the concept of the contiguous zone did not provide an answer to the problems involved. The contiguous zone did not give the coastal State any special rights in the matter of fishing. It was not a question of the conservation of fisheries that was involved, but of fishing activities. And for that purpose, only an extension of the territorial sea could possibly meet the legitimate requirements of the States to which he had been referring in his remarks.

37. Mr. EDMONDS said that any court of justice called upon to decide a dispute on the basis of the provisions the Commission was discussing would be faced by a very serious problem. Courts could only be guided in their decisions by principles of law. In the face of a provision referring to vague generalities like national necessities, a court had only two courses before it: either to say that no such national necessities existed or else to indulge in what was known as judicial legislation—a process generally recognized as a maladministration of the judicial function.

38. He wished to dispel the impression that the United States Government had somehow departed from the three-mile rule. It was President Jefferson who had established the three-mile rule for the United States, and since then his country had been the most consistent and persistent upholder of that rule. The Truman Declaration of 1945[5] only provided for jurisdiction over the sea-bed and the sub-soil of the continental shelf, while making explicit reservation in respect of the freedom of the superjacent waters, such waters being recognized as an integral part of the high seas.

39. Mr. ZOUREK said, with regard to the suggestion that a special authority be set up, that if international organizations were created for every specific purpose, there would arise a multifarious assemblage of such organizations which could only lead to increased confusion in the international scene.

40. As to the reference to judicial settlement, he pointed out that judges could only base their decisions on legal principles. Otherwise, they would be invading the legislative function—a function which was outside their competence.

41. All three proposals on article 3 which were before the Commission clearly repudiated all distances other than three miles as the breadth of the territorial sea. And yet claims to greater distances, in so far as they were made within reasonable limits, were just as much a part of existing international law as the so-called three-mile rule.

42. None of the three formulae proposed could be accepted by any of those States—the majority of the Members of the United Nations—which, at the present time, possessed a territorial sea of more than three miles; for such acceptance would necessarily imply only that they renounced the benefits of a legal situation which had been brought about by the exercise of sovereignty over their territorial waters, often combined with explicit or tacit recognition of their action by other States.

43. Mr. HSU stressed that neither the United Kingdom nor the United States was a genuinely strict adherer to the three-mile rule. Both those States claimed either sovereignty, or control and jurisdiction, over the continental shelf. The United States claimed a contiguous zone. It was clear to all that those claims in respect of the continental shelf and contiguous zones were intended to remedy the defects of the three-mile rule by extending beyond three miles the control of the coastal State for certain essential needs.

44. The CHAIRMAN suggested that the principles embodied in Faris Bey el-Khouri's amendment should be voted upon.

[4] 311th meeting, para. 63.

[5] See text in *Laws and Regulations on the Régime of the High Seas* (United Nations publication, Sales No.: 1951.V.2), p. 38.

45. Sir Gerald FITZMAURICE pointed out that a great deal depended on the wording in which the principles were actually going to be expressed. For those reasons, he preferred a vote on the texts proposed by Faris Bey el-Khouri rather than on principles.

46. He appealed to Faris Bey to accept the term "legitimate requirements" proposed by Mr. Sandström (para. 17 above) instead of the much vaguer term "national necessites". Such a change might enable him to vote differently on Faris Bey's proposal.

47. Faris Bey el-KHOURI said he preferred not to alter the terms of his proposal.

48. Mr. AMADO agreed on the necessity of voting on actual texts rather than on principles.

49. Following the adoption of his proposal at its 311th meeting, the problem before the Commission was whether it wished to go further and formulate in article 3 the conditions under which a State might legitimately extend its territorial sea beyond three miles but not more than twelve miles from its coast. Such a formulation was the aim both of the Special Rapporteur's proposed article 3 and of the amendments thereto proposed by Faris Bey el-Khouri and Mr. Sandström. For his part, he did not favour a formulation of that kind because he did not feel that international custom had reached the stage where such detailed provisions could be codified. It was, however, right and proper for the Commission to vote on the proposal made by the Special Rapporteur, and the amendments thereto by Faris Bey el-Khouri and Mr. Sandström.

50. The CHAIRMAN invited the Commission to vote on Faris Bey's amendments to the first paragraph of article 3 as proposed by the Special Rapporteur.

51. Mr. GARCÍA AMADOR requested separate votes on Faris Bey's two amendments to that paragraph, namely:

(1) To insert the words "or national necessities" after the opening words "Subject to any historical rights"; and

(2) To insert the words "up to a maximum of twelve miles" after the words "over a greater breadth".

52. Mr. AMADO questioned whether it was possible for the Commission to take a vote on the twelve-mile maximum in view of the fact that it had already done so in voting on the second paragraph of the resolution adopted at the 311th meeting.

53. The CHAIRMAN, speaking as a member of the Commission, and with a view to clarifying the position, formally proposed two amendments to the first paragraph of the Special Rapporteur's proposal[6] as amended by Faris Bey:

(1) To delete the words "or national necessities"; and

(2) To delete the words "up to a maximum of twelve miles".

He emphasized that he proposed the second amendment in order to facilitate the procedure, not because he personally was in favour of deleting the words "up to a maximum of twelve miles".

Mr. Spiropoulos' proposal to delete the words "or national necessities" was rejected by 7 votes to 5, with 1 abstention.

54. Mr. HSU, speaking to a point of order, said Mr. Spiropoulos' second proposal re-opened the question of a twelve-mile maximum beyond which extensions of the territorial sea were in no case justified by international law. It therefore involved the reconsideration of the second paragraph of the resolution adopted at the 311th meeting (para. 63).

55. The CHAIRMAN assured Mr. Hsu that, whatever vote the Commission might take on his second proposal, the resolution adopted at the 311th meeting would not be affected.

56. Mr. HSU accepted that assurance.

Mr. Spiropoulos' proposal to delete the words "up to a maximum of twelve miles" was rejected by 7 votes to 2, with 4 abstentions.

The Commission rejected by 6 votes to 5, with 2 abstentions, Faris Bey el-Khouri's proposed amendments to the first paragraph of the Special Rapporteur's proposed article 3.[7]

57. Faris Bey el-KHOURI then withdrew his amendment to the second paragraph of the Special Rapporteur's proposal in favour of Mr. Sandström's text (para. 1, above). He was prepared to do so particularly because the latter made no mention of a maximum limit of twelve miles and contained a provision whereby extensions beyond three miles had to be justified before the International Court of Justice.

58. Mr. FRANÇOIS (Special Rapporteur) withdrew his proposal in favour of Mr. Sandström's.

59. The CHAIRMAN pointed out that since the Special Rapporteur's text had been withdrawn his own amendment to it[8] was no longer before the Commission.

60. Mr. GARCÍA AMADOR, noting that Mr. Sandström had taken over proviso 1 of the Special Rapporteur's text, opposed its inclusion for reasons that he had already given. First, it was unnecessary to make explicit reference to treaty obligations since, if they existed, disputes would not arise; and secondly, it should surely be open to States to contest a claim for the same distance as they applied themselves if they considered the claim ill-founded.

61. Mr. FRANÇOIS (Special Rapporteur), explaining the reason for proviso 1, said that though self-evident,

[6] 310th meeting, para. 3.

[7] *Ibid.*

[8] 313th meeting, para. 20.

it was desirable to make express reference to the conclusion of treaties between two or more States for the reciprocal recognition of a certain delimitation of the territorial sea. He did not agree with Mr. Scelle concerning the latter part of the proviso because he thought it inadmissible for States to contest a delimitation equal to or smaller than their own. Moreover, the provision might have the useful effect of restraining States from claiming a certain extension because it would mean having to recognize the equivalent for another State. For those reasons he considered that the proviso should be retained.

62. Mr. SCELLE maintained his view and proposed the deletion of the words "or claim an equal or greater breadth for their own territorial sea" in proviso 1.

63. Mr. LIANG (Secretary to the Commission) observed that there was a substantial difference between proviso 2 in Mr. François' text and proviso 2 in Mr. Sandström's. The former had provided for the submission of disputes not only to the International Court but also to an arbitral tribunal. Mr. Sandström, on the other hand, while not providing for arbitration, had given far-reaching effect to the Court's decision. It would be interesting to learn the reason for Mr. Sandström's rejection of possible recourse to an arbitral tribunal.

64. Mr. SANDSTRÖM replied that his reason had been that States not parties to the dispute could not intervene in a hearing before an arbitral tribunal, whereas they could before the Court.

65. Mr. HSU asked whether Mr. Sandström would accept the Chairman's amendment originally moved to the Special Rapporteur's text.

66. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Chairman's purpose had been to render his proposal more flexible, and Mr. Sandström had already achieved that by referring to "the legitimate requirements" of States. The Court would not be bound to apply the three-mile rule and would take into account all the legitimate interests of the coastal State.

67. Mr. ZOUREK asked whether the expression "legitimate requirements" was an exact translation of *besoins légitimes*.

68. Mr. FRANÇOIS (Special Rapporteur) replied in the negative and said that that point would have to be cleared up by the Drafting Committee.

69. Faris Bey el-KHOURI proposed the substitution of the words "national necessities" for the words "legitimate requirements", which, being vague and ambiguous, could not provide a criterion on which the Court could base its decision. It was impossible to determine what were legitimate requirements. On the other hand, there could be no doubt at all as to what was meant by "national necessities".

70. Mr. SCELLE proposed the insertion in proviso 2 of the words "an arbitral tribunal or" before the words "the International Court of Justice" and of the words "the tribunal or" before the words "the Court recognizes". He submitted that amendment because he had not been convinced by Mr. Sandström's reasoning. In practice there would be no great difference between submitting a case to the Court or to an arbitral tribunal, but the latter possibility should not be excluded, so as to allow States not bound by Article 36, paragraph 2, of the Court's Statute to intervene in a case.

71. Mr. FRANÇOIS (Special Rapporteur) pointed out that Mr. Scelle's amendment was quite unacceptable because according to Mr. Sandström's text the Court's decision would be binding on all States; that would be inadmissible in the case of arbitral awards.

72. Mr. SCELLE, drawing attention to Article 59 of the Statute of the Court, observed that the Court's decisions could only be binding on the parties to a particular case.

73. Mr. LIANG (Secretary to the Commission) said that Mr. Sandström had done little to dispel his doubts, which had now been further reinforced by Mr. Scelle's remarks. If the present provision were accepted by most States there would be little difference between the binding force of a decision by the Court and that of an arbitral award, but he could not understand why States which had not intervened in the case should be held to have forfeited the right to the delimitation in dispute. Such an argument could not be sustained in the face of the possibility of the Court's refusing to grant a hearing to a third party. Thus, as far as the creation of new obligations was concerned, the Court and an arbitral tribunal stood on the same footing.

74. Mr. SANDSTRÖM said that he would hesitate to accept Mr. Scelle's second amendment—for reference to an arbitral tribunal—first because third parties could not intervene in a case before an arbitral tribunal and secondly because the jurisprudence resulting from a whole series of arbitral awards would not be uniform and homogeneous, as in the case of the Court's decisions.

75. Mr. FRANÇOIS (Special Rapporteur) asked Mr. Scelle whether in reintroducing the arbitral tribunal he intended the award to be binding on the parties alone.

76. Mr. SCELLE replied in the negative since third parties could intervene in arbitral proceedings if the original parties to the dispute agreed. He added that no decision could be made universally valid for all States.

77. Mr. FRANÇOIS (Special Rapporteur) pointed out that a third party might be reluctant to intervene since it had had no influence in the choice of arbiters.

78. Sir Gerald FITZMAURICE considered that there was an important difference between the views held by the Special Rapporteur and Mr. Scelle. He personally agreed with Mr. François that the purpose of proviso 2 was to render the finding of the Court in any particular case binding not only on the parties, but on all other States as well. The question was whether it was desirable to give a similar status to an arbitral award, which in the nature of things would not have the same

authority as a finding of the International Court of Justice. Mr. François had rightly brought out that third parties would be reluctant to intervene in a case submitted to arbitration unless they had had some say in the choice of arbiters. Yet under Mr. Scelle's amendment they would still be bound by the award even if they did not intervene.

79. Mr. SCELLE asked whether, under proviso 2, a decision of the Court would be binding on all States.

80. Sir Gerald FITZMAURICE replied in the affirmative, on the ground that if States accepted that provision they undertook to recognize that any decision by the Court was valid for them, even though they had not been parties to the dispute.

81. Mr. SCELLE suggested that on that assumption, adoption of his amendment would simply mean that States also accepted in advance the validity of arbitral awards.

82. Sir Gerald FITZMAURICE pointed out that a further reason why a decision of the Court could be regarded as valid *erga omnes* was that if the claim in question were challenged again the same decision would be rendered.

83. Mr. SCELLE said that he was still unconvinced.

84. In reply to a question by the CHAIRMAN, Mr. FRANÇOIS (Special Rapporteur) said that there was no provision in the text for the obligatory submission of disputes to the International Court.

85. Mr. GARCÍA AMADOR said that after Mr. François' explanation concerning the first part of proviso 1 he would be prepared to accept it, but would support Mr. Scelle's proposal for the deletion of the latter part.

86. The CHAIRMAN put to the vote Mr. Scelle's proposal for the deletion from proviso 1 of the words "or claim an equal or greater breadth for their own territorial sea".

The proposal was rejected by 5 votes to 4, with 4 abstentions.

87. The CHAIRMAN put to the vote Mr. Scelle's proposal to re-introduce the reference to an arbitral tribunal in proviso 2.

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

88. Mr. GARCÍA AMADOR, referring to Faris Bey el-Khouri's amendment to proviso 2 (para. 69 above), said that it did not affect the Spanish text which would in any event remain unchanged.

89. The CHAIRMAN, before putting Faris Bey el-Khouri's proposal to the vote, pointed out that it was the word "legitimate" and not the word "requirements" which had given rise to difficulties.

The proposal to substitute the words "national necessities" for the words "legitimate requirements" was adopted by 6 votes to 4, with 3 abstentions.

90. Sir Gerald FITZMAURICE said that though he had intended to support Mr. Sandström's text, he would now be compelled to vote against it owing to the adoption of Mr. Scelle's second amendment. It was, in his opinion, impossible to stipulate that an award rendered by an arbitral tribunal appointed by two parties should be valid for the whole world. The reference to "national necessities" further reinforced his opposition to the amended text.

91. Mr. FRANÇOIS (Special Rapporteur) said that he would have to vote against the text for the same reasons. Mr. Scelle's second amendment had, in effect, destroyed the whole system proposed, since arbitral awards could not be binding on all other States.

92. Mr. SANDSTRÖM said that he would also have to vote against his own text as now amended.

93. Mr. SCELLE observed that neither a decision of the Court nor an arbitral award could be binding on States not parties to the dispute.

94. Mr. GARCÍA AMADOR expressed his intention of voting in favour of the amended text because he was unable to see how it could be inferred that decisions of the Court could be binding on States not parties to the dispute and an arbitral award obviously had no general validity. He therefore failed to understand why Mr. Scelle's second amendment should have aroused such keen opposition. Clearly there had been some misunderstanding with regard to Article 59 of the Court's Statute. He also favoured the amended text because it reinforced the Commission's decision to accept Mr. Amado's proposal recognizing the legitimacy of extensions up to twelve miles.

95. Mr. FRANÇOIS (Special Rapporteur) said that there appeared to be complete confusion about the meaning of proviso 2; it was essential to establish whether the decisions of the Court or the arbitral awards would be valid *erga omnes*. He therefore moved that the vote on the text as a whole be postponed until the following meeting.

96. Mr. AMADO considered that it would be inadmissible to lay down that decisions were valid *erga omnes*.

97. Mr. GARCÍA AMADOR supported Mr. François' motion.

Mr. François' motion was rejected by 7 votes to 6.

98. Mr. FRANÇOIS (Special Rapporteur) said that he could support proviso 2 on the understanding that a decision of the Court or an arbitral award were binding solely on the parties to a dispute.

99. Mr. SANDSTRÖM agreed.

100. The CHAIRMAN put to the vote Mr. Sandström's text as amended.

The text was rejected by 8 votes to 3 with 2 abstentions.

Further discussion of article 3 was deferred to the next meeting.

The meeting rose at 1.10 p.m.

315th MEETING

Monday, 20 June 1955, at 3 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Proposal to amend the Commission's Statute

1. The CHAIRMAN proposed that the Commission recommend to the General Assembly an amendment to article 10 of the Commission's Statute (A/CN.4/4) whereby members of the Commission would be elected for five years instead of three, beginning with those members whose term of office started in 1957.

The Chairman's proposal was adopted

Appointment of a special rapporteur for the topic of State responsibility

2. The CHAIRMAN proposed that Mr. García Amador be appointed Special Rapporteur for the topic of "State responsibility". Mr. García Amador had already submitted a memorandum on the question (A/CN.4/80) but the Commission had not yet taken it up because of its heavy agenda at previous sessions.[1]

Mr. García Amador was appointed Special Rapporteur for the topic of "State responsibility".

[1] See "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 74, in *Yearbook of the International Law Commission, 1954*, vol. II.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*resumed from the 314th meeting*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*resumed from the 314th meeting*)

Article 3 [3]: Breadth of the territorial sea (resumed from the 314th meeting)

3. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had provisionally adopted the resolution proposed by Mr. Amado on the breadth of the territorial sea.[2] Since that vote, all the other proposals made to the Commission concerning article 3 had either been withdrawn or rejected. It was now incumbent upon the Commission to take a final decision on the resolution proposed by Mr. Amado.

4. Faris Bey el-KHOURI recalled that the first paragraph of Mr. Sandström's proposal for article 3[3] had given rise to no objections and that the proposal as a whole had been rejected only because of the reference to arbitration in the second paragraph.

5. He now proposed that Mr. Sandström's text be reconsidered since he believed that, if the reference to arbitration had been omitted, that text would have gained the necessary majority.

6. Mr. AMADO said he had not understood the vote in favour of his proposal at the 311th meeting to be in any sense a provisional decision.

7. The CHAIRMAN said the resolution proposed by Mr. Amado stood, having been duly voted. It was true, however, that that resolution had only laid down certain principles and that the need was felt to complete it with certain more specific provisions.

8. Mr. AMADO warned the Commission that it might endanger its whole work if it were to try to go any further than it had gone at the 311th meeting. His resolution did not claim to solve a problem which had baffled the legal and international world for a very long time. Its only purpose had been to take note of the existing facts in a formula which was likely to be accepted not only by the majority of the Commission —as had been significantly shown by the vote—but also by the majority of States.

9. Mr. GARCÍA AMADOR said that the resolution proposed by Mr. Amado had not been adopted in a form suitable for an article. The words "Without taking any decision as to the question of the proper extension of the territorial sea" could hardly appear in an article which purported to state what the breadth of the territorial sea was.

10. Mr. HSU said that perhaps the best course for the Commission might be to postpone further discussion until the following year. If the Commission failed to arrive at a decision at its next session, it could fall back

[2] 311th meeting, para. 63.

[3] 314th meeting, para. 1.

on Mr. Amado's formula and add to it a paragraph along the lines of the third paragraph of his original proposal,[4] which read as follows:

> "In view of the lack of uniformity in international practice, the Commission has not been able to propose a general formula for recommendation."

The practical result would be to throw the whole matter back to the General Assembly for it to decide.

11. Sir Gerald FITZMAURICE pointed out that under the instructions it had received from the General Assembly the Commission was bound to make a proposal by its eighth session. If, however, no proposals were submitted to governments following the current session, there would be no time for comments on their part.

12. The CHAIRMAN agreed that the normal procedure would be for the Commission to take a decision at the current session, submit it to governments, obtain their comments and discuss the matter finally in the light of those comments at the following session.

13. Mr. GARCÍA AMADOR said that the Chairman had described the normal procedure. But that procedure was one to which exceptions were possible. He recalled that when the General Assembly had, in 1949, instructed the Commission to report on the rights and duties of States, the Commission had submitted its report without awaiting comments by governments.

14. General Assembly resolution 899 (IX) was drafted in such terms that it was incumbent upon the Commission to report on all the topics relating to the sea in time for its report to be included in the provisional agenda for the eleventh session of the General Assembly. It was clear from that resolution that, until the report on its eighth session was approved, the Commission could not regard its work on any of the problems to be dealt with in that report as complete.

15. Mr. AMADO said the Commission was torturing its mind in trying to find a solution to a problem which it knew to be insoluble. States which had adopted a territorial sea of more than three miles would not agree to being bridled. The position simply was that, struggle as it might, the only thing the Commission could do was to take note of the real situation concerning the breadth of the territorial sea.

16. Mr. ZOUREK said that the Commission's proposals had necessarily to be submitted to governments; it was not, however, necessary for them to be submitted to governments in final form. The Commission could simply state that it had found some members in agreement with the so-called three-mile rule, while others were of the opinion that States which had proclaimed a greater distance as the breadth of their territorial sea were in the same juridical situation as States which proclaimed the three-mile distance. That would be quite sufficient to provoke the necessary comments for the Commission to undertake its final discussion at the following session.

17. Mr. LIANG (Secretary to the Commission) said he agreed with Mr. García Amador's remarks.

18. In view of the fact that the General Assembly had imposed a time-limit it would have to accept whatever procedure that time-limit made necessary.

19. In its report on the sixth session, the Commission had submitted to governments provisional articles concerning the régime of the territorial sea. In doing so, the Commission had reported the various divergent opinions expressed on the breadth of the territorial sea (para. 68), and asked for the comments of governments thereon (para. 70).

20. So far only fourteen States had replied. If the Commission were to succeed in formulating an article at the present session, it was not certain that all governments would give their comments on the proposed article. Perhaps the best practical course would be for the Commission to indicate, in its report on the current session, that it still awaited the replies of many governments to its 1954 report. That would give governments another opportunity to reply.

21. He stressed that article 3 was the only one in respect of which any question of departure from the normal procedure arose. All the other articles, both on the territorial sea and on the high seas, had been duly submitted to governments for their comments.

22. As had been suggested, the two paragraphs of Mr. Amado's resolution could figure in the Commission's report on its eighth session if, by then, the Commission's attempts to formulate article 3 had altogether failed.

23. Mr. FRANÇOIS (Special Rapporteur) felt the Commission should submit to governments a text based on Mr. Amado's resolution so as to obtain their comments by the 1956 session.

24. In substance, there was no very great difference between the principles underlying that resolution and his own proposals.

25. Mr. Amado's resolution contained one vitally important statement: that any extension of the territorial sea beyond twelve miles was contrary to international law. In view of the text's lack of precision, however, some doubts had arisen with regard to the legal position in respect of claims to a territorial sea of more than three, but less than twelve, miles. It was essential to clarify the position so that the resolution was not misconstrued as meaning that other States were obliged to recognize the coastal State's extension of its territorial waters, provided it did not exceed twelve miles.

26. The CHAIRMAN said that as Mr. Amado's resolution had been voted, it was incumbent upon the Commission to submit it to governments and eventually to the General Assembly.

27. The resolution, however, was not framed as an

[4] 309th meeting, para. 14.

article. It was none the less a text, and a very important text, which the Commission had adopted.

28. Mr. AMADO said that, in order to transform the resolution into the text of an article, it was sufficient to delete the words "The Commission recognizes that..."

29. Sir Gerald FITZMAURICE, with reference to Faris Bey el-Khouri's proposal (para. 5 above) for reconsideration of Mr. Sandström's text for article 3, recalled that he had voted against the text, as amended, not only because of the reference in proviso 2 to arbitration but for another, more important, reason. That proviso made reference to national necessities and the Commission, as a juridical body, could not adopt a vague provision of that nature without defining what national necessities entailed.

30. He recognized that, in view of the present international feeling, it was necessary to make certain concessions and try to meet reasonable claims on the part of certain States for the expansion of their territorial sea. He would, therefore, not be altogether averse to a reference to "legitimate requirements" (a better expression than "national necessities"), provided, however, that a definition were adopted which would lay down some bounds, thus enabling legitimate requirements to be assessed in advance. Such a definition would be more or less along the following lines:

> "A legitimate requirement (or a national... necessity) is to be understood as meaning a requirement that cannot find reasonable satisfaction except by the exercise of jurisdiction over territorial waters, and in particular cannot be satisfied either by means of the exercise of special rights in the contiguous zone—or the several special rights in the various contiguous zones—or by the adoption of fishery conservation measures on the basis of the draft articles thereon adopted by the Commission."

31. The CHAIRMAN called upon the Commission to vote on Faris Bey el-Khouri's proposal for the reconsideration of Mr. Sandström's proposed text for article 3.

Faris Bey el-Khouri's proposal was rejected by 6 votes to 5, with 2 abstentions.

32. The CHAIRMAN said that the Commission was now left, by way of definition of the breadth of the territorial sea, only with Mr. Amado's resolution, the text of which could, however, be clarified before its inclusion in the report.

33. Comments by governments on that text would enable the discussion to be resumed at the Commission's eighth session.

34. Mr. GARCÍA AMADOR felt that the Commission need only examine in what manner Mr. Amado's resolution should be incorporated in its report on the present session. Presumably the purpose of any addition would be solely to eliminate the possibility of contradictory interpretations. He therefore proposed the insertion of the words "or making any judgement at the present session" after the words "without taking any decision" in paragraph 2. The text would then constitute an objective statement of the facts.

35. Mr. FRANÇOIS (Special Rapporteur) considered that members were free to propose amendments to Mr. Amado's text because it had been adopted purely on a provisional basis. At the time those who had considered it to be insufficient had assumed that it would be supplemented by further proposals, but all such proposals had now been rejected.

36. In the circumstances he proposed that paragraph 2 be replaced by the following text:

> "The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.
>
> "The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles."

37. Mr. KRYLOV considered that the Commission would have to decide by a two-thirds majority to reconsider Mr. Amado's proposal before it could vote on a text which conflicted with paragraph 2 thereof.

38. Mr. AMADO wondered whether it was correct to state that international law did not recognize an extension beyond three miles.

39. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Chairman had interpreted Mr. Amado's text in that sense.

40. The CHAIRMAN explained that he had stated that according to paragraph 2 of Mr. Amado's text extensions beyond twelve miles were contrary to international law, but nothing was said about extensions beyond three miles but not further than twelve.[5]

41. Mr. SANDSTRÖM observed that the conclusion to be drawn from Mr. Amado's text was that extensions beyond three miles had to be justified, if challenged.

42. Mr. SCELLE agreed with the interpretation of Mr. Amado's text given by Mr. Sandström and the Chairman, but wished to make certain that all other members of the Commission supported the proposition that any unilateral extension of the territorial sea beyond three miles was not valid for another State. The question of how it could be challenged was an entirely separate issue, with which the Commission need not concern itself at the present moment. Some of Mr. Amado's remarks seemed to imply that any extension once fixed was final.

43. Mr. AMADO asked in what manner the three-mile limit had originally been established—was it by international treaty, or a judicial decision?

44. Mr. SCELLE replied that the three-mile rule had been established by international law because it was the minimum required by States. It had won general con-

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[5] See *supra*, 311th meeting, para. 52.

sent and, unlike greater extensions, had never been challenged.

45. Mr. SANDSTRÖM could not agree with Mr. Krylov that before the Special Rapporteur's amendment could be voted, a motion to reconsider Mr. Amado's proposal would have to be carried by a two-thirds vote. For, unlike the Special Rapporteur's previous proposal which provided a procedure for delimitation, his amendment merely laid down that other States were not bound to recognize a unilateral extension beyond three miles.

46. Sir Gerald FITZMAURICE said that if the Special Rapporteur's amendment were put to the vote he would support it, not because it affirmed the principle of the three-mile limit as the only permissible one, but because it made two points about which there was general agreement: first that a claim to a three-mile limit could not be opposed and secondly that the Commission had decided that claims beyond twelve miles were inadmissible. The Commission would then not have pronounced in favour of any of the claims between those minimum and maximum limits. It was an exact statement of the position to say that there was no obligation to recognize an extension beyond three miles.

47. The CHAIRMAN, speaking in his personal capacity, said that Mr. Amado's text accurately reflected the present practice but not the legal position, since any State which applied a limit beyond three miles affirmed that it should be recognized by other States.

48. Sir Gerald FITZMAURICE said that he was of the opposite opinion. The text seemed to him to reflect the juridical position though perhaps not universal practice. There was no juridical basis upon which States that applied a limit exceeding three miles could demand that it be recognized, since no other rule had replaced the three-mile rule prescribed by international law.

49. Mr. HSU said that it was difficult to examine the Special Rapporteur's amendment without a written text. His impression was that the Special Rapporteur was seeking to revive his earlier proposal. A two-thirds majority would certainly be necessary before the text could be discussed.

50. Mr. AMADO said that he could not accept the thesis that international law laid down a three-mile limit, though he was perfectly well aware of the long-established practice of certain States, which, however, others did not follow. He had been very careful throughout the discussion to bring out the distinction between law and practice.

51. Sir Gerald FITZMAURICE, observing that Mr. Amado appeared to recognize the three-mile limit as a minimum, suggested that there was no rule of international law recognizing six or twelve miles as a minimum.

52. Mr. SCELLE said that he did not wish to complicate the discussion any further by raising difficult issues as to what was law and what was not. There was general agreement about the existence of an international custom to fix the limit of the territorial sea at three miles, and it was admitted that any State had a provisional right to extend that limit but that any other State was entitled to challenge its action. If the coastal State took no notice whatsoever of the challenge, the whole question was removed from the domain of international law.

53. An extension beyond three miles was only legal when it had enjoyed uninterrupted tacit acquiescence or had been established as a prescriptive right by a judicial decision. It was unquestionable that a three-mile limit was recognized by international law and that anything beyond it was a claim which had to secure recognition.

54. Mr. KRYLOV observed that the whole issue had been posed quite differently in Mr. Amado's text.

55. Mr. ZOUREK said that there was no need for him to recapitulate his views concerning the three-mile limit, but he was bound to intervene because the Special Rapporteur had re-introduced the notion that extensions beyond three miles must be justified. He personally disagreed and knew of no rule whereby extensions called for express recognition provided that, as was ensured elsewhere in the provisional articles, the right of innocent passage throughout the territorial sea was safe-guarded.

56. The four-mile and six-mile limits had an older history than the three-mile limit and, as he had already argued, there was no rule of international law concerning the delimitation of the territorial sea. Coastal States were free to delimit their territorial sea according to their particular needs on the juridical grounds that they exercised sovereignty in that area.

57. Mr. AMADO said that it was inacceptable that States adhering to a three-mile limit should impose on others the obligation to secure express recognition of their practice.

58. The CHAIRMAN said that as there were no more speakers on the list, the Commission might vote on Mr. García Amador's amendment (para. 34 above).

59. Mr. FRANÇOIS (Special Rapporteur) observed that his amendments (para. 36 above) were farthest removed from the original text and should be voted first.

60. Sir Gerald FITZMAURICE said that the Commission should vote on the Special Rapporteur's two paragraphs together because they formed a whole.

61. He asked whether the Special Rapporteur could accept the insertion of the words "subject to historical rights" in the second paragraph after the words "considers that".

62. Mr. FRANÇOIS (Special Rapporteur) agreed that his two paragraphs formed a whole. He would in fact have had no objection to combining them in one.

63. While prepared to support Sir Gerald Fitzmaurice's amendment, he would not incorporate it in the text because he would prefer it to be put to the vote separately, lest it should endanger acceptance of his own text.

64. Mr. KRYLOV proposed that the two paragraphs of the Special Rapporteur's amendment be put to the vote separately.

65. The CHAIRMAN asked whether the Commission thought it necessary first to vote on a motion to reconsider Mr. Amado's text; such a motion would require a two-thirds majority.

66. Mr. HSU formally proposed a motion to that effect.

67. Mr. FRANÇOIS (Special Rapporteur) felt that such a motion was unnecessary in view of the fact that the Commission had originally taken only a provisional vote on Mr. Amado's text.

68. Mr. EDMONDS agreed with the Special Rapporteur that rule 124 of the rules of procedure was inapplicable, because the previous decision had been provisional.

69. The CHAIRMAN said that in order to extricate the Commission from the present difficulty he would put to the vote the question whether a vote on the Special Rapporteur's amendment should be regarded as constituting reconsideration of Mr. Amado's text.

The question was decided in the negative by 6 votes to 2, with 4 abstentions.

70. Mr. GARCÍA AMADOR asked whether Sir Gerald Fitzmaurice could withdraw his amendment to the Special Rapporteur's text since the Commission had decided to postpone consideration of objective criteria until its next session.

71. Sir Gerald FITZMAURICE withdrew his amendment for the insertion of the words "subject to historical rights", which had been designed to render the text more acceptable to certain members such as Mr. Sandström, in view of the fact that it would raise difficulties for others.

72. Mr. SANDSTRÖM, invoking rule 91 of the rules of procedure, opposed Mr. Krylov's request for separate votes on the two paragraphs of the Special Rapporteur's amendment because they formed an indivisible whole.

73. Mr. KRYLOV insisted on his proposal because the first paragraph was a perfectly complete and coherent statement and could stand by itself.

74. Mr. ZOUREK, supporting Mr. Krylov, pointed out to Mr. Sandström that if the second paragraph were rejected its substance could be re-introduced in the form of a new amendment.

75. Mr. SANDSTRÖM said that he would not press his objection if the Special Rapporteur considered a separate vote feasible.

76. Mr. FRANÇOIS (Special Rapporteur) said that the two paragraphs could be put to the vote separately.

77. The CHAIRMAN then put the Special Rapporteur's amendment to the vote paragraph by paragraph.

The first paragraph was adopted by 8 votes to none, with 5 abstentions.

The second paragraph was adopted by 7 votes to 6.

78. Mr. ZOUREK said that adoption of the Special Rapporteur's amendment entirely altered Mr. Amado's text, which he would now be forced to oppose.

79. The CHAIRMAN then put Mr. Amado's text to the vote as amended. It read:

"1. The Commission recognizes that international practice is not uniform as regards traditional limitation of the territorial sea to three miles.

"2. The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles."

That text was adopted by 7 votes to 6.

Further consideration of item 3 of the agenda was adjourned.

The meeting rose at 6.25 p.m.

316th MEETING

Tuesday, 21 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA

AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 3 [3]: Breadth of the territorial sea (continued)

1. Mr. HSU proposed reconsideration of the Special Rapporteur's amendment, adopted at the previous meeting.[1] He recalled that the Commission, when it had tentatively adopted the resolution proposed by Mr. Amado,[2] had thereby recognized that international practice was not uniform regarding limitation of the territorial sea to three miles, and had stated that it considered international law did not justify an extension beyond twelve miles. To say that practice was not uniform was merely to admit a point of fact. But in stating the twelve-mile limitation, the Commission laid down a rule—a rule which, however much some members were unwilling to face the fact, clearly implied the coming into existence of another rule, namely, that a coastal State was entitled to extend its territorial sea within the twelve-mile limit. The Commission had done so only tentatively, subject to the determination of rules governing such extension, as could be seen from the qualifying phrase "without taking any decision as to the question of the proper extension of the territorial sea".

2. With a view to determining such rules, the Commission had gone on to discuss the proposal of Mr. Sandström, which had been accepted by the Special Rapporteur; after lengthy consideration, it had rejected it. When discussion of the subject had been resumed at the previous meeting, the members had informally agreed that the whole question of rules governing extensions between three and twelve miles be left over to the following session. They had then reverted to the resolution which had been adopted on the proposal of Mr. Amado. Having failed to lay down any rules or conditions governing extensions within the twelve-mile limit, the Commission should have set that resolution aside. To allow it to stand on its own—implying that States were completely free to extend their territorial sea up to twelve miles—would have been unjustifiable, particularly as the resolution in question had been adopted only tentatively.

3. Instead of setting that resolution aside, the Commission had, on the Special Rapporteur's proposal, adopted at its previous meeting an additional rule on the effect that other States were under no obligation to recognize such extension by the coastal State.

4. That course, although having justice on its side, unfortunately turned the original resolution into a legal monstrosity. It was axiomatic that if A had a right against B, B owed a duty to A; also, if B had a privilege against A, A had no right to deny it to B. It could not be stated that, while A had a right against B, B owed no duty to A or that, while B had a privilege against A, A had the right to deny it to B.

5. It could therefore not be stated that, while a coastal State had the privilege of extending its territorial sea to any distance within the twelve-mile limit, other States had the right to refuse to recognize such extension.

6. International law, as applied by the States upholding the three-mile rule, undoubtedly gave them the right to object to the extension. But by making it say that other States had the right to raise objection, side by side with the statement that a coastal State had the privilege of extending its territorial sea up to any distance within twelve miles, the Commission had transmogrified Mr. Amado's resolution and robbed it of all logicality.

7. Thus transmogrified, the resolution could not be allowed to stand. The Commission was a technical body, and it was the privilege of political, not technical, bodies to create legal monstrosities.

8. There were two courses open to the Commission: either to eliminate the statement regarding extension beyond twelve miles; or to discard the resolution entirely. For his part, he (Mr. Hsu) preferred the second course, because it was more in harmony with the earlier decision to leave the whole question to the following session.

9. He therefore appealed for the necessary two-thirds majority to decide to reconsider the action taken at the previous meeting.[3]

The Commission decided not to reconsider the matter by 5 votes to 1, with 7 abstentions.

Article 4 [4]: Normal base line

10. Mr. FRANÇOIS (Special Rapporteur) pointed out that some of the comments by governments on article 4 were connected with their comments on article 5, dealing with straight base lines and he would therefore deal with them together.

11. Specific issues concerning article 4 had been raised by the Union of South Africa and Norway (A/2934, Annex, Nos. 15 and 11). The Union of South Africa had suggested that the article be re-drafted in such a way as to enable States whose coastlines contained long sandy stretches to measure their territorial waters from the "surf line" of the normal outer (seaward) edge of the surf. He (the Special Rapporteur) did not propose

[1] 315th meeting, paras. 36 and 77.

[2] 311th meeting, para. 63.

[3] 315th meeting, para. 79.

that the Commission should adopt the Union Government's suggestion, which embodied quite a novel criterion. In any case, it would be most impracticable to try and measure the territorial sea from the "surf line" because the surf line was very much dependent on atmospheric conditions. In his own country, the Netherlands, the surf line was very near the coast with calm seas, but extended to several hundred metres when there was wind, and even further in case of storm.

12. The Norwegian Government suggested the deletion of the last sentence of article 4, and he (the Special Rapporteur) proposed in document A/CN.4/93 that that suggestion be followed. The sentence in question could be construed as meaning that a State might be obliged to use the high-water line in cases where no charts were available.

13. Mr. ZOUREK drew attention to the comment by the Government of Iceland (A/2934, Annex, No. 7), which suggested the deletion of the words "Subject to the provisions of article 5" so as to emphasize the fact that the two types of coast and the two different régimes applicable to them (normal base lines and straight base lines) were juridically on the same level and that one of them did not constitute an exception vis-à-vis the other.

14. Mr. FRANÇOIS (Special Rapporteur) felt that his own proposal to delete the words "As an exception" from article 5, paragraph 1, met the Icelandic Government's point. With regard, however, to the opening words of article 4, they seemed essential to a clear drafting of the text.

15. Mr. SANDSTRÖM said he was not in favour of article 5 as drafted. But it was clear that if an article on straight base lines were to figure in the provisional articles, it was necessary to include in article 4 a proviso along the lines proposed by the Special Rapporteur.

16. Mr. ZOUREK agreed to leave it to the Drafting Committee to decide about the opening words of article 4 in the light of the form in which article 5 was finally approved by the Commission.

The Special Rapporteur's proposal to delete the last sentence of article 4 was adopted by 9 votes to none, with 4 abstentions.

Article 4 as a whole, as amended, was adopted by 11 votes to none, with 2 abstentions.

Article 5 [5]: Straight base lines

17. Mr. FRANÇOIS (Special Rapporteur) proposed that, in accordance with the valid comment made by the Belgian Government, (A/2934, Annex, No. 2) the words in the French text of article 5, paragraph 2, *fonds affleurant à basse mer* be replaced by *rochers ou fonds couvrants et découvrants.*

18. With regard to substance, he had a number of proposals, following the suggestions made by various governments.

19. In paragraph 1, he proposed the deletion of the first phrase "as an exception". The phrase had little meaning and seemed to suggest that the straight base lines were an exception to a general rule instead of a rule covering a particular type of coast.

20. A second proposal for paragraph 1 was to insert the word "numerous" before the words "islands in its immediate vicinity". That proposal followed the suggestion made by the United States Government (A/2934, Annex, No. 17). The presence of a few islands in front of the coast did justify *per se* the use of the straight line method.

21. In connexion with paragraph 2, there had been a number of criticisms, one State—Iceland (A/2934, Annex, No. 7)—going so far as to suggest that the provision was incompatible with the judgement of the International Court of Justice in the Fisheries Case.

22. In fact, the text he proposed for paragraph 2 was not incompatible with the Fisheries judgement.[4] That judgement had laid down certain principles which had been incorporated in paragraph 1 of article 5. However, certain more precise formulations were necessary to put those principles into practice. For that reason, a committee of eminently qualified experts had been consulted and it was on the basis of their report[5] that the rule had been adopted under which te maximum permissible length for a straight base line would be ten miles.

23. The Commission had not claimed that that rule, or the rule that longer straight base lines could be drawn provided no point on them was more than five miles from the coast, constituted part of positive international law. They were simply necessary practical criteria for the application of the general principles which the International Court of Justice had laid down in the Fisheries Case, and which the Commission had adopted for paragraph 1.

24. The United Kingdom Government, in its comments (A/2934, Annex, No. 16) on articles 4 and 5, had suggested that provision be made to safeguard the right of innocent passage where straight base lines were drawn, even though that might involve, in certain cases, that such right of passage would apply to internal as well as to territorial waters. And Sir Gerald Fitzmaurice had made a proposal along the same lines at a previous meeting.[6]

25. For his part, he (the Special Rapporteur) could not accept the United Kingdom's suggestion. That suggestion proceeded from the erroneous assumption that the essential purpose of the straight base lines system was to extend the outer limit of the territorial sea. In fact, the system was primarily aimed at increasing the

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[4] *I.C.J. Reports 1951*, p. 116.

[5] *Yearbook of the International Law Commission, 1953*, vol. II, doc. A/CN.4/61/Add.1.

[6] 299th meeting, para. 85.

zone of internal waters wherein navigation might be restricted by the coastal State. That such was the primary consideration in Scandinavia—an example particularly pertinent to the issue—was shown by the Swedish Government's comment (A/2934, Annex, No. 13) on article 5, in which the point was made that article 5 appeared to be based on the same idea as that expressed in Swedish law concerning internal waters.

26. The Commission could not, after giving the coastal State the right to draw straight base lines, take away the main corollary of that right by making provision for the right of passage. He quoted the French legal dictum: *donner et retenir ne vaut.*

27. Furthermore, the United Kingdom proposal would give rise to a complex situation in which there would be three types of waters:

(1) Internal waters properly so-called;

(2) Internal waters subject to right of passage;

(3) Territorial waters.

28. It would be extremely difficult to draw a demarcation line between the first and second of those two categories of waters, particularly in the case of a deeply indented coast-line.

29. For all those reasons, he felt that the United Kingdom Government's suggestion could not be entertained.

30. Mr. SANDSTRÖM proposed that article 5, paragraph 2, be amended to read as follows:

> "As a general rule the drawing of straight base lines shall be subject to the following additional conditions. The maximum length of such base lines shall be ten miles. They may be drawn between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Base lines shall not be drawn to drying rocks or drying shoals. The above distances may be modified in special cases particularly for historical or geographical reasons."

31. There were two important differences between that text and the amended text proposed by the Special Rapporteur (A/CN.4/93). Firstly, the reference to "the international organ mentioned in article 3" made by the Special Rapporteur had been omitted in view of the fact that article 3 as voted did not provide for any international organ. In the second place, his (Mr. Sandström's) proposal omitted the sentence: "Longer straight base lines may, however, be drawn provided that no point on such lines is more than five miles from the coast." That provision was far too general.

32. Mr. GARCÍA AMADOR said the straight-base-line system was an old-established one, although it had not received legal recognition until the Fisheries Case.[7] In its judgement of 18 December 1951 on that case, the International Court of Justice, although dealing with a particular dispute, had laid dow in very general terms the criteria on which the straight base lines system should be founded. The Court had said in its judgement: "In this connection, certain basic considerations inherent in the nature of the territorial sea bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question."[8]

33. The judgement then states those considerations, which were three in number:

(1) "...The drawing of base lines must not depart to any appreciable extent from the general direction of the coast...";

(2) "...The close dependence of the territorial sea upon the land domain"; the real question raised in the choice of base lines was "whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the régime of internal waters";

...

(3) "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[9]

34. In the Special Rapporteur's draft for article 5, reference was made to the first two of those considerations, but nothing had been said about the third, which was extremely important.

35. That departure from the principles of the International Court of Justice's decision justified the criticism by the Government of Iceland that paragraph 2 of article 5 was imcompatible with the Court's judgement.

36. Even more significant—in view of Norway's having been a party to the Fisheries dispute—was the comment by the Norwegian Government (A/2934, Annex, No. 11) that paragraph 2 embodied innovations "unwarranted by the practice of States". The International Court of Justice, constituting the greatest authority on international law, had been satisfied with the three criteria above referred to. It was incumbent upon the Commission to adhere to those three criteria instead of reproducing them in part only. And it was equally incumbent upon the Commission not to endeavour to lay down a rule concerning the length of the straight base lines or their distance from the coast where international law acknowledged no such rules. He recalled the legal dictum: *Ubi lex non distinguit, nec nos ne distinguere debemos.*

37. The novel suggestion for a maximum limit for straight base lines of, as a general rule, ten miles in length and, exceptionally, five miles' distance from the coast had originated in the report of a committee of experts on geography, oceanography and navigation, who were not cognizant of the economic and social back-

[7] *I.C.J. Reports 1951*, p. 116.

[8] *Ibid.*, p. 133.

[9] *Ibid.*

ground to the straight-base-line rule. The Commission should not therefore follow their conclusions.

38. He proposed that paragraph 2 be deleted and that paragraph 1 be amended so as to include a reference to "certain economic interests peculiar to a region, the reality and importance of which are evidenced by a long usage"—thus incorporating, in the terms by the International Court of Justice, the third of the three basic considerations which the Court had regarded as inherent in the nature of the territorial sea.

39. Mr. KRYLOV said he agreed with Mr. García Amador's remarks. The Icelandic criticism of paragraph 2 was rigorously correct; that paragraph was incompatible with the judgement of the International Court of Justice in the Fisheries Case.

40. He felt the Commission should not go any further than the International Court in the formulation of the basic considerations involved. As had been said, paragraph 2 was based on the report of a committee of distinguished experts on nautical problems. Those nautical experts, however, were not qualified to lay down a legal rule of that type.

41. Besides, the adoption of paragraph 2 would place the Commission in a very difficult position. There was no valid argument on which to base the arbitrary choice of the particular distances therein referred to.

42. He agreed with Mr. García Amador that paragraph 2 should be deleted from article 5, and that paragraph 1 should be re-drafted so as to incorporate all three considerations laid down by the International Court of Justice.

43. Mr. HSU recalled that the Icelandic Government (A/2934, Annex, No. 7) had described the provisions of paragraph 2—based on the suggestions of the Committee of Experts—as absolutely inacceptable because incompatible with the judgement in the Fisheries Case. For his part, faced with the choice between a decision of the International Court of Justice and the opinion of the group of nautical experts, he had no hesitation in siding with the former.

44. Sir Gerald FITZMAURICE pointed out that the report of the Committee of Experts (A/CN.4/61/Add. 1) had been made in May 1953—i.e., two years after the International Court of Justice's judgement in the Fisheries dispute.

45. The Committee of Experts had been invited by the Special Rapporteur to examine certain questions of a technical nature raised during the Commission's discussions regarding the régime of the territorial sea. Those technical questions had arisen precisely because the considerations laid down in the International Court of Justice's decision in the Fisheries Case had been of a rather too general—and in some respects altogether too vague—nature to be suitable for inclusion in the Commission's draft articles. In that respect and in several others, it was apparent to any well-informed observer that many of the International Court of Justice's formulations might have been framed differently if it had taken independent expert advice on the technical issues involved.

46. It was essential to give a more precise character to some of the International Court of Justice's rather subjective considerations. That was particularly true of the following provision in article 5 which was taken from the judgement in the Fisheries Case: "The drawing of base lines must not depart to any appreciable extent from the general direction of the coast."[10]

47. The words "general direction of the coast" were an expression the implications of which depended upon how much coast was included in order to determine the general direction in question. It was obvious that the so-called general direction of the coast would be totally different according to the scale of the map or chart used: on a small-scale map of Europe, the whole Norwegian coastline from Narvik to Alesund could appear as a single straight line; on a large-scale chart such as used by seamen for navigation purposes, the general direction of the same coastline would appear as a complex broken line showing many deep indentations.

48. The expression "general direction of the coast" was already imprecise enough. But if, as was done in the article under discussion, it were coupled with the expression "must not depart to any appreciable extent", which introduced a subjective element, the whole sentence became altogether too vague a formulation and one which could not possibly be used as a valid legal criterion.

49. The Commission had to choose between two courses: (1) either to say "The drawing of such base lines must not depart to any appreciable extent from the *line* of the coast"—the term "line of the coast" being a generally recognized one having a clear meaning; or else (2) to say "The drawing of such base lines must not depart from the *general direction* of the coast"—the latter formulation being a less precise one than the former.

50. Reverting to his proposal to include a new article safeguarding the principle of the freedom of innocent passage through areas enclosed between the coastline and the straight base lines drawn in accordance with article 5, he recalled his earlier remarks concerning the somewhat accidental consequence of the judgement of the International Court of Justice in the Fisheries case—the fact that the waters between the straight base lines and the coast had acquired a new legal status as internal waters, instead of territorial waters, as they had previously been.[11]

51. That was a case where waters which were geographically part of the sea and necessary to navigation, and in which the right of passage had existed from time immemorial, had been suddenly made subject to a régime which implied the coastal State's right to interfere with freedom of navigation.

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[10] *Ibid.*

[11] 299th meeting, paras. 85–89.

52. A provision safeguarding freedom of passage in the waters concerned would help to mitigate certain inconveniences caused by the International Court of Justice's decision in the Fisheries Case.

53. There was no difficulty in determining the waters which would be subject to the provision which he proposed. The area of water involved was simply that lying between the new straight base lines and the old limit of the internal waters. The latter limit, by and large, only enclosed waters which were actually behind the coastline, such as those of estuaries, lagoons and certain deep bays.

54. Finally, he opposed Mr. García Amador's proposal for the deletion of paragraph 2 of article 5. That paragraph introduced an element of precision which was absolutely indispensable. Following the International Court of Justice's decision in the Norwegian fisheries dispute, base lines of a very great length had been drawn with very little foundation. It was clear that the considerations laid down in the Fisheries Case decision left an enormous amount to the subjective appreciation of States.

55. A rule laying down a definite distance as the maximum permissible length for a straight base line would go a long way to avoid international disputes. So long as a State's straight base lines were kept within a reasonable distance from its coast and did not run to too great a length, it was unlikely in practice that other States would dispute them. In fact, with distance limitations clearly laid down, the relative importance of the other criteria was very considerably decreased. It was only if straight base lines of unlimited length were permitted that complaints on their validity were bound to arise and arguments entered into as to whether they departed from the general line of the coast, or again whether the sea areas they enclosed were sufficiently closely linked to the land domain to be subject to the régime of internal waters.

56. He supported the figures of ten and five miles respectively, as proposed, but the fixing of any other reasonable distances would have the same effect of reducing the chances of international disputes.

57. Mr. HSU pointed out in reply to Sir Gerald Fitzmaurice that expert opinion had been given during the hearing of the Fisheries Case as well as by the Committee of Experts which had sat at The Hague in 1953.[12]

58. Mr. ZOUREK said that in view of the critical reception given to paragraph 2 by governments it should be deleted if the draft were to command the widest possible measure of acceptance.

59. It was hardly appropriate to deal with the status of waters between base lines and the coast in a draft devoted to the régime of the territorial sea. It would be remembered that the Commission had deleted the reference to "inland waters" in article 24.

60. With regard to the substance of the question, he pointed out that it was difficult to accept a new category of waters with no very well-defined status. In the past, the area between base lines and the coast had been regarded as inland waters and that had not given rise to inconvenience since the only navigational interests involved were free entry to or exit from a port, which was a matter for regulation in a régime for international ports.

61. Mr. SANDSTRÖM was uncertain whether States using straight base lines in fact prohibited foreign merchant vessels from navigating in the zone between the base lines and the coast. It was certainly not the case in Sweden, though on certain routes vessels did have to take a pilot on board. On the other hand, some zones were declared closed to warships.

62. Mr. FRANÇOIS (Special Rapporteur) suggested that governments criticizing paragraph 2 had perhaps overlooked its opening proviso—"As a general rule"—which had been expressly inserted to give the text greater flexibility. The Commission had aimed to give general directives, recognizing that in special circumstances States need not be rigidly bound by the distances laid down. He could not remember offhand whether the text had been adopted by a considerable majority, but at all events considered that the objections to it were not weighty enough to warrant its deletion. Though he would prefer the Commission to maintain the original wording, he would be prepared to suppress the five-mile limitation if there were a considerable body of opinion in favour of doing so.

63. Turning to the problem raised by Sir Gerald Fitzmaurice, he said that in his third report (A/CN.4/77)[13] he had strongly criticized the expression "general direction of the coast", having studied the report of the Committee of Experts, who had demonstrated irrefutably the errors of that concept and that it could not furnish a basis for a legal text. However, as the expression had been borrowed from the judgement of the Court, it should perhaps be retained and some modification introduced in paragraph 2 to elucidate its meaning a little more precisely. If, however, the latter paragraph were omitted altogether, then the Commission should attempt to find clearer and more accurate language for use in paragraph 1.

64. Sir Gerald Fitzmaurice's remarks had confirmed his own view that it would be difficult to recognize merchant vessels' right of innocent passage in the zone between straight base lines and the coast, which had now become inland waters. He wondered whether Sir Gerald wished to extend the proviso to warships as well.

65. Sir Gerald FITZMAURICE confirmed that he had had in mind the protection of the normal commercial activities of merchant vessels, and agreed that it would be difficult to envisage warships being granted the right of passage through inland waters. There was a strong case of continuing to grant the right of innocent passage through such zones to merchant vessels, whose

[12] See "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 63, in *Yearbook of the International Law Commission, 1953*, vol. II.

[13] *Yearbook of the International Law Commission, 1954*, vol.II.

natural routes might for many years have crossed areas which had now suddenly become inland waters.

66. In answer to a question by Mr. SANDSTRÖM, Mr. FRANÇOIS (Special Rapporteur) explained that as the Commission had rejected the proposal for the establishment of an international organ, in connexion with both the draft articles on fisheries and article 3 of the present draft, he withdrew his first amendment to paragraph 2 (A/CN.4/93).

67. Mr. ZOUREK, referring to Mr. Sandström's remarks about the practice followed by his government, said that the regulations applied by a single State and a rule of international law were two quite separate things. The Commissian must find some solution of the problem on the basis of general principles.

68. Mr. AMADO said that once again the Commission found itself in difficulties because it was trying to devise a general rule for exceptional cases. As a person without expert knowledge in the field under discussion, and as a national of a State for which the problem was not acute, he could approach it from a slightly different angle. He noted from its comment on the provisional text of article 5 that the Commission had interpreted the Court's judgement on the point as expressing the law in force and had based the article on that judgement. The Commission had also declared that the rules recommended by the Committee of Experts in 1953 (A/CN.4/61/Add.1)[14] added certain desirable particulars to the general method advised by the Court and that it therefore endorsed the experts' recommendations in a slightly modified form. Finally, the Commission had expressed the view that those additions represented a progressive development of international law and could not be regarded as binding until approved by States. However, in view of the contradictory nature of the observations submitted by governments, he wondered whether that comment in fact reflected a discernible trend and because of his doubts had so far remained silent.

69. The CHAIRMAN suggested that as the Special Rapporteur's text was the basic one his amendments need not be put to the vote unless they gave rise to formal objections.

70. Mr. EDMONDS proposed that the words "As an exception" in paragraph 1 be retained.

The proposal was rejected by 6 votes to 3 with 3 abstentions.

The Commission accepted the Special Rapporteur's amendment for the insertion of the word "numerous" in paragraph 1 before the words "islands in its immediate vicinity".

71. Sir Gerald FITZMAURICE said that if paragraph 2 were deleted he intended to propose the deletion in paragraph 1 of the words "to any appreciable extent".

72. Mr. GARCÍA AMADOR said that apart from proposing the deletion of paragraph 2 he wished to amplify paragraph 1 by reference to the third criterion mentioned by the Court in its judgement, namely, special economic interests, since it would be impossible to give valid grounds for omitting it and mentioning the other two. He proposed that the Commission vote on the principle of such an addition at the end of paragraph 1 and leave the exact wording, which should be borrowed from the Court's judgement, to the Drafting Committee.

73. Mr. SANDSTRÖM pointed out that the criterion mentioned by Mr. García Amador had not been treated by the Court as one generally applicable, but only in special cases where there had been lengthy usage.

74. Mr. GARCÍA AMADOR replied that he had already indicated that his amendment should be couched in the terms used by the Court, and would therefore refer to special economic interests as evidenced by a long usage.

75. Sir Gerald FITZMAURICE suggested that Mr. García Amador's point was already covered by the reference to "historical reasons". The Court had not referred to any economic interests but to those whose reality and importance were "clearly evidenced by a long usage". Later, in connexion with the very long Lopphavet base line it had concluded that traditional rights "founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."[15]

76. Thus, the Court had clearly linked economic considerations with historic rights. The former were not a criterion for establishing base lines but a motive for selecting a particular method in doing so; they could not therefore be appropriately mentioned at the end of paragraph 1.

77. Mr. EDMONDS said that Mr. García Amador's amendment to paragraph 1 involved an important matter of principle which could not be put to the vote before the text had been circulated in writing. The Commission could not take a decision in the dark to transfer certain wording from the judgement of the Court into what was intended to become a legal instrument.

It was agreed to defer consideration of Mr. García Amador's amendment to paragraph 1 until it had been circulated.

78. The CHAIRMAN then put to the vote Mr. García Amador's proposal to delete paragraph 2.

The proposal was adopted by 6 votes to 5 with 2 abstentions.[16]

[14] *Yearbook of the International Law Commission, 1953*, vol. II.

[15] *I.C.J. Reports 1951*, p. 142.

[16] See *infra*, 319th meeting, para. 70.

79. Sir Gerald FITZMAURICE said that as the Commission had now eliminated the sole provisions which might give at least some precision to the very vague idea of "the general direction of the coast", he would formally propose the deletion of the words "to any appreciable extent" in paragraph 1.

80. Mr. KRYLOV said that having just learnt from the Special Rapporteur that those words derived from the judgement of the Court, he considered that they should be retained. Though he understood the reasons for Sir Gerald Fitzmaurice's amendment, it was sometimes difficult to go beyond somewhat imprecise concepts, and it would be unwise to create difficulties: he was confident that the provision in question would be interpreted with common sense.

81. Sir Gerald FITZMAURICE said that it was natural that Mr. Krylov should be in favour of imprecision in the present instance since it would enable coastal States to draw base lines with the minimum of restriction. However, such latitude would surely simplify neither the law nor practice.

82. Mr. KRYLOV observed that the criticism should be directed against the Court's judgement.

83. Mr. GARCÍA AMADOR moved that voting on any amendment to paragraph 1 be deferred until his own had been circulated.

The motion was carried by 8 votes to 1 with 1 abstention.

84. Mr. FRANÇOIS (Special Rapporteur) observed that there had been no comments by governments on paragraph 3.

Paragraph 3 was unanimously adopted, further discussion of article 5 being deferred.[17]

Article 6 [6]: Outer limit of the territorial sea

85. Mr. FRANÇOIS (Special Rapporteur) said that apart from the United Kingdom, which had expressed its approval (A/2934, Annex, No. 16) of the article, no other government had commented on article 6.

Article 6 was unanimously adopted.

Further consideration of item 3 of the agenda was adjourned.

The meeting rose at 12.55 p.m.

[17] See *infra*, 317th meeting, para. 1.

317th MEETING

Wednesday, 22 June 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 5 [5]: Straight base lines
(resumed from the 316th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of article 5. The voting on paragraph 1 had been deferred pending the circulation of Mr. García Amador's amendment.

2. Mr. GARCÍA AMADOR said that members now had before them the text he had submitted to replace paragraph 1. It read:

"1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such 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 régime of internal waters."

3. He had proposed that amendment in order to reproduce as closely as possible the three criteria laid down by the International Court in the Fisheries Case.[1] The first two, which were both geographical in character, had been included in the original text, but the last, namely, "economic interests peculiar to a region the reality and importance of which are clearly evidenced by a long usage" had been omitted, and though Sir Gerald Fitzmaurice had argued that it was covered by the words "historical reasons" there was surely every reason for using the Court's own wording. Apart from that change, he had followed the Commission's original text.

4. Sir Gerald FITZMAURICE, referring to Mr. Hsu's remarks at the previous meeting concerning experts, explained that he had had in mind independent experts of the kind used by the Court in the Corfu Channel Case[2] and not experts brought by the parties as in the Fisheries Case.[3] On the latter occasion the opinions of the experts on the two sides had been contradictory.

5. Turning to article 5, he proposed, without any great hope of support, that it be omitted altogether. The reason why he made that proposal was that the Commission had at the previous meeting decided to delete paragraph 2. It would be remembered that the Court's decision in the Fisheries Case had been received with a great deal of dismay, in the United Kingdom and elsewhere, not because the Court had reached a specific decision about the base lines drawn by Norway—a decision which had been fully accepted by the United Kingdom—but because it had laid down certain general principles without giving them any precision, thus leaving coastal States in the dark as to whether the base lines they had drawn or intended to draw were valid, and other States equally in the dark as to whether they were bound to accept them. It was most undesirable to have a general rule allowing straight base lines, provided they fulfilled certain conditions, without clearly defining those conditions, because the numerous controversies likely to arise could only be resolved by a tribunal, and it was perfectly conceivable that a coastal State might refuse to appear. Great relief had accordingly been felt when the Commission, while adopting the principles laid down by the Court for use in certain types of case, had sought to give them rather more concrete and precise form, as a result of which some of the difficulties of application might have been overcome. The concrete provisions introduced by the Commission in paragraph 2 had rendered article 5 more acceptable even to those States which were in principle opposed to the system of straight base lines. The Commission's decision to delete those provisions for no easily apparent reason meant a return to the uncertainty created by the Court's decision and would revive much of the opposition to the principle of straight base lines which the Commission's original draft had gone some way to diminish. In his opinion the only remedy was to omit article 5 altogether. If his proposal were rejected he would move that the Commission reconsider its decision to delete paragraph 2, in the hope that it would see its way to restoring that provision, though perhaps in a modified form.

6. Mr. EDMONDS entirely agreed with the views of Sir Gerald Fitzmaurice. No tribunal would be able to render judgement on the basis of such an imprecise text as that submitted by Mr. García Amador. It would only be applied, in fact, by recourse to judicial legislation, which was not an appropriate function for a judicial body. The expression "appreciable extent" and other indefinite elements in the text seemed to him open to the same kind of criticism as that levelled against a certain judgement in the United States according to which a statute had been held to be "slightly unconstitutional".

7. Mr. SCELLE agreed with the preceding speakers that, after the suppression of paragraph 2, the remaining text was both vague and dangerous. Indeed, the Commission seemed to be following a retrograde course by giving States great latitude in delimiting their territorial sea by the use of straight base lines. Sir Gerald Fitzmaurice was right in thinking that, in the circumstances, it would be preferable to delete article 5 altogether.

8. Mr. FRANÇOIS (Special Rapporteur) could not agree with Sir Gerald Fitzmaurice, though he regretted the Commission's decision to delete paragraph 2. Its importance, however, should not be exaggerated, because it only provided general directives. Paragraph 1 was not as useless as Sir Gerald Fitzmaurice supposed, and did give some guidance to States. It was true that the expression "to any appreciable extent" was not very precise, but elsewhere the Commission had accepted such words as "reasonable", which were no less vague. The article, like others, might have to be submitted to an impartial judicial organ for interpretation, but its total suppression would not make the position any clearer, particularly as there were certain States which in fact applied the system of straight base lines.

9. Mr. KRYLOV said that he was astonished by the unexpected attack made on the decision of the International Court of Justice, which in the Fisheries Case had made a contribution to case-law. Like Mr. Edmonds he too had some experience of the bench and believed that in any specific instance a judge would be able to determine the meaning of the words "to any appreciable extent" by a simple exercise in logic and would not return a verdict of *non liquet*. It was the special business of judges to be able to apply such provisos.

10. He strongly deprecated any effort to undermine the case-law created by the Court. Norway was not the

[1] See *supra*, 316th meeting, para. 33.

[2] *I.C.J. Reports 1949*, p. 4.

[3] *I.C.J. Reports 1951*, p. 116.

only State which possessed a deeply indented coastline as he had had the opportunity of seeing for himself when travelling near Murmansk and along the Finnish coast. There was, therefore, a need for article 5. He had, however, opposed paragraph 2 because it went far beyond what had been laid down by the Court.

11. Faris Bey el-KHOURI considered it essential to allow States to delimit their territorial sea from a straight base line whether their coast was deeply indented or not. He therefore proposed the insertion in article 5 of the following paragraph:

> "When the coast is not appreciably indented, the base line shall be drawn by the coastal State in such a way as to keep its distance from the dry shore not less than one mile."

12. Though he had abstained from voting on Mr. García Amador's proposal to delete paragraph 2, he believed that it might be useful to provide some indication of the method to be used in drawing straight base lines where the coast was heavily indented. He would therefore support a motion to reconsider the Commission's decision.

13. Mr. SANDSTRÖM said that he understood the reasons why Sir Gerald Fitzmaurice believed that the omission of paragraph 2 would create uncertainty and would encourage States to apply the system of straight base lines without real justification. He could not, however, support his proposal to eliminate the article altogether because, as the Special Rapporteur had argued, it filled a real need. The Commission had already adopted article 4 and unless article 5, paragraph 1, were retained, States would be prohibited from using straight base lines at all.

14. He did not believe that such vague wording as "to any appreciable extent" could be avoided in modern legislation, and judges often had, in the course of their duties, to apply such texts. In the Fisheries Case the Court had based its finding on the general direction of the coast, which it had evidently found to be discernible. The words "to any appreciable extent" should not therefore give rise to difficulties of application.

15. He would be unable to vote for Mr. García Amador's text because it was not consistent with the Court's finding. The Court, though it had taken into account "economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage", had not made the use of straight base lines conditional on the existence of such interests.

16. Mr. GARCÍA AMADOR said that he had proposed the deletion of paragraph 2 laying down a maximum permissible length for base lines because though some of the language used in the judgement might have been vague, the Court had made a very definite and precise declaration to the effect that the Norwegian system of drawing straight base lines, being based on the three criteria it had accepted, was not contrary to international law.

17. Mr. Edmonds' critical remarks about his new text for paragraph 1 should be directed against the judgement of the Court since he had reproduced its language word for word. He vividly remembered one of his advantages of imprecision in connexion with the decidistinguished professors at Havard demonstrating the sions of the Supreme Court of the United States.

18. In replying to Mr. Scelle he would point out that it was quite erroneous to suppose that coastal States would arrogate to themselves in an arbitrary manner the right to apply straight base lines when there was no geographical justification for doing so. They would only take advantage of the system, which the Court had declared not contrary to international law, if the requisite conditions were fulfilled. He therefore believed that the draft should contain a provision of the kind embodied in his text.

19. Mr. EDMONDS said that notwithstanding Mr. Krylov's generous appraisal of the ability of judges, he himself remained convinced that the expression "to any appreciable extent" would inevitably be interpreted in a most subjective way and could not provide a precise standard. The language of judgements, being frequently loose, was generally not appropriate for inclusion in an instrument of a legislative character and it would be well to bear in mind that there was a great difference between the legislative and the judicial function. In the present instance, the Commission should seek to establish a criterion which could be applied with reasonable certainty. The Special Rapporteur's argument that the Commission had used imprecise terminology elsewhere was no excuse for repeating the same fault. Moreover, the inclusion of ambiguous and doubtful criteria would provoke criticism and increase the possibility of the draft articles not being accepted. The analogy drawn from the imprecision of some of the judgements of the Supreme Court was hardly pertinent to an article which should fix precise standards, since it was essential for States to know exactly how their rights regarding the territorial sea were limited. In drafting the provision, the Commission must remember that it was exercising a legislative function which could not appropriately be carried out by the courts.

20. Mr. AMADO said that contrary to his usual practice, he had at the previous meeting abstained from voting on paragraph 2 of article 5 because he was doubtful about the manner in which the Special Rapporteur had sought to go beyond the judgement of the Court into the realm of the progressive development of international law. Such a move would give rise to even greater objections than those levelled against the use of the expression "to an appreciable extent", which, in his opinion, was not particularly imprecise. Mr. Sandström had rightly argued that such provisos were necessary in the modern world because they gave the courts some latitude so that verdicts of *non liquet* could be avoided. He therefore intended to support Mr. García Amador's text.

21. Mr. SCELLE pointed out that the Commission had entirely overlooked the fact that the deletion of the

words "as an exception" in paragraph 1 had completely transformed article 5, which had originally been designed to cover exceptional cases. As it now stood, the text would encourage States to adopt a system of straight base lines on the most slender pretexts. Those which sought to extend their territorial sea would be particularly pleased to abandon the principle of the low-water line in favour of straight base lines. The Court in its judgement had made it very clear that it was dealing with a specific case and had purposely couched its conclusion in a particular way, declaring that the Norwegian base lines, fixed in application of a certain method, were not "contrary to international law". There could be no doubt whatsoever that the Court had not expounded any general principle or rule of international law. In any event, a single judicial decision was not enough to create case-law and until a further judgement had confirmed the Court's findings in an exceptional case, the whole of article 5 should be suppressed, because as it at present stood it was contrary to a general trend and was thus at variance with Article 38, paragraph 1 (d), of the Court's Statute.

22. Sir Gerald FITZMAURICE considered that Mr. Krylov had perhaps underestimated the difficulties which a phrase such as "to any appreciable extent" might cause. Apart from the fact that it was bound to be interpreted subjectively, it had two possible connotations since the word "appreciable" either meant capable of being perceived, so that only the smallest deviation from the general direction of the coast would be allowed, or it could mean "considerable". A whole range of conflicting interpretations was possible between those two extremes. Though in practice a verdict of *non liquet* would not be returned and the judge would reach a decision, differing decisions were possible. Thus it was dangerous not to give more precise form to the provision regarding straight base lines in a text intended for general application in the future.

23. Referring to Faris Bey el-Khouri's amendment, he said that it was difficult to visualize the case he had in mind. In the Fisheries Case the Court had clearly laid down that straight base lines must have their terminal points on the coast or on an island—a principle which it was easy to apply where the coast was indented, whereas, where there were no indentations, the base line must be the line of the coast itself, that being the reason for the tide-mark rule. According to Faris Bey's text, the base lines would begin and end at some point in the sea, which was quite inacceptable.

24. Faris Bey el-KHOURI saw no objection to the terminal points of straight base lines being fixed in the water and was anxious that States with a more or less straight coast line should be compensated for the concession made by the Court to States with a highly indented coast. His text would enable certain countries applying a three-mile limit to extend their territorial sea up to four miles, which might make them more willing to accept the whole draft.

25. He did not agree with the criticisms of paragraph 1 on the score of imprecision; laws were frequently imprecisely drafted and had to be interpreted by the courts. In the present instance the competent court would be the International Court of Justice.

26. Sir Gerald FITZMAURICE observed that if in article 5 the Commission was trying to follow the Court's decision, it must bear in mind that there was no precedent for drawing base lines with terminal points which were not on land. The scheme proposed by Faris Bey el-Khouri was quite impracticable.

27. Mr. FRANÇOIS disagreed with the view propounded by Mr. Scelle in his last statement. The words "Where circumstances necessitate a special régime" amply sufficed to show that straight base lines could only be used in certain conditions and not at the mere whim of the coastal State. Of course no legal text in itself could prevent States from violating the law but that was a separate issue to be dealt with by an international judicial organ. The text proposed by Mr. García Amador made it clear that States were not at liberty to delimit their territorial sea arbitrarily by the use of straight base lines.

28. Perhaps too much importance had been attached to the words "to any appreciable extent". Though he held no strong views on the subject, on the whole he would prefer them to remain because they had been borrowed from the judgement of the Court.

29. He was unable to understand the purpose of Faris Bey el-Khouri's totally inacceptable amendment because when the coast was not highly idented there was no reason whatsoever for departing from the normal base lines. As at present drafted, the amendment would open the way to unlimited extensions of the territorial sea.

30. Faris Bey el-KHOURI observed that the high-water line to which reference was made in article 4 was not always straight. There was no reason why straight base lines should not be used even in cases where the coast was not heavily indented.

31. Mr. ZOUREK was surprised by the criticisms aroused by paragraph 1. The Commission should bear in mind that its task was to find a solution which might be acceptable to the maximum number of States. Surely, it was perfectly obvious that after the Court's judgement in the Fisheries Case, States would be unwilling to accept the provisions of paragraph 2.

32. Paragraph 1 as drafted by Mr. García Amador provided certain precise criteria establishing the cases where the use of straight base lines was permissible, and there was no reason to fear that States would abuse their right. Members who had objected to paragraph 1 perhaps exaggerated the exceptional character of the straight-base-line principle, and should note that the Court had stated that it "is unable to share the view of the United Kingdom Government that Norway, in the matter of base lines, now claims recognition of an exceptional system. As will be shown later, all that the

Court can see therein is an application of general international law to a specific case."[4]

33. If article 5 were to be dropped altogether, all States, including those with a heavily indented coastline, would be forced to adopt the system of normal base lines; that would be inconsistent with both international law and the judgement of the Court. He could not, therefore be a party to such a decision.

34. The expression "to any appreciable extent" was perhaps not a happy one, but such wording was sometimes necessary when a precise spatial limitation applicable in all cases could not be laid down. The Commission would remember that in article 6 of its draft articles on the continental shelf[5] it had referred to "a reasonable distance". In the present instance any precise limitation would be purely arbitrary and no harm would be done by retaining the phrase "to any appreciable extent". He added that he interpreted the word "appreciable" in the sense of "considerable".

35. Mr. HSU said that despite the objections which it had provoked he would support Mr. García Amador's amendment because it was based on the finding of the Court, which being liberal had been in harmony with the modern trend to depart from the three-mile rule.

36. Sir Gerald FITZMAURICE withdrew his proposal for the total deletion of article 5 (para. 5 above). He did not approve of the text of that article as it at present stood. The Special Rapporteur, however, was technically correct in saying that a provision for a deeply indented coast was necessary. Unfortunately, paragraph 1 by itself was not precise enough for practical purposes.

37. He urged the Commission to reconsider paragraph 2. Should the Commission refuse to do so, he would vote against article 5 as a whole. Prior to that, however, he would, in accordance with the proposal he had made at the previous meeting,[6] ask for a separate vote on the words "to any appreciable extent".

The Commission decided, by 6 votes to 5, with one abstention, not to reconsider its decision on paragraph 2 of article 5.

Article 5, paragraph 1, as proposed by Mr. García Amador (para. 2 above), was adopted by 9 votes to 3, with one abstention.

38. Mr. FRANÇOIS (Special Rapporteur) said he had understood that there was general agreement to qualify the term "islands" by the adjective "numerous".

39. Mr. GARCÍA AMADOR pointed out that the term "numerous" had not been used by the International Court of Justice in its judgement in the Fisheries Case.

40. Mr. FRANÇOIS (Special Rapporteur) said that the matter could be dealt with by means of a reference in the comment to article 5. It would be stated therein that the Commission interpreted the International Court of Justice's decision as meaning that a single island would not be enough to justify the application of the straight-base-line rule, but that a certain number of islands were necessary.

41. Mr. GARCÍA AMADOR agreed to such a reference in the comment.

Faris Bey el-Khouri's proposal (para. 11 above) for article 5, paragraph 2, was rejected by 6 votes to one, with 6 abstentions.

Sir Gerald Fitzmaurice's proposal (para. 36 above) for deletion of the words "to any appreciable extent" in paragraph 1 was rejected by 8 votes to 3, with 2 abstentions.

42. The CHAIRMAN invited the Commission to vote on article 5 as a whole as amended. The text read as follows:

"1. Where circumstances necessitate a special régime because the coast is deepy intented or cut into or because there are islands in its immediate vincinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such 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 régime of internal waters.

"2. The coastal State shall give due publicity to the straight base lines drawn by it."

Article 5 as a whole as amended was adopted by 10 votes to 3.[7]

43. Mr. SCELLE explained that he had voted against article 5 for the reasons given in the course of the discussion.

Article 7 [7]: Bays

44. Mr. GARCÍA AMADOR proposed that speakers be limited to ten minutes in their first statement on any article and to five in subsequent statements.

It was so agreed.

45. Mr. FRANÇOIS (Special Rapporteur) said his proposal for article 7 (A/CN.4/93) provided that where the entrance of a bay exceeded ten miles, a closing line of such length should be drawn within the bay. That distance of ten miles, as the International Court of Justice had had occasion to state in the Fisheries Case,

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[4] *I.C.J. Reports 1951*, p. 131.

[5] "Report of the International Law Commission covering the work of its fifth session" (A/2456), in *Yearbook of the International Law Commission 1952*, vol. II.

[6] 316th meeting, para. 79.

[7] See discussion of article 11, *infra*, 319th meeting, paras. 57–66.

did not constitute a part of positive international law. It was, however, based on a considerable measure of international practice and it appeared in several multilateral conventions; it represented twice the range of vision to the horizon in clear weather from the eye of a mariner at a height of 5 metres, which, as stated by the Committee of Experts he had consulted, was the internationally accepted height for hydrographical purposes (A/CN.4/61/Add.1, Annex, II).[8]

46. It was important to bear in mind that the said distance of ten miles was not in any way connected with the problem of the breadth of the territorial sea. Its purpose was to define the limits of a bay and thus indicate how far its waters constituted internal waters. The closing line of the bay simply constituted part of the base line from which the territorial sea was measured.

47. It was inadvisable to provide for a greater distance than ten miles as the closing line of a bay, because that would increase unduly the extent of internal waters. The ten-mile rule had much to recommend it to the Commission in its task of the progressive development of international law, although of course it did not constitute a rule of existing international law susceptible of codification as such.

48. He (the Special Rapporteur) proposed that when different lines of a length of ten miles could be drawn, that line should be chosen which enclosed the maximum water area within the bay. That proposal was based on the suggestion of the Committee of Experts (A/CN.4/61/Add.1, article 6, para. 7).

49. Perhaps the most difficult problem which arose in connexion with article 7 was the actual definition of a bay. Clearly it could not be held that incurvation of the coast constituted a bay. No coast was absolutely straight and some relationship between the depth of a bay and the breadth of its entrance was necessary. The International Court of Justice had acknowledged the necessity for some such relationship; unfortunately it had not been in a position to give a ruling with regard to actual figures.

50. The Committee of Experts had suggested a definition (A/CN.4/61/Add.1, II) on the basis of which he (the Special Rapporteur) proposed that a bay be defined as "an indentation of an area as large or larger than that of the semi-circle drawn on the entrance of that indentation". That definition could also be expressed as follows: the term "bay" meant an indentation the depth of which was at least half the length of its closing line.

51. Mr. KRYLOV said article 7 dealing with bays was very closely linked with the problem of the breadth of the territorial sea. He therefore felt that the Commission was not in a position to take a vote upon it. For his part, he could accept paragraph 2 of the Special Rapporteur's proposal (A/CN.4/93). He had, however, serious misgivings about the rest of the article. It was not essential for the Commission to give definite rulings on all the points dealt with in paragraphs 1, 3, 4 and 5. The Commission was not a court of justice, and it was not improper for it to give a finding of *non liquet*.

52. Mr. GARCÍA AMADOR proposed the following text for article 7:

"1. For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.

"2. The closing line of a bay shall be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay.

"3. The waters within a bay shall be considered inland waters:

"(*a*) If the area of the indentation is as large or larger than that of the semicircle drawn on the entrance of that indentation.

"(*b*) If the bay is totally bordered by the territory of a single State.

"4. If a bay has more than one entrance, the semicircle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

"5. If the entrance of a bay is split up into a number of smaller openings by various islands, closing lines across the openings may be drawn.

"6. When the waters of a bay which lies within the closing line thereof are bordered by the territory of two or more States, the bordering States may agree upon a division of such waters as inland waters: in the absence of such agreement, the territorial sea of each State shall follow the sinuosities of the shore in the bay."

53. His proposal did not depart very much in substance from that of the Special Rapporteur. There was one important drafting change, in that the Special Rapporteur's text began by stating that "The waters within a bay shall be considered inland waters". It seemed to him (Mr. García Amador) more accurate first to define a bay in detail and only then state, by way of consequence, that the waters within the bay constituted inland (internal) waters. He preferred to mention the effect after the cause.

54. Paragraph 1 of his proposal was inspired by paragraph (6) of the conclusions which the United Kingdom Government had presented in the Fisheries Case, wherein it was stated:

"The definition of a bay in international law is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to

[8] *Yearbook of the International Law Commission, 1953*, vol. II.

constitute the indentation more than a mere curvature of the coast." [9]

He had amended that text by the addition of the words "as to contain landlocked waters"—an idea taken from the dissenting opinion of Judge McNair in the same case.[10]

55. He had not adopted the so-called 10-mile rule because the International Court of Justice had explicitly that rule. Indeed the Court had noted that:

> "The United Kingdom Government concedes that Norway is entitled to claim as inland waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than 10 sea miles long. But the United Kingdom Government concedes this only on the basis of historic title." [11]

56. In dealing with specific fjords, the International Court of Justice had not hesitated to acknowledge as bays such indentations as the Svaerholthavet and the Vestfjord, the mouths of which were as wide as 39 and 40 miles respectively, in the light of all the geographical factors involved. On the other hand, certain Norwegian claims in respect of the Lopphavet had not been accepted by the Court, again without any reference to a 10-mile distance.[12]

57. Paragraph 2 of his proposal was based on the definition of a bay given in paragraph (7) of the United Kingdom Government's conclusions in the Fisheries Case.[13] That definition had been implicitly recognized by the International Court of Justice and tallied with historical tradition, which considered the waters of a bay as being those which were enclosed within the line *inter fauces terrarum*.

58. Proviso (b) in paragraph 3 had been taken from the proposals of the 1930 Codification Conference.

59. Paragraph 6 was based on the Harvard Draft dealing with the problem of a bay the waters of which were bordered by the territory of two or more States. The Harvard group had studied that problem following the dispute [14] between El Salvador and Nicaragua (1917) brought before the Central American Court of Justice in connexion with the Gulf of Fonseca, the shores of which were shared by Honduras, Nicaragua and Salvador.

Further discussion of article 7 was adjourned.

The meeting rose at 1 p.m.

[9] *I.C.J. Reports 1951*, p. 122.

[10] *Ibid.*, p. 163.

[11] *Ibid.*, p. 131.

[12] *Ibid.*, pp. 141–143.

[13] *Ibid.*, p. 122.

[14] *American Journal of International Law* (1917), vol. 11, pp. 674 and 705.

318th MEETING

Thursday, 23 June 1955, at 9.30 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 7 [7]: Bays (continued)

1. Mr. FRANÇOIS (Special Rapporteur) said that there was a considerable difference between the text which he proposed in document A/CN.4/93 and that submitted by Mr. García Amador.[1] The former defined a bay as an indentation the entrance of which was not more than twice its depth. The latter provided a definition which, when applied, might be found to be a *petitio principii*. Moreover, the expression "landlocked waters", even in the sense ascribed to it by the International Court of Justice in the Fisheries Case,[2] was imprecise. He realized that in paragraph 3 Mr. García Amador had sought to avoid a fixed limit for the closing line of a bay, but that did not solve the problem since, according to his text, the waters of a bay which was a hundred miles wide at the opening and fifty miles in depth would become inland waters, and that would be absolutely unacceptable. The possibility of admitting a greater limit than ten miles could be contemplated, but not without any limitation as proposed by Mr. García Amador.

[1] 317th meeting, para. 52.

[2] *I.C.J. Reports 1951*, p. 116.

2. He was doubtful whether proviso (*b*) in paragraph 3 of Mr. García Amador's text was necessary since, if a bay was bordered by the territory of two States, the demarcation line between internal waters and territorial sea would still remain the same. The second part of paragraph 6, relating to cases where there was a dispute about the demarcation line, did not offer an equitable solution and he believed that the matter would have to be settled by arbitration.

3. The result of establishing no fixed limits could also be seen in paragraph 5. He himself had suggested that when there was a series of islands at the opening of a bay they should be treated as a continuous strip of land provided the distance between each of them did not exceed a certain limit. Mr. García Amador had rejected that limit without substituting any other. That again was unacceptable.

4. Though he appreciated the reasons why Mr. García Amador's text contained no fixed limits, he did not think that in its present form it could command support.

5. Mr. SALAMANCA expressed disappointment at the failure of both texts to cover the case of the River Plate. Though that case would come up in connexion with article 14, the decision would clearly depend on the outcome of the present discussion concerning bays. The Commission would remember that Argentina considered that the mouth of the River Plate constituted a bay, whereas Uruguay held that it was an estuary, and the two governments could come to no agreement about the demarcation line. The rights of the coastal states, however, did not affect the freedom of navigation, which had been safeguarded in conventions between South American States and conventions with the United Kingdom. The area in question was very wide and shallow with a great number of sandbanks making navigation difficult. Though the case was an exceptional one it was important and could not be covered if a ten-mile limit were accepted. Clearly geographical factors must determine the solution and he hoped that both the Special Rapporteur and Mr. García Amador would take the problem into account, otherwise the provision finally adopted might give rise to serious objections on the part of certain States.

6. Sir Gerald FITZMAURICE doubted whether Mr. García Amador had been well advised to introduce certain proposals derived from the conclusions presented by the United Kingdom Government in the Fisheries Case into a draft the general spirit of which was wholly contrary to the well-known views of that government. Mr. García Amador's text was, on the contrary, in accordance with the Icelandic Government's opinion (A/2934, Annex, No. 7), which, as he understood it, was that there should be no limit as to the length of the closing line.

7. He thought that Mr. García Amador had perhaps adopted the definition of a bay contained in paragraph (6) of the United Kingdom Government's conclusions and had incorporated in his paragraph 2 the wording used in paragraph (7) for tactical reasons rather than from conviction as to their intrinsic merit.

8. Introducing his proposal at the previous meeting, Mr. García Amador seemed to have inferred with some satisfaction that the Court had rejected the United Kingdom's contention about the so-called ten-mile rule; but in fact the United Kingdom had put forward no such submission and had conceded in paragraph (5) of its conclusions that "Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than 10 sea miles long".[3] The limit of ten miles for bays had never been an issue before the Court and its observations on the question had been gratuitous; being in the nature of an *obiter dictum,* not necessary for the decision of any issue in the case, they carried no direct authority and could not be regarded as binding.

9. Mr. Krylov had been mistaken in stating that the ten-mile rule had been either invented or championed mainly by France and the United Kingdom. In fact until fairly recently the United Kingdom had held that the proper closing line of a bay was twice the breadth of the territorial sea, in other words six miles, and it had only admitted the extension to ten miles with the greatest reluctance.

10. The Commission would note that it emerged from the observations of Sub-Committee II of the Conference for the Codification of International Law—reproduced in the Special Rapporteur's second report (A/CN.4/61, para. 57)[4]—that the majority of delegations at that Conference had accepted a limit of ten miles. The statement of the Court that the ten-mile rule had not acquired the authority of a rule of international law was therefore questionable.

11. Though the definition contained in paragraph 1 of Mr. García Amador's text was quite a good one, he greatly preferred the one offered by the Special Rapporteur on the basis of the report of the Committee of Experts (A/CN.4/61/Add.1)[5] which had sat in 1953. He much regretted that the Commission did not, where possible, follow the conclusions of a body of men who had special knowledge of the geographical aspect of problems connected with the territorial sea and were particularly well versed in maritime law.

12. Paragraph 2 of Mr. García Amador's text was misleading. Though it reproduced the wording of paragraph (7) of the United Kingdom's conclusions, the purpose of that paragraph had been entirely different. Its sole object had been to indicate the points between which a closing line should be drawn. It had never been intended to suggest that there was no limitation whatsoever on its length.

13. He had little to add to the Special Rapporteur's remarks about the merits of Mr. García Amador's text,

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[3] *I.C.J. Reports 1951*, p. 122.

[4] *Yearbook of the International Law Commission, 1953*, vol. II.

[5] *Ibid.*

which showed to what exaggerated use general statements in the Court's judgement in the Fisheries Case could be put. He was unable to see on what grounds it could be deduced from the Court's passing reference to the ten-mile limit that there was no limit whatsoever: a conclusion which would make nonsense of the well-known concept of the historic bay. Yet that concept had certainly formed part of international law in 1951. Unfortunately, in overthrowing one limit the Court had failed to establish another, thereby creating confusion. Such incomplete statements were to be deprecated. The implication of Mr. García Amador's text, which he could not support, was that henceforth the waters enclosed by a bay even three hundred miles wide at its mouth would become internal waters.

14. Mr. GARCÍA AMADOR did not think that the expression "land-locked waters" could be condemned on the grounds that it was imprecise since it had been used not only by Sir Arnold McNair, whose respect for the exact meaning of words could surely not be impugned, but also by the United States Government in its reply to the Commission's questionnaire (A/CN.4/19, section C, No. 10).[6]

15. It would be quite incompatible with international practice to substitute for his definition a ten-mile limit. The Court in its judgement in the Fisheries Case had made clear that closing lines of a greater length were not contrary to international law; that statement by the Court had greater weight than the conclusions of an expert committee most of whose members represented countries adhering to a three-mile limit for the territorial sea.

16. The Court in making its general statement about bays must have had in mind the fact that many, of which he gave some examples, were considerably wider than ten miles at the mouth. He was, therefore, unable to understand on what grounds the Committee of Experts had defended a ten-mile limit.

17. He had some sympathy with the objections raised by the Special Rapporteur to paragraph 6, which was taken from the Harvard Research Draft. If a bay was bordered by three States, they should be allowed to claim a territorial belt but no more.

18. Turning to Sir Gerald Fitzmaurice's statement, he did not propose to enter into the question of the sources from which his text was derived. It was perfectly appropriate for members of a Commission which should regard itself as a guardian of the interests of an Organization comprising many different nations to take advice from one of the Member States which was not necessarily their own. He had chosen the principles set out in the United Kingdom's conclusions because of their intrinsic worth. He hoped that his text would be examined in the light of the Court's judgement, which so far had been the main source of the rules proposed.

19. Mr. ZOUREK considered that Mr. García Amador's proposal constituted a good starting-point for solving the problems connected with the definition of bays. Flexibility was its chief merit since the practice of States varied greatly and a provision containing a rigid limitation of the kind contained in paragraph 1 of the Special Rapporteur's text was not likely to be widely accepted.

20. He agreed with those members who did not regard the conclusion of the Committee of Experts as authoritative because most of its members represented countries which upheld the three-mile rule. Moreover, the conclusion differed essentially from the definition of bays submitted by the United States delegation to the 1930 Hague Conference for the Codification of International Law;[7] that showed that technical opinion was divided as to geographical criteria.

21. Perhaps Mr. García Amador's text would need some modification. First, if proviso (*b*) in paragraph 3 were retained, it should be linked with proviso (*a*). Secondly, paragraphs 4 and 5 might be amalgamated as they dealt with one subject. Thirdly, a provision should be made for the criteria adopted by States to be published, in order that mariners might know which indentations came within the definition of a bay.

22. He considered that the Commission should take a vote on principles, deciding first on the definition and secondly on whether there should be any limitation on the length of the closing line. The Drafting Committee could then prepare a text for submission to a final vote.

23. Mr. SANDSTRÖM said that he was in general agreement with Mr. François and Sir Gerald Fitzmaurice. It was difficult to formulate a juridical definition based on geographical factors and he considered the definition in paragraph 1 of Mr. García Amador's text to be, if not a *petitio principii,* at any event extremely vague. The Norwegian fjords had attracted a good deal of attention, but it should be noted that their configuration was quite special, since they penetrated deep into the land, sometimes almost up to the Swedish frontier. Moreover, they were generally surrounded by high mountains, so that in that context the concept of landlocked waters was a natural one. It was not appropriate, however, when the indentation was shallow.

24. Mr. García Amador had not taken into account existing rights over waters which had hitherto been regarded as part of the high seas. For example, according to his text the Gulf of Bothnia would become internal waters and the existing rights of non-coastal States would thereby be abrogated. The same would be true of the Adriatic Sea, since, by the geographical criteria proposed by him, that too was a bay.

25. For those reasons he would support the Special Rapporteur's text.

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[6] *Yearbook of the International Law Commission, 1950,* vol. II, p. 60.

[7] League of Nations publication, *V. Legal, 1929.V.2* (document C.74.M.39.1929.V), p. 144.

26. Mr. HSU said that the weakness of the Special Rapporteur's text was that it laid down a ten-mile limit. The United Kingdom's original practice in adhering to a six-mile limit, which was equivalent to double the width of its territorial sea, was the most logical, but if the three-mile rule no longer held good, ten miles might well be insufficient for modern needs.

27. He still had some doubts about claims to historic bays and felt that they called for further discussion.

28. Although Mr. García Amador's text might require some amendment, it was nevertheless the better of the two because it contained no fixed limit for the closing line and did not refer to historic bays. Perhaps the Commission should adopt the text provisionally and then re-examine it at the next session in the light of its final decision on the territorial sea. He warned members that if too rigid a stand were taken on existing rules, it would not be possible to meet new requirements; such new requirements must be met, though without causing hardship to those States continuing to abide by older rules or practice.

29. Mr. SCELLE said that the Commission must choose between two principles. He intended to support the numerical limit on the closing line of a bay because it offered the only clear and definite solution. The geographical definition proposed by Mr. García Amador would make it difficult to distinguish between bays and gulfs. Furthermore, it would have the most regrettable result of vast inroads being made upon the high seas. That would be far more harmful than extensions of the territorial sea and would lead to the obstruction of entry into ports, thereby prejudicing the interests of international trade. At the risk of being labelled a Cassandra, he must warn the Commission that the overthrow of the traditional concept of bays would, like the draft articles on the continental shelf, utterly transform the notion of the high seas as *res communis*.

30. Mr. EDMONDS wondered whether the Commission might not be well advised to defer further consideration of any controversial articles in the draft in order to be able to devote sufficient time to the discussion of the draft articles on fisheries and of its report on the session.

31. Mr. FRANÇOIS (Special Rapporteur) said that it would be a pity to interrupt the discussion and hoped that the few remaining articles in the draft could be disposed of fairly quickly provided that speakers could state their views briefly. The Commission could start its final reading of the draft articles on the régime of the high seas early the following week and devote the last week of its session to the Drafting Committee's text on the territorial sea and the report on the session.

32. Mr. EDMONDS, in the light of the Special Rapporteur's remarks, withdrew his suggestion.

33. Turning to the texts before the Commission, he said that Mr. García Amador's was in certain respects too indefinite. The Commission should endorse the principles embodied in the Special Rapporteur's draft.

34. Faris Bey el-KHOURI proposed that the depth of a bay be defined in proportion to the length of the closing line by means of a perpendicular line drawn through the centre, no account being taken of indentations within the bay.

35. Mr. FRANÇOIS (Special Rapporteur) suggested that if the Commission were to vote on principles it should start by selecting one of the two definitions before it.

36. Mr. ZOUREK observed that the definition contained in paragraph 2 of the Special Rapporteur's text also appeared in paragraph 3 (*a*) of Mr. García Amador's proposal.

37. Mr. FRANÇOIS (Special Rapporteur) said that that was true but Mr. García Amador was using the definition in an entirely different context, and applying it in order to determine when the waters within a bay should be considered internal waters. In his own text he had sought to provide a definition of a bay without going into the entirely separate issue of the demarcation line between the territorial sea and internal waters.

39. He also wished to make clear that he recognized that the entrance to a bay as measured between two headlands could be much wider than ten miles. That did not, however, affect the closing line.

39. Sir Gerald FITZMAURICE agreed that paragraph 3 in Mr. García Amador's text did not relate to the definition of a bay. Nor did paragraph 1, which contained a good general description possibly helpful to a layman, provide a precise definition of the kind proposed by the Special Rapporteur. He therefore proposed that it be amplified by adding the following sentence at the end:

> "An indentation shall not, however, be regarded as a bay unless its area is as large or larger than that of the semi-circle drawn on the entrance of that indentation".

40. Mr. GARCÍA AMADOR said that he had no objection to Sir Gerald Fitzmaurice's amendment, which was complementary to his text.

41. He believed that the article should begin by defining a bay instead of first stating the juridical consequences of a definition as had been done by the Special Rapporteur.

42. Mr. SCELLE said that he would be unable to support Sir Gerald Fitzmaurice's amendment, because Mr. García Amador's text would still enunciate a geographical criterion, destroying the distinction between a bay and a gulf. In his opinion a bay could only be defined in juridical terms.

43. Mr. GARCÍA AMADOR said that geographers used the words "bay" and "gulf" as more or less synonomous terms.

44. Mr. SCELLE said that a bay was a small gulf. From a legal point of view, a bay existed inasmuch as international law acknowledged for it a particular status.

45. Mr. FRANÇOIS (Special Rapporteur) asked Faris Bey el-Khouri whether he would withdraw his proposed amendment (para. 34 above) concerning the depth of a bay. He (the Special Rapporteur) intended to put in the comment to article 7 a reference to the fact that the definition of a bay as an indentation with an area as large or larger than that of the semi-circle drawn on the entrance had virtually the same meaning as the statement that a bay was an indentation the depth of which was half the length of its closing line.

46. Faris Bey el-KHOURI withdrew his amendment on the understanding that a comment would be included as mentioned by the Special Rapporteur.

The Commission adopted paragraph 1 of Mr. García Amador's proposed text[8] *for article 7, as amended by Sir Gerald Fitzmaurice (para. 39 above), by 9 votes to none with 3 abstentions.*

47. Mr. KRYLOV suggested that the Commission should not deal at that stage with the other paragraphs of article 7. The paragraph just voted was quite sufficient to define a bay in its essentials. The other provisions of the article were closely linked with the problem of the breadth of the territorial sea and it was therefore desirable to leave their discussion to the following session.

48. Mr. SANDSTRÖM said he could not agree to that suggestion. The General Assembly expected from the Commission a report on all the matters relating to the seas. It was therefore necessary to include a provision on bays and obtain comments from governments before the Commission's final report was drawn up at its next session.

49. Mr. GARCÍA AMADOR said the problem of bays had not given rise to very serious divergence of views within the Commission and he hoped that a solution would be found. It was undesirable for the Commission to give the impression that an impasse had been reached where none really existed.

50. Mr. KRYLOV withdrew his suggestion.

51. The CHAIRMAN proposed that the Commission take a vote on the principle involved — namely, whether some definite limitation of the length of the closing line of a bay was necessary.

52. Mr. GARCÍA AMADOR said he did not approve of a definite distance being laid down in the matter. The International Court of Justice, in the Fisheries Case, had not ruled that such a distance limitation existed. That did not of course mean that the closing line would be drawn arbitrarily, and the Court had clearly implied that certain criteria were essential in the matter; but the length of the closing line was not one of them.

53. Sir Gerald FITZMAURICE said that Mr. García Amador's proposed paragraph 2, in stating that "The closing line of a bay shall be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay", did not really lay down any criterion at all. It merely stated the obvious fact that the closing line of a bay was drawn from headland to headland. The text in question could quite easily be applied to a gulf the entrance of which was 600 miles long.

54. In the Fisheries Case, the International Court of Justice had actually laid down no criteria at all to define a bay; it had simply said that certain Norwegian indentations could well have a closing line of more than ten miles.

55. The real issue before the Commission was whether the maximum length of the closing line should be fixed at some definite limit. Although, for his part, he considered that the ten-mile rule was part of international law, he would be prepared provisionally to accept a higher maximum figure, in order to mark his view that the essential thing was that some definite distance be laid down to stop abuses.

56. Mr. SCELLE said that a line from headland to headland could be drawn across any gulf, however large. For an indentation to be a bay and not a gulf, it was essential for it to conform to the one and only possible criterion — namely, that its closing line should not exceed a certain maximum distance.

57. Mr. GARCÍA AMADOR said the wording of paragraph 2 had been drawn from paragraph (7) of the United Kingdom Government's conclusions in the Fisheries Case, wherein it was stated:

> "7. That, where an area of water is a bay, the principle which determines where the closing line should be drawn is that the closing line should be drawn between the natural geographical entrance points where the indentation ceases to have the configuration of a bay."[9]

58. It was quite normal to adopt the United Kingdom definition because the International Court of Justice had definitely repudiated the ten-mile rule when it held that closing lines of more than ten miles were not contrary to international law. Indeed, if a definite ten-mile rule had existed, such bays as Long Island Sound and Hudson Bay would not have been recognized as such.

59. It was necessary to point out that the provision concerning historic bays only benefited old countries having a long history. There were a great many comparative newcomers to international society—countries of Latin America, the Middle East and the Far East—which could not claim such historic rights. To lay down a ten-mile rule would simply mean that those new States would alone be subject to it, while the old-established States could claim larger bays on the strength of historic title.

60. The CHAIRMAN pointed out that the new States referred to by Mr. García Amador could we benefit

[8] See *supra*, 317th meeting, para. 52.

[9] *I.C.J. Reports 1951*, p. 122.

from historic rights asserted in the past by the Powers to which they had formerly belonged.

61. Mr. GARCÍA AMADOR said that often the specific needs of a colony were not taken into account by a colonial Power, so that when that colony became independent, it did not inherit those historic rights to which it would have been entitled if it had lived for centuries as an independent nation.

62. Sir Gerald FITZMAURICE stressed that the length of the closing line of bays was not an issue in the Fisheries Case. There was no dispute between Norway and the United Kingdom on that point because all the bays concerned in the case had been conceded by the United Kingdom as historic bays.

63. The dispute between the United Kingdom and Norway, so far as it concerned bays, related to two issues: (1) the correct points of departure for the closing lines; and (2) the definition of a bay.

64. Because the length of the closing line of a bay was not an issue in the Fisheries Case, the conclusions presented by the United Kingdom Government, although containing a description of what constituted a bay, said nothing about the length of the closing line.

65. The International Court of Justice had stated the position perfectly clearly in the following terms in its judgement:

> "As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of the fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law." [10]

66. Mr. GARCÍA AMADOR suggested that a vote be taken on paragraph 2 of his proposal. It was desirable to vote on a text rather than on a principle. All members were agreed that some limitation was necessary. To ask members to vote for or against limitation by distance would load the scales against his proposal.

67. Mr. SCELLE said the principle involved was a clear one and it was desirable to vote upon it.

68. The CHAIRMAN pointed out that Mr. García Amador's paragraph 2 was really not so much an amendment to the Special Rapporteur's text for article 7 as a new proposal altogether; it did not correspond to the definition of amendment given in rule 92 of the rules of procedure of the General Assembly.

69. Mr. ZOUREK said the Commission had to vote on whether or not objective criteria should be laid down for the definition of a bay. Other factors besides the length of the closing line had to be considered. Mention had already been made of historical factors; but there were still other relevant considerations, such as the usefulness of a bay for industrial purposes, and its situation in relation to international sea lanes.

70. The CHAIRMAN called for a vote on the question whether the Commission should vote on principles.

The Commission decided in the affirmative, by 10 votes to none, with 2 abstentions.

71. The CHAIRMAN then called for a vote on the question of principle whether it should be stated that the closing line must not exceed a given length.

72. Sir Gerald FITZMAURICE said that there was some analogy between the problem under discussion and the question of the base line. Article 4 laid down the general principle that the base line for measuring the territorial sea was the coastline. Article 5 laid down certain specific criteria for exceptional cases where straight base lines could be drawn.

73. In connexion with bays, the position was somewhat similar. For an indentation to be considered as a bay, its closing line should not exceed ten miles; but in certain exceptional cases, where historic title existed, an entrance line of more than ten miles could be allowed.

The Commission decided by 6 votes to 4, with 2 abstentions, that the closing line of a bay should not exceed a given length.

74. Mr. HSU agreed that a numerical criterion was necessary; as the question was connected with the problem of the breadth of the territorial sea, however, it was desirable to postpone its consideration to the next session.

75. Mr. GARCÍA AMADOR said that, when discussing article 5, the Commission had voted against any limitation of straight base lines by reference to their length. That vote had now been contradicted by adopting the principle of a maximum length for the closing line of a bay. Yet the two situations were exactly alike and the International Court of Justice had understood them as such.

76. Mr. ZOUREK agreed that the two decisions—on straight base lines and on bays—were inconsistent with each other. He stressed the necessity of bringing them into line.

77. Sir Gerald FITZMAURICE pointed out that article 5 was concerned with the exceptional case of a coast which was deeply indented or cut into; its provisions concerned Norway and a handful of other countries. The provisions on bays concerned not an exceptional type of coastline, but the coastlines of practically all maritime States. There were practically no coasts where bays did not exist.

78. Mr. FRANÇOIS (Special Rapporteur) said that, although he personally preferred the ten-mile limit, and with a view to achieving a compromise solution, he proposed, in his capacity as Rapporteur, that a 25-mile limit be adopted.

[10] *Ibid.*, p. 131.

79. He had chosen the distance of 25 miles so that it would not be connected in anyone's mind with the breadth of the territorial sea. The Commission had already adopted very clearly the principle that under no circumstances was a State entitled to extend its territorial sea beyond 12 miles. In deciding, therefore, that the closing line of bays must not exceed 25 miles, the Commission could not be said to have fixed the distance as equivalent to twice the breadth of the territorial sea.

80. Mr. KRYLOV said he would prefer the closing line to be limited to twice the breadth of the territorial sea, except in the case of historic bays.

81. Mr. GARCÍA AMADOR said the choice of the distance of 25 miles was entirely arbitrary. The 10-mile distance, although not part of general international law, had at least in its favour the fact that it had been accepted in one multilateral treaty referring to the North Sea.

82. There appeared to be no juridical, historical, geographical or economic reason to accept the figure of 25 miles.

83. Mr. SCELLE pointed out to Mr. Krylov that a bay could have two coastal States claiming different distances as the breadth of the territorial sea.

84. Mr. KRYLOV said that the only answer to that problem was an agreement between the two States concerned.

85. Mr. SANDSTRÖM agreed that as the Commission had not laid down a definite distance for the breadth of the territorial sea, it was undesirable to define the closing line of the bay by reference to the breadth of the territorial sea, since that would only lead to controversy.

86. Sir Gerald FITZMAURICE said he would vote against any limitation of the closing line to twice the breadth of the territorial sea, although that conception had originally been supported by the United Kingdom. The fact of the case was that for a great many years ten miles had been recognized as the normal, "minimum" limit for the length of the closing line of a bay, more or less as the distance of three miles was the generally accepted, "minimum" limit for the breadth of the territorial sea.

87. The International Court of Justice in the Fisheries Case had ruled that the closing lines of bays were not limited to ten miles. It was clear from that decision that closing lines could be drawn to bays up to ten miles at least; it was possible that countries would draw longer lines, as the Court had not given a ruling that ten miles constituted a maximum.

The Commission adopted by 5 votes to 2, with 5 abstentions, the Special Rapporteur's proposal that the closing line of a bay should not exceed twenty-five miles in length.

88. Sir Gerald FITZMAURICE explained that he had abstained from voting on the 25-mile proposal, although he believed that the correct maximum limit was 10 miles, because he felt that some limitation of a reasonable character was preferable to no limitation at all. If the figure proposed had been in the neighbourhood of 15 miles, he would have voted in favour of it.

89. Mr. SCELLE also preferred a shorter distance, such as 10 or 15 miles. He had abstained, however, from voting against the twenty-five-mile proposal because he felt that some limitation was absolutely indispensable.

90. Mr. GARCÍA AMADOR said he had voted against the proposal for a limit of 25 miles because it was contrary to the ruling given by the International Court of Justice in the Fisheries Case; the Court had stated that a closing line of more than 10 miles was not contrary to international law.

91. Moreover there was no juridical, social, economic or geographical argument in favour of a numerical limitation of the type adopted.

92. Mr. KRYLOV explained he had abstained from voting because although he believed in a distance limitation he considered that such limitation should be in terms of the breadth of the territorial sea.

93. He recalled that he had originally proposed that the whole subject be left over to the following session, and had only withdrawn his proposal because Mr. García Amador was hopeful of finding a solution to the problems involved.

94. The Commission's vote on the 25-mile rule had been adopted by such a narrow majority that it would have very little authority. The Commission had incurred the penalty of excessive zeal. Its 25-mile rule was not a part of international usage and its adoption by the Commission under the circumstances was of little significance.

95. Mr. ZOUREK said that the criterion of maximum length should not be regarded as the only one applicable. He had abstained from voting because the choice of 25-mile distance was purely arbitrary.

96. He reserved his final attitude for the vote on the article as a whole.

97. Mr. EDMONDS said that although he agreed that a maximum length must be laid down for the closing line of bays, he had voted against the proposal for a limitation to 25 miles because the figure seemed to him too high.

98. Mr. SALAMANCA said he had voted in favour of the proposal for a 25-mile limitation because he regarded that criterion as a provisional one which would be reconsidered at the Commission's next session.

99. The 25-mile rule would be very useful because it would certainly elicit comments from governments. On the basis of those comments, the Commission could, at its next session, take a final decision.

100. The CHAIRMAN, speaking in his personal capacity, said he had abstained because he considered the

Commission was not in a position to decide on the maximum length of the closing line of bays any more than on that of the breadth of the territorial sea. Those questions could only be decided by an international conference of States.

Further discussion of article 7 was adjourned.

The meeting rose at 1.5 p.m.

319th MEETING

Friday, 24 June 1955, at 9.30 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 7 [7]: Bays (continued)

1. Mr. FRANÇOIS (Special Rapporteur) said that the Commission had to decide whether other criteria than the length of the closing line were to be incorporated in article 7. The only one that had been the subject of a proposal was the question of "historic" bays—the subject matter of paragraph 5 of his proposed text for the article (A/CN.4/93).

The principle of a reference to historic bays was adopted by 6 votes to none with 3 abstentions.

2. Mr. GARCÍA AMADOR asked for the actual text of paragraph 5 to be put to the vote.

3. In reply to a suggestion by Mr. SALAMANCA that a reference to estuaries be made in paragraph 5, Mr. FRANÇOIS (Special Rapporteur) said he wished to reserve the question until the Commission had dealt with article 14 on the delimitation of the territorial sea at the mouth of a river.

4. Mr. SALAMANCA agreed.

The text of article 7, paragraph 5, as contained in document A/CN.4/93, was adopted unanimously.

5. Mr. FRANÇOIS (Special Rapporteur), opening the discussion on paragraph 4, pointed out that the text must be brought into line with the Commission's decision to adopt a distance of 25 miles, instead of 10 miles, as the maximum length of closing lines.

6. Sir Gerald FITZMAURICE said paragraph 4 had been drawn up on the assumption that the closing line of a bay would in no case exceed 10 miles. On the basis of that assumption, it was quite proper to state that where different lines of such length could be drawn, that line should be chosen which enclosed the maximum water area within the bay.

7. Now that a distance of 25 miles had been substituted for that of 10 miles, it was doubtful whether the same argument applied. Indeed, it might even be suggested that, in order not to extend internal waters unduly, that line should be chosen which enclosed the minimum water area within the bay.

8. He would like to know the Special Rapporteur's views on the question.

9. Mr. FRANÇOIS (Special Rapporteur) said that as the Commission had adopted the 25-mile rule, it should apply it consistently and adopt paragraph 4 with a reference to the new distance. The matter was, however, not of any very great importance.

10. The CHAIRMAN called for a vote on article 7, paragraph 4, reading as follows:

> "4. Where the entrance of a bay exceeds 25 miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn that line shall be chosen which encloses the maximum water area within the bay."

Article 7, paragraph 4 was adopted by 8 votes to none, with 4 abstentions.

11. Mr. FRANÇOIS (Special Rapporteur) drew attention to the second and third sentences of paragraph 2. The third sentence, which read: "Islands within a bay shall be included as if they were part of the water area

of the bay" would enable any indentation to be considered as a bay provided its depth was at least half the closing line, even though some of the area within the bay was covered by islands rather than by sea. If a provision of that type were not included, the water area would be reduced and in certain cases might not be equal to the area of a semi-circle drawn on the entrance of the indentation—the criterion laid down for a bay in the opening sentences of paragraph 2, a criterion moreover which corresponded to the text adopted at the 317th meeting on the proposal of Mr. García Amador.[1]

12. Mr. SCELLE said that such a liberal system might have been justified with a closing line of ten miles but was questionable now that the Commission had adopted a normal, "minimum" closing line as long as 25 miles.

13. Mr. SANDSTRÖM pointed out that the presence of islands actually emphasized, from a geographical point of view, the inland character of the waters within the bay.

The second and third sentences of paragraph 2, as contained in document A/CN.4/93, were adopted by 10 votes to none with 2 abstentions.

14. Mr. FRANÇOIS (Special Rapporteur) then drew attention to paragraph 3 of the text he proposed for article 7 in document A/CN.4/93 ; that paragraph dealt with the problem of a bay whose entrance was split up into a number of smaller openings by various islands. He proposed that closing lines could be drawn across those openings provided none exceeded 5 miles in length, except that one of them might extend up to 25 miles. The original text, of course, referred to a distance of 10 miles in the last instance. As to the distance of 5 miles, he proposed to leave it as it was, notwithstanding the adoption of the 25-mile rule.

15. Mr. KRYLOV said that the provision was a cumbersome one and article 7 could well do without it. It was quite unnecessary to overload the text with such detailed provisions.

16. He proposed that no provision be included of the type of paragraph 3, so as to leave possible arbitrators a free hand to decide specific cases.

17. Mr. GARCÍA AMADOR said he had some sympathy with Mr. Krylov's remarks. Moreover, paragraph 3 constituted a further instance of the adoption of arbitrary distances without any foundation.

18. He proposed that article 7, paragraph 3, be amended to read as follows:

> "3. If the entrance of a bay is split up into a smaller number of openings by various islands, closing lines across these openings may be drawn."

19. Sir Gerald FITZMAURICE said that there were reasons for retaining the provision in question, since the case was quite a common one. The same geographical and physical reasons which caused the existence of a bay also frequently caused the formation of islands within and at the mouth of the bay. However, with some reluctance, he would be prepared to accept Mr. Krylov's proposal.

20. He could not, on the other hand, accept Mr. García Amador's proposal because that would be tantamount to removing all limitations. With a provision such as was suggested by Mr. García Amador, it would be possible to draw closing lines from island to island so as to cover hundreds of miles in all.

21. Mr. SCELLE agreed with Mr. Krylov's proposal to delete paragraph 3. There appeared to be no justification for a system whereunder two islands might be separated by 10 miles (or 25 miles) and the others by no more than 5 miles.

22. Mr. SANDSTRÖM suggested that a total distance of 25 miles be specified as the maximum for the total length of the various lines from island to island. In other words, if all the various lines added together gave a total of 25 miles or less, the indentation constituted a bay.

23. Mr. GARCÍA AMADOR said that, in view of the different opinions expressed by members of the Commission, perhaps the best course was to eliminate paragraph 3 altogether.

24. He would vote in favour of the deletion of that paragraph, while reserving the right to introduce his (Mr. García Amador's) own paragraph 5[2] at a later stage in the discussion, when a text for the whole of article 7 was prepared by the Drafting Committee on the basis of the various proposals adopted by the Commission.

Mr. Krylov's proposal to delete article 7, paragraph 3, was adopted by 9 votes to none, with 3 abstentions.

25. Mr. GARCÍA AMADOR pointed out that his own proposed paragraph 6[3] had not been voted upon by the Commission. It was necessary to vote thereon before the Drafting Committee undertook to re-draft article 7 as a whole on the basis of the various texts adopted by the Commission.

26. Mr. EDMONDS agreed that all discussion on an article had to be completed before it went to the Drafting Committee.

27. Mr. SANDSTRÖM enquired how Mr. García Amador construed his proposed paragraph 6 in the light of the various proposals actually accepted by the Commission.

28. Mr. GARCÍA AMADOR said his paragraph 6 concerned the case where the waters of a bay were shared by several States. If they were in agreement, they could share the waters of the bay as internal waters. Failing such agreement, the waters concerned

[1] 317th meeting, para. 42.

[2] *Ibid.*, para. 52.

[3] *Ibid.*

would not be internal waters, but each State would be entitled to territorial waters in the ordinary way.

29. Mr. FRANÇOIS (Special Rapporteur) suggested that the final clause of the proposed paragraph be amended to read as follows:

"... the territorial sea of each State shall be settled by arbitration."

30. Mr. SCELLE said that he had always understood that, where there were several coastal States, the waters concerned were free seas. He could see no reason why those waters should be turned into internal waters. To acknowledge as the internal waters of a State the waters of a bay having an entrance of 25 miles was already a very great concession to the coastal State. There was no reason why that concession should be extended to the case where there were several coastal States.

31. Mr. SANDSTRÖM pointed out that the provisional articles the Commission was drafting were concerned solely with the régime of the territorial sea. They did not specifically deal with internal waters. There was, therefore, no reason why a provision of the type of Mr. García Amador's paragraph 6 should be included in article 7.

32. Mr. GARCÍA AMADOR pointed out that the Harvard Law School had produced a text along the lines of his own paragraph 6 following exhaustive research into the problem of Fonseca Bay, shared by Honduras, Nicaragua and Salvador.[4]

33. If, where there was only one coastal State, the waters of a bay were recognized as its internal waters, there was no reason why in cases where there was more than one coastal State the waters concerned should not be shared between them.

34. Sir Gerald FITZMAURICE said that the concept of internal waters was only valid in the particular case of a bay having only one coastal State. It was precisely because a single State owned all the shores of the bay and because the waters of the bay thus lay, so to speak, within its body, that it was permissible for it to have that special privilege.

35. It had never been previously suggested that where a bay had several coastal States, the waters thereof could be anything but either territorial sea or high seas. Such a bay was a bay in a geographical sense, but not in a political.

36. Mr. SCELLE said he could not understand what interests the two or more coastal States in question could have in thus closing the doors of a bay to foreign shipping.

37. Mr. ZOUREK said the principles adopted by the Commission did not exclude the possibility of two States sharing the waters of a bay the coasts of which belonged to them.

39. Mr. FRANÇOIS (Special Rapporteur) recalled that the report of Sub-Committee II of the 1930 Codification Conference had clearly specified that the term "bay" in its juridical sense applied to indentations having only one coastal State. He noted with interest that Mr. García Amador had included the same idea in proviso (*b*) in paragraph 3 of his proposed text.

39. Mr. HSU enquired how Mr. García Amador's paragraph 6 would apply in the Baltic.

40. Mr. GARCÍA AMADOR pointed out that his paragraph 6 was concerned with bays as defined by the Commission. It certainly did not affect inland seas themselves, although it could affect specific bays therein.

41. All that the provision meant was that where a bay existed in the juridical sense, the benefit of the régime of internal waters would not be restricted to the case where there was a single coastal State but would also benefit two or more coastal States where such existed.

42. Mr. AMADO said there appeared to be very few cases of bays having more than one coastal State. There appeared to be little justification for a special provision concerning them.

The Commission decided by 7 votes to 3 with 2 abstentions against the principle of including a provision along the lines of paragraph 6 of Mr. García Amador's proposed text for article 7.

43. Mr. GARCÍA AMADOR enquired what was the position concerning proviso (*b*) in his paragraph 3, under which the waters of a bay would be considered inland (internal) waters if that bay were totally bordered by the territory of a single State.

44. Mr. FRANÇOIS (Special Rapporteur) said that he proposed to re-draft article 7 along the lines of the 1930 report of The Hague Conference[5] so as to specify that an indentation was a bay in the juridical sense when and only when it was bordered by a single coastal State.

Article 7, as a whole, was referred to the Drafting Committee for final drafting.

Article 10 [10]: Islands

45. Mr. FRANÇOIS (Special Rapporteur), after recalling that articles 8 and 9 had already been discussed,[6] pointed out that in document A/CN.4/93 he proposed the addition to the provisional text of article 10 of a second paragraph, reading as follows:

"Where the distance between the island and the coast only slightly exceeds twice the breadth of the territorial sea, the limit of the territorial sea shall be measured from the base line of the outer coast of the island."

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[4] See *American Journal of International Law*, vol. 11 (1917), p. 674.

5. League of Nations publication, *V. Legal, 1930.V.16* (document C.351(b).M.145(b).1930.V), p. 217.

[6] See *supra*, 295th meeting, paras. 69–82.

46. That proposal was designed to meet the suggestion of the Government of the Union of South Africa (A/2934, Annex, No. 15).

47. Sir Gerald FITZMAURICE felt that clarification of the term "slightly" was necessary. Where a State claimed a breadth of twelve miles for its territorial sea, an island 26 or 27 miles from the coast would leave a stretch of 2 or 3 miles as open sea. The use of vague terms such as "slightly" would enable the coastal State to claim that the 2- or 3-mile stretch in question was too small in proportion to be allowed to remain as high seas.

48. Mr. HSU said that the term "slightly" must be retained so long as the Commission did not reach a conclusion on the breadth of the territorial sea.

49. Mr. EDMONDS said that it was preferable to state a definite distance rather than to use vague terms.

50. Mr. FRANÇOIS (Special Rapporteur) said that he would include, in the comment to article 10, an indication that a distance of half a mile or a mile was intended.

51. There was a precedent in article 6, paragraph 2 of the draft articles on the continental shelf,[7] which laid down that safety zones around installations on the continental shelf could be established "at a reasonable distance around such installations".

52. In the comments on the draft articles, the Commission had stated:

> "Although the Commission did not consider it essential to specify the size of the safety zones, it believes that, generally speaking, a radius of 500 metres is sufficient for the purpose."[8]

53. In that connexion, the Commission had felt that it should not tie the hands of the judges or arbitrators by laying down too strict a rule in the article itself, but had given a general indication in the comment.

54. In the same manner, it was quite appropriate for the Commission to suggest, in the comment to article 10, on islands, the distance which, in its opinion, would correspond as a general rule to the term "slightly".

55. Mr. KRYLOV said he would abstain from voting on the additional paragraph proposed by the Special Rapporteur because he considered that the coastal State had the right to delimit its own territorial sea.

56. Mr. SCELLE said he could not vote in favour of the proposed second paragraph. The territorial sea of a coastal State was already being extended sufficiently by the process of allowing islands to have a territorial sea of their own. If, on top of that, channels of high seas were to be annexed too, there would be a further loss to the area within which the freedom of the seas applied.

The Commission rejected by 3 votes to 2 with 7 abstentions the Special Rapporteur's proposed paragraph 2 for article 10.

Article 10, in the form contained in the provisional articles, was unanimously adopted.

Article II : Groups of islands

57. Mr. FRANÇOIS (Special Rapporteur) recalled that at the 1930 Hague Conference for the Codification for International Law, there had been a tendency in favour of adopting a figure of ten miles as the maximum distance between islands in order for them to be regarded as a group of islands; no precise text had been formulated, however, and there had been complete disagreement with regard to the juridical status of the enclosed waters.[9]

58. The text which he proposed in document A/CN.4/93 was based on recommendations of the Committee of Experts (A/CN.4/61/Add.1) which had met at The Hague in April 1953. The experts had proposed that in order that they might be regarded as constituting a group the maximum distance between islands should be 5 miles instead of 10 except that in one case it might extend to 10. Now that the Commission had decided that the maximum length of a bay's closing line should be 25 miles instead of 10, the figure of ten miles in his proposed text for article 11 should, by analogy, be increased to 25. The figure of 5 miles, however, would remain unchanged.

59. The experts' reason for proposing that figure rather than 10 miles was to safeguard the freedom of the seas; if any larger figure were adopted there might well be cases where a very considerable area of the high seas would be affected. The fact that if his proposal was adopted the area of sea enclosed would become internal waters—a point on which there had been no agreement before—made it essential that the area enclosed should remain reasonably restricted.

60. Mr. GARCÍA AMADOR said that he could accept the Special Rapporteur's text of article 11 provided the distance limitation was deleted from paragraph 1. He stressed that any resemblance his proposal might have to the views of a particular country was coincidental. The particular country he had in mind, namely, Cuba, had refrained from submitting its written comments on the provisional articles since it was easier for him to acquaint the Commission with its views verbally. Moreover, in that way the Commission was spared such criticisms of the written views of governments as it had heard at the previous meeting.

61. Despite the fact that the Commission had adopted article 5 without any distance limitation by ten votes to three,[10] the Special Rapporteur apparently wished it

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[7] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 62, in *Yearbook of the International Law Commission, 1953*, vol. II.

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

[9] League of Nations publication, *V. Legal, 1930.V.16* (document C.351(b).M.145(b).1930.V), p. 219.

[10] 317th meeting, para. 42.

to retain the same form of limitation in article 11. The Commission should be consistent. Moreover, it was difficult to see how an archipelago which was linked to the mainland by the geographical, economic or other ties which the International Court of Justice had considered relevant could now be severed from it on the ground that the islands of which it was composed were more than 5 miles apart, simply because the Committee of Experts had so recommended.

62. Mr. SANDSTRÖM felt that the difficulty with regard to article 11 arose from the attempt to cover two different kinds of case in a single article. In such cases as that of the Aaland Islands off the coast of Finland, the straight-base-line system could be applied. In other cases, where the islands were small or few in number, he felt that the provisions of article 10 were sufficient. He therefore proposed the deletion of article 11.

63. Sir Gerald FITZMAURICE agreed that it might be impossible to cover in a single article the many different types of case which would arise.

64. He wondered whether Mr. García Amador had realized the implications of his proposal. The whole idea of having special provisions for groups of islands was in order that the enclosed waters might be regarded as internal waters. The islands must therefore be reasonably close together. Some numerical limitation in the definition of a group of islands was therefore essential in order that the waters enclosed could be regarded as internal waters. If the Commission could not agree on that point, it had indeed best delete article 11 altogether.

65. Mr. HSU said he was inclined to agree that article 11 should be deleted for the time being, on the understanding that it could be re-introduced at the next session if that seemed necessary and if it seemed possible to reach agreement on it.

66. Mr. GARCÍA AMADOR agreed that article 11 was not perhaps absolutely necessary since article 5, in the form in which it had been adopted, covered islands adjacent to the coast. It was possible that the countries concerned would regard that article as adequate for their purpose. He therefore withdrew his amendment to article 11, and agreed to its deletion pending the receipt of comments from governments.

Mr. Sandström's proposal for the deletion of article 11 was adopted by 10 votes to none with 2 abstentions.

Article 12 [11]: Drying rocks and shoals

67. Mr. FRANÇOIS (Special Rapporteur) said that in his amendment (A/CN.4/93) he had tried to meet the drafting point raised by the Belgian Government (A/2934, Annex, No. 2).

68. The Brazilian Government had proposed the insertion of the word "islands" at the beginning of the article, but he felt there must have been some misunderstanding because article 10 already provided that every island should have its own territorial sea. Article 12 did not give drying rocks and drying shoals a territorial sea of their own, but extended the territorial sea of the mainland off which they lay.

69. Sir Gerald FITZMAURICE said he had no objection to article 12, but drew attention to the third paragraph of the comment, where reference was made to the relation between that article and the last sentence of article 5, paragraph 2, which read: "Base lines shall not be drawn to and from drying rocks and shoals." The Commission, however, had deleted the whole of article 5, paragraph 2, including that sentence.[11] The much-criticized Committee of Experts had pointed out (A/CN. 4/61/Add.1, Annex, III) that straight base lines had the effect of dividing the territorial sea from internal waters and that it was very important for mariners to be able to see the points of departure for base lines at all times, in order that they might not unwittingly enter internal waters. If the point of departure was a rock or shoal which was only visible at low tide, mariners might easily cross the base line unawares. There was, therefore, good reason for the sentence to which he had referred, and which had now been deleted. He wondered whether the Commission would be willing to reconsider its decision on that particular point and to restore the sentence in question.

70. Mr. FRANÇOIS (Special Rapporteur) agreed with Sir Gerald that the objections which had been raised to the remainder of article 5, paragraph 2, did not apply to the last sentence. He was in favour of the Commission's reconsidering its decision on that point.

It was agreed by 9 votes to none, with 3 abstentions, to reconsider the decision to omit the last sentence of article 5, paragraph 2.

71. Sir Gerald FITZMAURICE proposed that the last sentence of article 5, paragraph 2, of the provisional articles be re-introduced in the text in a manner to be determined by the Drafting Committee.

72. Mr. SANDSTRÖM said that although Swedish law, in the same way, he believed, as the law of the other Scandinavian countries, allowed base lines to be drawn to and from drying rocks and shoals, he did not feel strongly about the question and would therefore abstain from voting.

73. Mr. KRYLOV felt that if the arguments which Sir Gerald had advanced in favour of his proposal were valid in respect of the last sentence of article 5, paragraph 2, it was difficult to understand why he did not regard them as valid in the case of article 12.

74. Sir Gerald FITZMAURICE said that the two cases were quite different. The same consideration did not arise in respect of article 12.

75. Mr. SCELLE agreed that the distinction was justified. In its internal waters, a State took up an entrenched position, and they should therefore be restricted as much as possible.

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[11] 316th meeting, para. 78.

76. Mr. SANDSTRÖM pointed out that a further consequence of the deletion of article 5, paragraph 2, was that it was not clear that straight base lines could be drawn between headlands of the coastline and off-shore islands or between such islands. He wondered, therefore, whether the second sentence of article 5, paragraph 2, should not also be re-introduced, without the words "less than five miles from the coast".

77. Mr. ZOUREK disagreed, pointing out that it was Mr. García Amador's proposal for paragraph 1 which had been adopted, not the original text.

78. Mr. SANDSTRÖM said that he was not convinced that the point he had raised was covered by Mr. García Amador's text, but that since he intended to abstain in the forthcoming vote, it was not for him to make any proposals on the subject.

79. Sir Gerald FITZMAURICE felt that the point which Mr. Sandström had raised was a separate one which did not affect his proposal for re-introduction of the last sentence of article 5, paragraph 2. The question of drying rocks and drying shoals would still arise even if base lines could be drawn only between headlands.

Sir Gerald Fitzmaurice's proposal for the re-introduction of the last sentence of article 5, paragraph 2, was adopted by 4 votes to none, with 8 abstentions.

Article 12 was unanimously adopted in the form contained in document A/CN.4/93.

Article 13 [12]: Delimitation of the territorial sea in straits

80. Mr. FRANÇOIS (Special Rapporteur) said that he proposed no amendment but that comments had been received from two governments. The United Kingdom Government had stated that it approved the article (A/2934, Annex, No. 16). The Norwegian Government (A/2934, Annex, No. 11) said that the text failed to take into account the case where two States did not agree on the breadth of the territorial sea. That was true but the article had been drafted on the assumption that agreement could be reached on the breadth of the territorial sea and, in his view, that was the only assumption which the Commission could validly entertain at the present stage.

81. Mr. ZOUREK wondered whether the article could not be amended to meet the point raised by the Norwegian Government.

82. He also recalled that at the previous session [12] he had argued that paragraph 4 was too restrictive in that it did not allow a coastal State to regard the waters in a strait as internal waters even if the strait in question was never used by shipping. In that way, the paragraph was contrary to international law.

83. Replying to the CHAIRMAN, Mr. ZOUREK said that his views on the subject had not been modified by the discussion which had taken place at the previous session,[13] but that unless there was evidence that they were shared by other members, he would refrain from complicating the Commission's task by submitting definite proposals.

84. Replying to a point raised by Mr. KRYLOV, Mr. FRANÇOIS (Special Rapporteur) pointed out that paragraph 3 referred only to "the extent of the two belts of territorial sea". That did not necessarily mean that the two belts should be equal in breadth. The words "twice the breadth of the territorial sea" were not used until article 15.

Article 13 was adopted by 10 votes to none, with 2 abstentions.

Article 14 [13]: Delimitation of the territorial sea at the mouth of a river

85. Mr. FRANÇOIS (Special Rapporteur) said that his proposal (A/CN.4/93) was designed to meet the points raised by the United Kingdom and Yugoslav (A/2934, Annex, Nos. 16 and 18) Governments in their comments.

86. Mr. SALAMANCA asked whether in trying to satisfy the United Kingdom and Yugoslav Governments, the Special Rapporteur had had any specific cases in mind. He (Mr. Salamanca) had, and he feared that they might not be satisfactorily covered by the text proposed by the Special Rapporteur. He had already drawn attention to the fact that the estuaries of the River Plate and other South American rivers were quite different in nature from the estuaries of European rivers. In estuaries of the former type, with their numerous shoals and sandbanks, there were considerable areas even outside a line drawn *inter fauces terrarum* which could properly be regarded as internal waters. Before proposing the deletion of paragraph 2, however, he would appreciate an answer to his question whether the Special Rapporteur had had any specific cases in mind.

Further discussion of article 14 was deferred to the next meeting.

The meeting rose at 1 p.m.

[12] See *Yearbook of the International Law Commission, 1954*, vol. I, 261st meeting (para. 31) and 271st meeting (para. 1).

[13] *Ibid.*, 261st meeting (paras. 24–64), 264th meeting (paras. 58–63) and 271st meeting (paras. 1–14).

320th MEETING

Monday, 27 June 1955, at 3 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

** The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (A/2693, A/CN.4/90 and Add.1 to 5, A/CN.4/93, A/CN.4/L.54) (*continued*)

PROVISIONAL ARTICLES (A/2693, CHAPTER IV) (*continued*)

Article 14 [13]: Delimitation of the territorial sea at the mouth of a river (continued)

1. Mr. FRANÇOIS (Special Rapporteur) said in reply to Mr. Salamanca's question at the previous meeting (para. 86) as to what cases paragraph 2 in article 14 (A/CN.4/93) was intended to cover, that the text had been taken from that submitted by Committee II to the 1930 Conference for the Codification of International Law.[1] He himself had had some hesitation about using the word "estuary" but had been reassured that it was a well-defined geographical concept which required no elucidation. In his turn he would be interested to learn from Mr. Salamanca what specific cases he considered would not be covered by the provision.

2. Mr. SALAMANCA explained that he had in mind certain estuaries in South America, and particularly that of the River Plate. The latter was continuously forming new strips of land and the estuary was barely navigable so that the Argentine Government had been forced to construct an artificial canal to make passage between Buenos Aires and Montevideo possible. Geographically speaking, therefore, article 4, paragraph 2 was inapplicable in that instance.

3. Mr. FRANÇOIS (Special Rapporteur) asked whether the continuously shifting sandbanks were uncovered at low tide.

4. Mr. SALAMANCA answered that they were not wholly submerged. The main characteristic, however, of the River Plate estuary was its limited navigability. The two coastal States had agreed not to attempt any demarcation because of the constantly changing contour of the land.

5. If the Special Rapporteur was unable to indicate the precise estuaries for which his text was designed, perhaps it might be preferable to delete paragraph 2 altogether.

6. Mr. FRANÇOIS (Special Rapporteur) said that he would be unable to answer that question without expert advice.

7. Mr. SANDSTRÖM believed that Mr. Salamanca was, in fact, concerned to know whether the same rules should apply to estuaries where the land formation was continuously changing as to normal ones.

8. Mr. SALAMANCA stressed that the important criterion was navigability. In his opinion the normal rule about estuaries could not be applied where they were not navigable. He was, therefore, convinced that it was better to delete paragraph 2 rather than to retain a provision which could not cover the important exceptions to which he had drawn attention.

9. Mr. ZOUREK reminded the Commission that it had decided to restrict the application of article 7 to bays within the territory of a single State. If the scope of article 14 were to be likewise restricted, perhaps Mr. Salamanca's difficulty would be overcome.

10. Mr. FRANÇOIS (Special Rapporteur) pointed out that navigability had never been taken into account during the Commission's discussion on bays,[2] many of which were not navigable throughout but only along certain channels. Moreover, the concept was a vague one and had no meaning except in terms of a particular vessel. Mr. Salamanca had, therefore, introduced an entirely new criterion, which had no relevance whatsoever to the question of delimitation. He remained unconvinced that a special provision was necessary to cover the cases Mr. Salamanca had in mind.

[1] League of Nations publication, *V. Legal, 1930.V.16* (document C.351(b).M.145(b).1930.V), p. 220.

[2] 317th–319th meetings.

11. In view of the Commission's decision about bays he certainly considered that article 14 should also apply solely to estuaries within the territory of a single State.

12. Sir Gerald FITZMAURICE felt that the problem with which Mr. Salamanca was preoccupied was that of the delimitation of an estuary with constantly shifting channels lying between two States. Paragraph 2, which had already figured in the Special Rapporteur's second report (A/CN.4/61),[3] together with paragraph 1 was intended to cover estuaries of the normal kind, where the boundary between inland waters and the territorial sea could be drawn along the line of the coast. When the land domain was being continually pushed out to sea by the constant formation of new sandbanks, it was necessary to determine the point from which the low-watermark was to be measured and States might find it necessary to revise the line from time to time. In the case of the River Plate estuary it was impossible to draw a line from headland to headland in order to establish the limit of inland waters and the rule for delimiting the territorial sea must therefore be applied along the whole circumference.

13. Mr. SANDSTRÖM considered that the Commission had not sufficient technical information at its disposal to decide whether special provision was necessary for the exceptional cases mentioned by Mr. Salamanca. He suggested therefore that it should wait for the comments of the States concerned, substantiated if possible by expert evidence.

14. Mr. SALAMANCA said that though he still remained unsatisfied with paragraph 2, the precise implications of which remained obscure, he would not be opposed to the Commission's taking a provisional vote on article 14, drawing the attention of governments to the special case he had mentioned and asking for their observations.

15. Mr. ZOUREK asked that it be made perfectly clear in the comment that article 14 applied solely to estuaries within the territory of one State.

16. Mr. KRYLOV doubted whether it was appropriate to draw an analogy between bays and estuaries: the whole question required further thought.

Pending the receipt of comments by governments, the Commission provisionally approved the Special Rapporteur's text of article 14 (A/CN.4/93) by 11 votes to none, with 1 abstention.

Article 15 [14]: Delimitation of the territorial sea of two States the coasts of which are opposite each other

17. Mr. FRANÇOIS (Special Rapporteur) drew the attention of the Commission to the amendments (A/CN.4/93) he had submitted to article 15, in order to meet the points raised by the Netherlands, Swedish and United Kingdom Governments respectively (A/2934, Annex, Nos. 10, 13 and 16).

Article 15, as amended by the Special Rapporteur, was adopted by 11 votes to none, with 1 abstention.

Article 16 [15]: Delimitation of the territorial sea of two adjacent States

18. Mr. FRANÇOIS (Special Rapporteur) said that he had proposed two changes (A/CN.4/93) following the observations made by the Netherlands and United Kingdom Governments (A/2934, Annex, Nos. 13 and 16). He saw no advantage in substituting for the original text the draft proposed by the Belgian Government (*ibid.*, No. 2).

Article 16, as amended by the Special Rapporteur, was adopted by 11 votes to none, with 1 abstention.

The CHAIRMAN pointed out that the Commission had thereby completed its first reading of the draft articles on the régime of the territorial sea.

Order of business

19. Mr. GARCÍA AMADOR, announcing his intention of submitting a draft resolution to supplement the resolution adopted at the previous session concerning co-operation with inter-American bodies,[4] asked when that question would be taken up as he wished to circulate the text in time for study by members of the Commission.

20. Mr. FRANÇOIS (Special Rapporteur) said that it would greatly facilitate the completion of the final report if the Commission could finish its work on the régime of the high seas before taking up Mr. García Amador's proposal.

21. Mr. LIANG (Secretary to the Commission), stating that he would make an oral report to the Commission on behalf of the Secretary-General about the steps taken in connexion with the decision regarding co-operation with inter-American bodies, suggested that the matter might be taken up on 30 June provided the work on the régime of the high seas had been wound up by then.

It was so agreed.

Régime of the high seas (item 2 of the agenda)
(resumed from the 306th meeting)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

22. The CHAIRMAN invited the Commission to consider the revised draft articles on the régime of the high seas prepared by the Drafting Committee.

23. Mr. FRANÇOIS (Special Rapporteur) said that in the course of discussion he would indicate those passages where the Committee had gone somewhat beyond mere drafting.

[3] *Yearbook of the International Law Commission, 1953*, vol. II.

[4] "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 77, in *Yearbook of the International Law Commission, 1954*, vol. II.

Article 1 [1]: Definition of the high seas

"The term 'high seas' means all parts of the sea which are not included in the territorial sea or inland waters of a State."

Article 1 was adopted without comment.

Article 2 [2]: Freedom of the high seas

"The high seas being open to all nations, no State may subject them to its jurisdiction. Freedom of the high seas comprises *inter alia*:

"(1) Freedom of navigation;

"(2) Freedom to lay submarine cables and pipelines;

"(3) Freedom of fishing;

"(4) Freedom to fly over the high seas."

24. Mr. FRANÇOIS (Special Rapporteur) said that it was not clear from the summary records whether Mr. Zourek's suggestions concerning article 2[5] had been accepted. At all events, the Drafting Committee had sought to take them into account.

25. Mr. KRYLOV proposed that the order of sub-paragraphs 2 and 3 be reversed.

26. Mr. FRANÇOIS (Special Rapporteur) said that that had been the intention of the Drafting Committee. The present order had not been corrected as the result of an oversight.

27. Mr. ZOUREK observed that the presence of the words "*inter alia*" implied that there might be other freedoms in addition to those listed in article 2, but he was unable to perceive what they might be.

28. He noticed that sub-paragraph 3 referred only to fishing and woundered whether it covered seal hunting, etc.

29. He would be interested to know why his original amendment for the addition of a new sentence to article 2 (A/CN.4/L.52),[6] had not been taken into account by the Drafting Committee.

30. Mr. FRANÇOIS (Special Rapporteur) explained that the words "*inter alia*" had been inserted in order to show that the enumeration was not necessarily exhaustive.

31. Mr. Zourek's amendment had not been taken into account because it seemed superfluous.

32. The CHAIRMAN considered it self-evident that since the high seas were open to all nations they could not, save in the exceptional cases provided for in the draft, be used for activities prejudicial to the nationals of other States.

33. Mr. KRYLOV considered that the substance of Mr. Zourek's amendment was contained in the first sentence of article 2.

34. Mr. SANDSTRÖM agreed that the principle Mr. Zourek had in mind had been better stated by the Drafting Committee.

35. Mr. ZOUREK maintained that his amendment was necessary so as to emphasize that States did not exercise sovereignty over the high seas. He had also proposed that it be made clear in the article that the high seas should be used by all States on an equal footing — a concept which did not appear in the Drafting Committee's text. However, he would not insist on his amendment being put to the vote, buts asked that a clear statement on the same lines be inserted in the comment.

It was so agreed.

36. Mr. SCELLE considered it important to retain the words "*inter alia*" because there were other freedoms covered by article 2, such as the right to scientific research and to the exploitation of the resources of the sea bed.

37. Mr. HSU said that although he usually considered any enumeration to be fraught with danger the words "*inter alia*" did provide some safeguard. However, it seemed inconsistent to have devoted chapters in the draft to the first three freedoms listed but not to the fourth. Given the nature of the articles and their purpose, he also doubted whether it was suitable to include the word "freedom" in the headings of the three chapters.

38. Sir Gerald FITZMAURICE wondered whether Mr. Hsu's point might be met if the latter part of article 2 were amended to read:

"Freedom of the high seas comprises freedom of navigation, of fishing, to lay submarine cables and pipelines and other freedoms such as, for instance, freedom to fly over the high seas."

39. With that modification the chapter headings should not give rise to objection.

40. Mr. LIANG (Secretary to the Commission) did not think that Sir Gerald Fitzmaurice's suggestion would effectively dispose of Mr. Hsu's criticism. Since chapters I, II and III all dealt with regulations it seemed hardly appropriate to include the word "freedom" in their titles. The appropriate emphasis had already been given to the freedom of the high seas in article 2 itself.

41. Mr. SANDSTRÖM proposed that the Commission take up Mr. Hsu's point at the end of the discussion on the draft articles, which would be a better time to consider the chapter headings.

It was so agreed.

Article 2 was adopted, subject to sub-paragraphs 2 and 3 being transposed.

Article 3 [4]: Status of ships

"Ships posses the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in the present regulations, they shall be subject to its exclusive jurisdiction on the high seas."

Article 3 was adopted without comment.

[5] 293rd meeting, para. 43.

[6] See *supra*, 283rd meeting, footnote 13.

Article 4 [5]: Right to a flag

"Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:

"1. Belong to the State concerned, or

"2. Be more than half owned by:

"(*a*) Nationals of, or persons legally domiciled in the territory of, the State concerned and actually resident there;

"(*b*) A partnership of 'commandite' company in which the majority of the partners with personal liability are nationals of, or persons legally domiciled in the territory of the State concerned and actually resident there; or

"(*c*) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State."

42. Mr. FRANÇOIS (Special Rapporteur) said that as the Drafting Committee had felt itself to be lacking in the expert knowledge necessary to resolve the problems connected with the types of companies to be mentioned in article 4, Mr. Scelle had been asked to seek the advice of Mr. Arminjon, who had drafted a new text. However, Mr. Arminjon had laid down certain requirements which, during the first reading, had been rejected as too severe.

43. In Mr. Arminjon's draft the expression *personnes résidant effectivement établies* was used.

44. Mr. SCELLE said that though the two expressions were synonymous he preferred the latter as being more definite.

45. He added that the Commission was not bound to accept Mr. Arminjon's text.

46. Mr. AMADO said that he knew of no such concept as *personnes établies* in any civil code, and also had doubts about the expression *résidant effectivement*, which seemed somewhat tautological.

47. He found the requirement laid down in sub-paragraph (*b*) surprising, because it was not the nationality of the majority of the partners which was important but the nationality of those who owned the bulk of the shares.

48. Mr. SANDSTRÖM asked whether there was a distinction in English law between domicile and residence.

49. Sir Gerald FITZMAURICE said that under English law there was a difference between domicile and residence, but in practice they amounted to much the same thing, domicile usually being equivalent to permanent residence, though not always. However, the problem did not arise for the registration of shipping because for a ship to be registered as British it had to be either wholly owned by a British subject or by a company in which the majority of shares were owned by British subjects.

50. He pointed out that, as the text stood, it would be enough if any one of the conditions laid down in article 4 were fulfilled.

51. Mr. SANDSTRÖM said that in Sweden the law drew no distinction between legal domicile and effective residence.

52. Mr. SALAMANCA said that the distinction would cause difficulties in those countries where there was no special legislation concerning residence. There might, moreover, be some contradiction between the first sentence in article 4 and sub-paragraph (*a*). Where domicile was the only concept recognized by law it must be regarded as equivalent to residence for the purposes of the article.

53. Mr. SCELLE said that the article had been so drafted as to take into account the situation in France where a distinction existed between *de facto* domicile, which was almost equivalent to residence, and *de jure* domicile.

54. Mr. Arminjon had wished to bring within the scope of the article such companies as those composed of members of a single family who, having invested their money, left the entire management to one member. The shares could be transferred from one person to another, and it was impossible to establish the number of shareholders. If such a provision were felt to be too specialized he would have no objection to its deletion, particularly as that would not greatly affect the application of the article. Indeed, the earlier text drawn up by the Institute of International Law would probably have been perfectly adequate.

55. Mr. LIANG (Secretary to the Commission) said that as far as the English text was concerned it was difficult to understand the precise meaning of the words "legally domiciled" since English law knew no such concept as *de facto* domicile.

56. He had some doubts about the word "or" following the words "a partnership" in sub-paragraph (*b*). If it was intended to establish a distinction between a partnership and a "commandite" company that should be made clear.

57. Mr. AMADO said that notwithstanding Mr. Scelle's remarks he could not agree to the inclusion of the words *des personnes établies* in sub-paragraph (*b*) because they did not correspond to any concept in civil law as he knew it.

58. Mr. SCELLE pointed out that for certain purposes a person might be legally domiciled in France without necessarily living there.

59. Sir Gerald FITZMAURICE said that the Secretary's remarks about English law were correct, but the words "legally domiciled" should not give rise to difficulty. Although he appreciated the reasons for Mr. Amado's objections, he believed there was a need to refer both to domicile and residence, because in countries such as France the two were not necessarily equivalent.

60. Mr. ZOUREK considered that sub-paragraph (*c*) should be expanded by the insertion of the words "or any other company" after the words "a joint stock company". The article would then cover other types of

companies, such as co-operatives. He also believed that some proviso was necessary to allow registration of vessels hired and operated by nationals of the State and not necessarily owned by them. That was particularly important for non-coastal States like Czechoslovakia, and the omission of such a proviso might make article 4 unacceptable.

61. Mr. FRANÇOIS (Special Rapporteur), referring to Mr. Zourek's last point, said that a similar proposal originally made by Mr. Amado had been rejected.

62. The opening words of sub-paragraph (*b*) might be amended to read, in the French text, *d'une société en commandite simple*.

63. He also proposed that the words *résidant effectivement* be substituted for the word *établies* in sub-paragraph (*b*) of the French text.

64. Mr. SANDSTRÖM considered that sub-paragraph (*c*) nullified the effect of the preceding requirements.

65. Sir Gerald FITZMAURICE, referring to the Special Rapporteur's suggestion with regard to sub-paragraph (*b*), considered that in the English text it would be preferable to maintain the fundamentally important notion of "a partnership" but to delete the words "or 'commandite' company".

Sir Gerald Fitzmaurice's suggestion was adopted.

The Special Rapporteur's proposal for substitution of the words résidant effectivement *for the word* établies *in the French text of sub-paragraph* (b) *was adopted.*

66. Mr. ZOUREK asked for a separate vote on the first sentence of article 4.

The first sentence of article 4 was adopted by 10 votes to none, with 1 abstention.

The remainder of article 4 was adopted by 6 votes to 1, with 3 abstentions.

67. Mr. SANDSTRÖM explained that he had voted against the article because of the requirement laid down in sub-paragraph (*c*).

68. Mr. FRANÇOIS (Special Rapporteur) said the following letter dated 31 May 1955 had been addressed to Mr. Liang (Secretary to the Commission) by Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations:

> "I have been following with interest the discussions of the International Law Commission on the nationality of ships. In this connexion there is a recent incident which concerned the United Nations which may be of interest to the Special Rapporteur and other members of the Commission, and I should be grateful if you would be good enough to communicate it to them informally.
>
> "The United Nations Korean Reconstruction Agency (UNKRA) recently had ten fishing vessels (motor trawlers with a gross tonnage of about 77.5) built in Hong Kong for the purpose of helping to reconstruct the fishing industry of the Republic of Korea. They were to proceed to Pusan in Korea for delivery there to Korean owners. The question arose of what flag should be flown and what registry used on the voyage from Hong Kong to Pusan. British registry was unavailable under the applicable legislation, by reason of the vessels' ownership. Nor could Korean registry be obtained while the vessels were still owned by UNKRA; it would theoretically have been possible to bring the future Korean owners to Hong Kong and turn over ownership to them there, thus making Korean registry available, but apart from the unreasonable expense involved there were urgent reasons *connected with their course en route to Pusan* why it was necessary that the vessels should be under United Nations rather than Korean ownership during the trip.
>
> "In these circumstances it was still open to us to register the vessels in one of the countries (for instance, Liberia) where no degree of national ownership is required for registration, but we thought this course inappropriate as the vessels had no real connexion with any such country, and registration there would be the barest legal fiction. Consequently, we saw no alternative but to undertake the function of registration ourselves, and to navigate the vessels to Pusan under the United Nations flag. This was in fact done. The vessels, in several groups, left Hong Kong, stopped over in a Japanese port, and proceeded thence to Pusan, all without incident. They have now been turned over to their Korean owners. Some further information about the matter is given in the *United Nations Review* for May 1955 at page 15.
>
> "In view of the possible occurrence of future cases of this kind where it is, practically speaking, impossible for a vessel owned by an inter-governmental organization to obtain national registry, it would seem to me desirable that the Commission's draft should at least not exclude the possibility of such an organization's registering its vessels for itself, and should not imply that the right to register vessels is necessarily confined to States. The Commission might also wish to study, from the standpoint of *lex ferenda*, the questions of the law applicable aboard vessels under international registration and also of the appropriate jurisdiction, in case an international organization should again feel obliged, in very exceptional and compelling circumstances such as those we faced, to register ships.
>
> "Since the last summary records of the Commission which I have received are dated 18 May, I am not sure how the draft now stands, or whether it will be possible to take account of this point. But I think that the case I have described is at least an interesting precedent for the consideration of the Special Rapporteur and the other members of the Commission most concerned."

69. The question raised was an interesting one. Undoubtedly, it was feasible for a ship to fly the United Nations flag and also for that ship to be under the protection of the United Nations. But the national flag

of a ship implied more than protection; there was, for instance, the question of the law to be applied in respect of acts committed on board.

70. Mr. GARCÍA AMADOR said that article 4, as voted by the Commission, would appear to imply that legal entities other than States were not entitled to register ships. Such a suggestion was not desirable, as the United Nations and other internationally recognized legal entities or "juridical persons" were fully entitled to own ships and protect them in fulfilling the purposes of the organizations concerned.

71. He proposed that a paragraph be added either to article 4 or to its comment stating that the provisions of that article did not exclude the right which might pertain to the United Nations, and other international organizations endowed with the same legal capacity, to register, and fly their flag on, ships owned by them or used by them in an international service.

72. Mr. KRYLOV said that the matter raised by Mr. Stavropoulos could best be dealt with in a comment.

73. Mr. ZOUREK recalled his proposal (A/CN.4/L.56)[7] for an article making provision for exceptional cases wherein, for urgent reasons, the government of a State might confer its national flag for a limited period on a ship not yet registered in that State, provided either the owner or the operator of the ship were nationals of the State in question.

74. A provision of that type would solve, in practice, any of the difficulties to which reference had been made in Mr. Stavropoulos' letter.

75. Mr. SANDSTRÖM recalled that during the Second World War the International Committee of the Red Cross had chartered a certain number of ships which sailed under the Red Cross flag. It would be interesting to make enquiries from that body to find out the conditions under which that action had been taken.

76. Mr. SCELLE said that the United Nations and its agencies were recognized in international law as legal entities or juridical persons. They were fully entitled, in order to exercise their functions, to take part in international relations. For the purpose of exercising functions within its competence, an international organization might well engage in certain activities on the high seas and its right to register ships and make them fly its flag must be recognized.

77. He recalled that certain international religious orders and such international commercial organizations as the Hansa had been acknowledged in the past as having the international status of juridical persons and allowed to fly their flags on the high seas.

78. Sir Gerald FITZMAURICE said the United Nations was indeed a juridical person. It was not, however, a State, and did not possess any legislation of its own. That did not raise any difficulty concerning the private-law ownership of the ships in question; there was no reason why the United Nations should not be acknowledged as the owner of its ships. Other problems, however, were much more complex. All States had elaborate laws concerning ships and seamen; they had criminal legislation which could be enforced on the high seas on board their ships. The United Nations had no legislation of that sort and the matter therefore required more careful study.

79. The CHAIRMAN urged the Commission not to plunge into a new and extremely difficult problem.

80. It was probable that Member States of the United Nations would always recognize the flag of the United Nations. But the full implications of United Nations registration for a ship were something which it would probably require an international convention to determine.

81. Mr. AMADO, referring to the first sentence of the penultimate paragraph of Mr. Stavropoulos' letter, said he could not agree to the final phrase thereof, wherein it was stated that the Commission "should not imply that the right to register vessels is necessarily confined to States".

82. Mr. ZOUREK recalled that a ship's flag implied a nationality. It also implied submission to a particular legal order, to a legislative system which would govern all legal problems connected with the ship on the high seas. The United Nations flag could not possibly have any such implications.

83. Mr. SCELLE said that a legal order was no more than a body of rules accepted by a society. In that sense, the United Nations possessed a legal order, which superimposed itself on that of all States.

84. Mr. LIANG (Secretary to the Commission) said that the situation referred to in Mr. Stavropoulos' letter arose under "compelling and exceptional circumstances" as Mr. Stavropoulos put it. The question raised could also be examined apart from any problem of the nationality of ships. When an international organization had a particular function to perform it must be clothed with all the powers essential or necessary for the accomplishment of the tasks involved. Concerning the case referred to in Mr. Stavropoulos' letter, the registration of a ship in the name of the United Nations under the given circumstances would certainly be considered as the exercise of an essential power.

85. It could not be argued that the articles adopted by the Commission would exclude the possibility of an international organization registering ships which it owned or used for the exercise of its functions and the fulfilment of its purposes.

86. Regarding the question whether the Commission should examine in detail, at the present juncture, the problem as to whether an international organization in normal circumstances should have the capacity of owning and registering ships in the same way as States, he recalled that in connexion with its study of the law of treaties the Commission had, at its second session,

[7] See *supra*, 294th meeting, footnote 1.

decided to include in that study also agreements to which international organizations were parties.[8] The then Special Rapporteur on the topic of the law of treaties, Mr. J. Brierly, had proposed that the matter be the subject of detailed provisions. The tentative texts of articles which the Commission had in due course provisionally adopted did not, however, deal with the matter in that manner; the Commission felt that the treaty-making power of certain international organizations would require further consideration before it could adopt any detailed provisions upon it.

87. The matter raised by Mr. Stavropoulos in his letter could, at the present stage, be covered by a reference in the Commission's report to the Commission's intention to study the question at a later date.

88. Mr. GARCÍA AMADOR said that the Commission should go further than just take note of Mr. Stavropoulos' letter. He proposed that it should also state that its draft articles did not exclude the possibility of an international organization registering its own ships and allowing them to fly the United Nations flag.

89. The CHAIRMAN said that if the Commission were to make a statement such as suggested by Mr. García Amador, it would in fact be adopting implicitly a decision that such registration was possible.

90. He proposed that the Commission should, at the present stage, confine itself to stating that it intended to examine the question raised by Mr. Stavropoulos at a later date.

91. Mr. SCELLE said the Commission should not carry prudence too far. It should recognize the fact that the United Nations could have ships under its control and had in fact flown its flag over them.

92. There was no reason why the Commission should assume that only a State could be responsible for ships on the high seas. The State, in its modern form, had not existed prior to the fifteenth century and might disappear in that form by the twenty-first century.

93. Mr. AMADO said that maritime States had behind them a long history of struggle and pioneer work in the field of navigation—a human endeavour of which their flag was a symbol. It was still early for the adoption of Mr. García Amador's proposal. The United Nations was, in essence, an organization constituted by the Member States.

94. Mr. ZOUREK said that, if the Commission were to adopt Mr. García Amador's proposal, it would be implicitly contradicting article 3, under which ships possessed the nationality of the State in which they were registered and were subject to the exclusive jurisdiction of that State on the high seas.

95. He supported the Chairman's proposal that the Commission should take note of Mr. Stavropoulos' letter and state that it proposed to examine the question therein raised.

96. Mr. GARCÍA AMADOR said that his proposal contained neither an explicit nor an implicit recognition of any particular right on behalf of the United Nations and other international organizations. He merely proposed that the Commission should state that its articles did not exclude the possibility of the United Nations and its agencies registering ships and making them fly the United Nations flag.

97. Article 104 of the Charter clearly stated that the Organization enjoyed in the territory of each of its Members such legal capacity as might be necessary for the exercise of its functions and the fulfilment of its purposes. The legal capacity which it enjoyed in the actual territory of the Member States belonged to it *a fortiori* on the high seas.

98. Article 104 of the Charter gave a blank cheque to the United Nations in respect of such matters as registering ships and allowing them to use its flag. The statutes of the Organization of American States and of the United Nations' specialized agencies all contained similar blank cheques acknowledging to the legal entities in question such legal capacity as might be necessary for the exercise of their functions and the fulfilment of their purposes.

99. If the Commission were merely to take note of Mr. Stavropoulos' letter without at the same time stating that it did not exclude the right that might pertain to international organizations in the matter, it would be casting doubt on a subject which was covered by a very explicit article of the Charter.

100. Faris Bey el-KHOURI enquired what was the position regarding the nationality of United Nations planes used by observers of the armistice agreement in Palestine.

101. Mr. LIANG (Secretary to the Commission) said that, to his mind, the problem was independent of any question of the nationality of either airplanes or ships. It must, however, be possible for ships and airplanes used in connexion with the activities of the United Nations to be registered by the organization running them.

102. Sir Gerald FITZMAURICE said that the United Nations had a flag. Its agencies had not, and Mr. García Amador's reference to "other international organizations" seemed rather vague.

103. Mr. GARCÍA AMADOR pointed out that the Organization of American States had a flag of its own.

Mr. García Amador's proposal was rejected by 4 votes to 3 with 4 abstentions.

104. The CHAIRMAN then put to the vote his own proposal to include in the report a comment to the effect that the Commission, having taken note of Mr. Stavropoulos' letter, proposed to examine the question therein raised at a later date.

[8] "Report of the International Law Commission covering the work of its second session" (A/1316), para. 162, in *Yearbook of the International Law Commission, 1950*, vol. II.

The Chairman's proposal was adopted by 10 votes to 1 with 1 abstention.

Further discussion of the revised draft articles relating to the régime of the high seas was adjourned.

The meeting rose at 6 p.m.

321st MEETING

Tuesday, 28 June 1955, at 9.30 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter II of the Report of the Commission (A/2934).

** The numbers within brackets indicate the article numbers in the draft contained in Annex to Chapter II of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the high seas (item 2 of the agenda) (*continued*)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of the revised draft articles submitted by the Drafting Committee.

Article 5 [6]: Ships sailing under two flags

"A ship which sails under the flags of two or more States may not claim any of the nationalities in question with respect to other States and may be assimilated by them to ships without a nationality."

Article 5 was adopted without comment.

Article 6 [7]: Immunity of warships

"1. Warships on the high seas shall enjoy complete immunity from the jurisdiction of any State other than the flag State.

"2. The term 'warship' means a vessel belonging to the naval forces of a State, under the command of an officer duly commissioned by the government, whose name figures on the list of officers of the military fleet, and the crew of which are under regular naval discipline."

Article 6 was adopted without comment.

Article 7 [8]: Immunity of other State ships

"For all purposes connected with the exercise of powers on the high seas by States other than the flag State, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used only on government service shall be assimilated to warships."

Article 7 was adopted without comment.

Article 8 [9]: Signals and rules for the prevention of collisions

"States shall issue for their ships regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not be inconsistent with those concerning the safety of life at sea internationally accepted for the greater part of the tonnage of sea-going vessels."

Article 8 was adopted without comment.[1]

Article 9 [10]: Penal jurisdiction in matters of collision

"1. In the event of a collision or any other incident of navigation concerning a ship on the high seas

[1] See, however, paras. 85–92 below.

and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship involved in the collision, proceedings may be instituted against such persons only before the judicial or administrative authorities either of the State of which the ship on which they were serving was flying the flag, or of the State of which such persons are nationals.

"2. No arrest or detention of the vessel shall be ordered, even as a measure of investigation, by any authorities other than those whose flag the ship was flying."

Article 9 was adopted without comment.

Article 10 [11]: Duty to render assistance

"The master of a vessel is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to any person found at sea in danger of being lost. After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and her passengers."

Article 10 was adopted without comment.

Article 11 [12]: Slave trade

"Every State shall adopt effective measures to prevent and punish the transport of slaves on vessels authorized to fly its colours, and to prevent the unlawful use of its flag for that purpose. Any slave who takes refuge on board a warship or a merchant vessel shall *ipso facto* be free."

Article 11 was adopted without comment.

Articles 12-19 [13-20]: Piracy

Article 12

"All States shall co-operate as far as possible in the repression of piracy on the high seas."

2. Mr. KRYLOV said the French text of article 12 could be strengthened by adding the word *toute* after the words *doivent coopérer dans*.

3. Mr. FRANÇOIS (Special Rapporteur) agreed to the amendment.

Article 12 was adopted with Mr. Krylov's amendment to the French text.

Article 13

"Piracy is any of the following acts:

"1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or a private aircraft;

"(*a*) Against a vessel on the high seas other than that on which the act is committed, or

"(*b*) Against vessels, persons or property in territory outside the jurisdiction of any State.

"2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft.

"3. Any act of incitement or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."

4. Mr. ZOUREK said that the definition of piracy contained in article 13 was too restrictive and did not correspond to international law. He maintained his reservations in that respect.

Article 13 was adopted.

Article 14

"The acts of piracy committed on a warship or a military aircraft, whose crew mutinies, are assimilated to acts committed on a private vessel."

5. Mr. ZOUREK suggested that the article be amended to read "by a warship" and "by a private vessel" rather than "on a warship" and "on a private vessel". Warships which were not subject to the authority of a State, whether warships whose crew had mutinied or warships which refused to obey the government of their State in cases where it had taken power in the place of a government that had been overthrown, should, for the purposes of the definition of piracy contained in article 13, be assimilated to private vessels.

6. Mr. FRANÇOIS (Special Rapporteur) agreed to Mr. Zourek's suggested amendment of the text.

Article 14 was adopted as amended.

Article 15

"A ship or aircraft is considered a pirate ship or aircraft when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of article 13, paragraph 1."

Article 15 was adopted without comment.

Article 16

"A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which it was originally derived."

Article 16 was adopted without comment.

Article 17

"On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that State may pronounce sentence on such persons, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith."

7. Mr. KRYLOV pointed out that the second sentence of the article was ambiguous in its reference to pronouncing sentence "on such persons". The text appeared to suggest that the penalties could be inflicted on the

victims of the pirates as well as on the pirates themselves.

Article 17 was referred back to the Drafting Committee.

Article 18

"Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State, the nationality of which is possessed by the ship or aircraft, for any damage caused by the seizure."

Article 18 was adopted without comment.

Article 19

"A seizure because of piracy may be made only by warships or military aircraft."

Article 19 was adopted without comment.

Article 20 [21]: Right of stoppage [Right of visit]

"Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting:

"1. That the vessel is engaged in piracy;

"2. That while in the maritime zones regarded as suspect in international treaties for the abolition of the slave trade, the vessel is engaged in that trade;

"3. That while flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality as the warship.

"In the case provided for in paragraphs 1-3 above, the warship may proceed to verify the vessel's title to fly its flag. To this end, it may send a boat under the command of an officer to the suspect vessel. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the vessel, which must be carried out with all possible consideration.

"If the suspicions prove to be unfounded and provided that the vessel boarded has not committed any acts to justify them, it shall be compensated for the loss sustained."

8. Mr. ZOUREK proposed the deletion of the words "or in taking any further action" in the first paragraph.

9. Mr. FRANÇOIS (Special Rapporteur) agreed.

10. He recalled that Mr. Edmonds had proposed the addition of the following words after the words "reasonable ground for suspecting that the vessel is engaged in piracy or the slave trade", in the original text of the article:

"... or, during times of imminent peril to the security of the State, in activities hostile to the State of the warship." (A/CN.4/L.57)

That proposal had been referred to the *ad hoc* Committee. After due consideration, that Committee had decided that such a provision would lend itself to abuse and should, therefore, not be included in the text. He proposed that the Commission should formally reject the proposed addition.

It was so agreed.

11. Mr. LIANG (Secretary to the Commission) said that the title "Right of stoppage" was somewhat incongruous. Probably the reference was to the right of verification of flag.

12. In connexion with the final paragraph of the article, in cases where the suspicions proved unfounded, it seemed unnecessary to stipulate in addition that the vessel should not have committed any acts to justify the suspicions. Possibly the intention was to make provision for two alternative possibilities, in which case the words "or if" should be substituted for the words "and provided that".

13. Sir Gerald FITZMAURICE said that the intention was to make provision for two cumulative conditions. If a ship acted in a suspicious manner, it did not deserve compensation even if it eventually transpired that no offence had been committed. Compensation was justified only where a ship had neither committed any offence nor given any reasonable grounds for suspicion. With regard to the title of the article, perhaps "Right of visit" might be more appropriate.

14. Mr. GARCÍA AMADOR proposed that the paragraphs be numbered in arabic numerals and the subparagraphs of paragraph 1 be lettered (*a*), (*b*) and (*c*), with a consequential change at the beginning of paragraph 2.

15. Mr. FRANÇOIS (Special Rapporteur) agreed.

Subject to final drafting of its title, article 20 was adopted with that amendment.

Article 21 [22]: Right of pursuit

"1. The pursuit of a foreign vessel for an infringement of the laws and regulations of a coastal State, commenced when the foreign vessel is within the inland waters or the territorial sea of that State, may be continued outside the territorial sea provided that the pursuit has not been interrupted. It is not necessary that, at the time when the foreign vessel within the territorial sea receives the order to stop, the vessel giving the order should likewise be within the territorial sea. If the foreign vessel is within a zone contiguous to the territorial sea, the pursuit may only be undertaken if there has been trespass against the rights for the protection of which the said zone was established.

"2. The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.

"3. The pursuit shall not be deemed to have begun unless the pursuing vessel has satisfied itself by bearings, sextant angles or other like means that the vessel pursued or one of its boats is within the limits of the territorial sea or, as the case may be, within the contiguous zone. The commencement of the pur-

suit shall in addition be accompanied by a signal to stop. The order to stop shall be given at a distance permitting the foreign vessel to see or hear the accompanying signal.

"4. The release of a vessel arrested within the jurisdiction of a State and escorted to a port of that State for the purpose of an enquiry before the competent authorities shall not be claimed solely on the ground that such vessel, in the course of its voyage, was escorted across a portion of the high seas where the circumstances rendered this necessary."

Article 21 was adopted without comment.

Article 22 [23]: Pollution of the high seas

"All States shall draw up regulations to prevent water pollution by fuel oils discharged from ships, taking account of existing treaty provisions on the subject."

Article 22 was adopted without comment.

Chapter II [III]: Freedom to lay submarine cables and pipelines (Articles 23-27 [34-38])[2]

16. Mr. FRANÇOIS (Special Rapporteur) said that the chapter on submarine cables and pipelines would be included in the report after the chapter on fisheries, which he therefore proposed should be considered first.

It was so agreed.

Chapter III [II]: Freedom of fishing (Articles 28-37 [24-33])

Article 28 [24]: Right to fish

"All States have the right to claim for their nationals the right to fish on the high seas subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas."

17. Mr. FRANÇOIS (Special Rapporteur) said article 28, dealing with the right to fish, now came before the Commission for the first time. The Commission had felt it necessary to place such an article before the rest of the chapter, which dealt with the conservation of the living resources of the high seas, and the Drafting Committee had prepared the text proposed.

18. Mr. ZOUREK said that it would perhaps have been more appropriate to speak of the nationals of certain States having the right to fish on the high seas.

19. Mr. AMADO said he did not like the term *revendiquer* in the French text. The English "to claim" was perfect. Perhaps a better French expression would be *réclamer pour leurs nationaux.*

20. Mr. FRANÇOIS (Special Rapporteur) pointed out that the various draft articles were concerned with the rights of States. Thus in the chapter on submarine cables and pipelines, all the articles began with the words "All States shall" or "Every State shall".

21. Mr. SALAMANCA said that in cases such as the laying of pipelines and submarine cables, the articles were concerned with the activities of States. But where fishing was concerned, the State's role was to protect those individuals who carried on fishing.

22. Mr. KRYLOV said that perhaps a better French drafting would be *Tous les états ont le droit d'assurer à leurs nationaux...*

23. Mr. SANDSTRÖM said it was better to take the standpoint of duties rather than rights. The text should provide that all States should respect the right to fish enjoyed by the nationals of each other State.

24. Sir Gerald FITZMAURICE said that the difficulties which had been mentioned could perhaps be avoided by framing the article more or less along the following lines: "Subject to treaty obligations and to provisions contained in the following articles concerning conservation of the living resources of the high seas, the right to fish shall not be interfered with."

25. Mr. SCELLE said the article was not necessary. Article 2 contained everything that was required in the way of recognition of the right to fish. The article, though repetitive, was, however, not harmful; but if the Commission decided to keep it, it would be preferable to speak of *garantir* instead of *réclamer* as had been suggested. A State did not merely complain when its nationals' right to fish was interfered with: it took action to protect that right. He quoted the example of Japan, which had introduced proceedings in the International Court of Justice in order to safeguard the right of its nationals to fish in certain areas where Australia claimed sovereign rights over the continental shelf.

26. Mr. GARCÍA AMADOR said that General Assembly resolution 900 (IX) had clearly separated the subject of fisheries conservation from the other problems of the sea. The Commission had not yet decided how it should present its draft on that subject. For his part, he felt that it should be presented separately and be preceded by a preamble.

27. In view of article 2, which fully safeguarded the right to fish, there was no necessity for an article along the lines of article 28.

28. Mr. FRANÇOIS (Special Rapporteur) said that, as article 2 had listed the various freedoms in respect of the high seas, it was essential to have an initial article on the right to fish preceding the articles on fisheries conservation.

29. As to the preamble which had originally accompanied Mr. García Amador's draft articles,[3] the various ideas which it contained could well be included in the comment to the articles.

30. Mr. LIANG (Secretary to the Commission) agreed that article 28 required re-drafting. In the English text, the concept of a State's claiming the right of fishing on behalf of its nationals was perhaps far-fetched. What

[2] See para. 84 below.

[3] 296th meeting, para. 16.

took place as an every-day phenomenon was that the nationals of the various States pursued fishing activities, and the State would not intervene until interference with such activities by its nationals on the part of other States called for intervention. It was not desirable either to replace that expression by a term such as " to guarantee ", which referred more appropriately to the relationship between a State and its own nationals rather than to relations between States.

31. He suggested that the article be re-drafted so that the operative part would read: " nationals of all States have the right to fish on the high seas ". That clause would be preceded by one along the following lines: " Subject to treaty obligations on the part of the State to which they belong and to the provisions... "

32. The CHAIRMAN suggested that the article might be re-drafted along the following lines:

" Subject to treaty obligations... all States have the right that their nationals should fish on the high seas."

33. Mr. KRYLOV, speaking in his capacity as Chairman of the Drafting Committee, said that the Commission should deal with proposals to change the substance of the texts proposed but that it was not practicable for the full Commission to discuss drafting changes.

34. Mr. AMADO said that Mr. García Amador's intention appeared to be to emphasize the moral character of the fisheries conservation articles.

35. Mr. GARCÍA AMADOR said that under resolution 899 (IX) the Commission would produce its final report on the problems of the high seas, territorial sea, contiguous zones and other related questions at its next session. In view of that fact, it was unnecessary for the Commission to try and give a final shape to its whole draft at the present stage.

36. The best procedure was the one which the Commission had already followed in 1953 when it had adopted three separate sets of provisions on the continental shelf, fisheries and the contiguous zone. Those drafts had then been submitted to governments for their comments.

37. If the Commission were to try and incorporate the articles on fisheries conservation in a general draft on the high seas, it would probably find that the comments by governments would lead to the separation of the chapters which the Commission had laboriously knitted together.

38. Finally, there were the provisions which the Commission had adopted at its fifth session concerning the continental shelf and the contiguous zone. Those provisions would have to be incorporated into the final report as well and would therefore alter its presentation. It was obviously too early for the Commission to enter into that problem of presentation; but it was reasons of presentation alone which justified the inclusion of an article on the right to fish as a sort of heading to the articles on fisheries conservation.

39. Mr. SALAMANCA said that resolution 899 (IX) invited the Commission to deal with all the various problems of the sea in a comprehensive manner. That resolution had been motivated by the impression gained in the General Assembly that the Commission had been dealing with the various problems of the sea in a somewhat haphazard manner. It was essential for the Commission to prepare a well-integrated report and present it to governments in a manner which showed clearly the interconnexion of the various problems with which it dealt.

40. Mr. KRYLOV said that Mr. García Amador had played a leading part in drafting the articles on fisheries conservation and naturally desired those articles to be presented separately in view of their novel character.

41. The Drafting Committee, of which he (Mr. Krylov) was the Chairman, had given preference to a different method of presentation and had incorporated the articles in question in the general codification of the law of the high seas, in the interests of coherence.

42. For his part, he felt that governments would be in a better position to study the Commission's draft articles on fisheries if those articles were presented in the way proposed by the Drafting Committee.

43. Mr. LIANG (Secretary to the Commission) stressed how important it was that the final report of the Commission should be as systematic and as comprehensive as possible. In view of that fact, there was no alternative to including the articles on fisheries conservation in the report on the high seas.

44. When the final report came to be submitted to the General Assembly, certain delegations could no doubt extract some part of the report and propose a separate convention on the subject.

45. As far as the work of the current session was concerned, it would be of advantage to send as complete as possible a report to governments for comment. That would be done with the reservation that the Commission might, in the light of those comments, consider certain subjects for separate treatment when adopting its final report. It would be premature to try to predict the fate of the articles on fisheries conservation at the current session.

46. Mr. ZOUREK agreed that it was necessary for the governments to receive a complete report, including the articles on fisheries conservation.

47. At the Commission's next session, the whole draft would have to be reshaped, if only because the provisions on the continental shelf and the contiguous zone had to be incorporated in the final report.

48. Mr. GARCÍA AMADOR pointed out that resolutions 899 (IX) and 900 (IX) had been the result of nearly one month of protracted discussion in the Sixth Committee of the General Assembly.[4] The provisions of those resolutions, which had been very carefully pon-

[4] 430th to 438th meetings.

dered and equally carefully drafted, made it clear that the whole problem of the conservation of the living resources of the sea was a distinct question which required separate treatment.

Article 28 was referred back to the Drafting Committee.

Articles 29-37 [1-9]: Conservation of the living resources of the high seas [sea]

"*Article 29 [1]*

"A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the purpose of the conservation of the living resources of the high seas.

"*Article 30 [2]*

"1. If the nationals of two or more States are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necessary for the conservation of the living resources of the high seas.

"2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated in article 35.

"*Article 31 [3]*

"1. If, subsequent to the adoption of the measures referred to in articles 29 and 30 nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

"2. If the State whose nationals take part in the fisheries do not accept the measures so adopted, and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure contemplated in article 35. Subject to paragraph 2 of article 36 the measures adopted shall remain obligatory pending the arbitral decision.

"*Article 32 [4]*

"A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts, is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

"*Article 33 [5]*

"1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

"2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled:

"(*a*) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

"(*b*) That the measures adopted are based on appropriate scientific findings;

"(*c*) That such measures do not discriminate against foreign fishermen.

"3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 35. Subject to paragraph 2 of article 36, the measures contemplated shall remain obligatory pending the arbitral decision.

"*Article 34 [6]*

"1. Any State, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coasts, but which has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

"2. If no agreement is reached within a reasonable period, such State may initiate the procedure contemplated in article 35.

"*Article 35 [7]*

"1. The differences between States contemplated in articles 30, 31, 33 and 34 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

"2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties. Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organisation. In that case, the commission shall consist of 4 or 6 qualified experts in the matter of conservation of the living resources of the sea, and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be divided between the parties.

"3. The commission shall, in all cases, be constituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months, unless it decides to extend that time-limit.

"*Article 36 [8]*

"1. In arriving at its decisions, the arbitral commission shall, in the case of measures not unilaterally adopted by coastal States, apply the criteria listed in

article 33, paragraph 2, according to the circumstances of each case.

"2. The commission may decide that pending its award the measures in dispute shall not be applied.

"*Article 37* [9]

"The decisions of the commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration."

49. Mr. FRANÇOIS (Special Rapporteur) recalled the Commission's earlier decisions,[5] by which it had been agreed to begin with an article laying down the general criteria for all conservation measures, no matter by what State they were adoped.

50. The Commission had instructed the sub-committee set up to consider the draft articles on fisheries to restrict the scope of article 6 (the present article 33) to the criteria to be applied to the coastal State alone—as distinct from the criteria to be applied to all States, which were to be laid down in a general article. The sub-committee, however, had arrived at the conclusion that it was desirable to leave article 33 as drafted and to place the provision regarding generally applicable criteria immediately after article 35, which dealt with arbitration. Hence the sub-committee's paragraph 1 in article 36, stating:

"In arriving at its decisions, the arbitral commission shall, in the case of measures not unilaterally adopted by coastal States, apply the criteria listed in article 33, paragraph 2, according to the circumstances of each case."

51. The purpose of that provision was to enable sub-paragraphs (*b*) and (*c*) of article 33, paragraph 2, to be applied to conservation measures adopted otherwise than unilaterally by coastal States.

52. Mr. KRYLOV said article 36, paragraph 1, was by no means clear. In order to dispel any possible ambiguities, the article would have to be re-drafted more or less along the following lines:

(i) In an initial paragraph, the article would state that, when faced with a situation arising from unilateral measures by a coastal State, the Commission would apply the criteria listed as (*a*), (*b*) and (*c*) in article 33, paragraph 2;

(ii) The second paragraph of article 36 would state that, in all other cases, the arbitral commission would apply the criteria listed as (*b*) and (*c*) in article 33, paragraph 2;

(iii) The final paragraph of the article would remain unchanged as follows: "The commission may decide that pending its award the measures in dispute shall not be applied."

53. Mr. AMADO agreed with Mr. Krylov's suggestion, which would give article 36 an explicit character; it had been originally drafted in an elliptic form.

54. The CHAIRMAN said that the best course was to refer the article to the Drafting Committee for re-drafting in the light of the foregoing remarks.

Article 36 was referred to the Drafting Committee for re-drafting.

Articles 29-35 and 37 were adopted without comment.

55. Sir Gerald FITZMAURICE said the discussion in the Commission had demonstrated the necessity for expert views on so technical a problem as fisheries conservation. He suggested that the Commission should include in its report a proposal for the convening of a committee of fishery experts, whose report would be of assistance with a view to the discussion at the Commission's next session.

56. There was some analogy with the case of the delimitation of the territorial sea, regarding which a group of highly qualified experts had been convened; their report (A/CN.4/61/Add.1)[6] had been extremely useful to the Commission in its discussion, even though many members had criticized its conclusions. That criticism had been due not to any lack of ability on the part of the experts, but rather to the fact that they had been drawn from too narrow a field.

57. In the case under discussion, the fishery experts chosen might perhaps be more numerous—he would suggest six or seven in number—so as to cover the main points of view on fishery conservation.

58. Mr. KRYLOV agreed with Sir Gerald Fitzmaurice's suggestion, which could well be made the subject of a separate resolution by the Commission. The matter could then be taken up by a delegation to the General Assembly with a view to the suggestion's being adopted.

59. The CHAIRMAN, speaking in his personal capacity, said that the Commission's draft articles were not concerned in any material way with technical problems of fishery conservation. They were concerned with the rights and duties of States in connexion with conservation measures; the problems involved were purely of a legal nature.

60. It was also undesirable to incur further expenditure. Expert advice would be directly available without any such expense, because governments, before submitting their comments, would consult their own experts.

61. Mr. SALAMANCA opposed the idea of convening a group of experts—a course which would suggest that the Commission was not quite sure of its own views.

62. The problems involved were all of a juridical or quasi-juridical nature.

63. The only technical issue which had any material bearing on the questions dealt with in the Commission's article was the simple problem of whether there was any genuine need for conservation. Although some doubt had been cast at times on that point, the report (A/CONF.

[5] 204th meeting, paras. 6, 10 and 23.

[6] *Yearbook of the International Law Commission, 1953*, vol. II.

10/6)[7] of the International Technical Conference on the Conservation of the Living Resources of the Sea which had recently been held in Rome ("the Rome Conference") left no doubt concerning the danger of depletion of stocks and the need for conservation measures.

64. It was common knowledge that fishery conservation measures were indispensable in view of the dangers arising from the extraordinarily efficient technical means now available for fishing. He quoted a recent advertisement for a process of fishing by direct suction from the sea which read: "How to land 6,000 fish per minute".

65. Mr. FRANÇOIS (Special Rapporteur) agreed with the Chairman's remarks. There appeared to be no reason for convening a group of experts before comments were received from governments concerning the Commission's draft articles.

66. Mr. GARCÍA AMADOR said the proposal to convene a group of experts was neither admissible in its form nor appropriate in its substance. On the latter point, he referred to the Commission's unfortunate experience with the report by a group of experts concerning delimitation of the territorial sea (A/CN.4/61/Add.1)—a report in which views had been expressed which were in fact at variance with International Court of Justice rulings. The result had been to lead the Commission to adopt provisions which actually did not reflect international law as construed by the supreme judicial authority on the subject.

67. However, the whole proposal was inadmissible as such. The Commission could not validly propose to the General Assembly the convening of a *group* of experts bcause the General Assembly had already convened an international technical *conference* of experts precisely to deal with the technical issues involved; that conference had been held and its report was available to the Commission. There was nothing further to be done in the technical field. Discussion at the technical level had ended with the report of the Rome Conference; the Commission was now dealing with the matter on the basis of resolution 900 (IX) at the juridical level. When the Commission terminated its work on the legal aspect, the General Assembly would deal with the problem at the political level.

68. Sir Gerald FITZMAURICE said he did not wish to press the matter though he had not been convinced by the arguments of those members of the Commission who disagreed with him. It was true that the draft articles were juridical in form but he personally would have had great difficulty in helping to draft them without expert advice. Indeed it was well known that they had been largely inspired by the work of experts. The Commission might well be criticized for not submitting the text, which despite its form was fundamentally concerned with technical matters, to experts for comment.

69. Although governments would probably consult specialists in fishery matters, their observations would undoubtedly be influenced by political, economic and social factors and there would therefore be considerable advantage in obtaining an independent expert opinion.

70. The CHAIRMAN observed that it was open to the Commission under Articles 16 and 25 of its Statute to submit the draft for comment to the Food and Agriculture Organization of the United Nations (FAO) or any other specialized body.

71. Mr. GARCÍA AMADOR said that a serious drawback to sending the text to FAO was that that organization already had an established policy in fishery matters which did not find favour with certain States. Its firm stand on the principle of the freedom of the seas had been one of the reasons for the objections to convening the Rome Conference in that city.

72. The CHAIRMAN did not think that that consideration was a decisive one. He added that whatever was finally decided each member of the Commission could consult experts in his own country before the next session.

73. Mr. KRYLOV was disturbed by Mr. Salamanca's description of the draft articles as quasi-juridical in character. Drafting articles on the conservation of the living resources of the sea was a very different matter to dealing with such questions as piracy where members might feel themselves more or less on familiar ground. He therefore considered Sir Gerald Fitzmaurice's suggestion to be a most pertinent one and doubted whether it should be rejected on grounds of economy. Though he proposed, on his return to Moscow, to consult the appropriate experts, that could not in his opinion suffice and he would certainly be in favour of sending the draft to FAO for comment.

74. Mr. SALAMANCA was unable to see what issues could be submitted to experts for an opinion, since the need for conservation measures had already been established at the Rome Conference as well as by the unilateral action taken by certain States to save the living resources of the sea from excessive exploitation and extermination. His experience in the United Nations had made him somewhat sceptical about the utility of expert committees, which, particularly in economic matters, seemed to find it difficult to reach agreement. Moreover, their members were usually influenced by special national considerations.

75. Mr. SANDSTRÖM believed that the Commission was under-estimating the useful contribution which experts could make to its work. In the present instance it was not so much scientific advice which was needed as the views of persons with experience in the field under discussion, who could judge whether the draft articles covered the ground adequately. He would therefore support the suggestion that the text be submitted to FAO.

76. In reply to Mr. SALAMANCA, the CHAIRMAN confirmed that the text would at the same time be submitted to governments.

[7] United Nations publication, Sales No.: 1955.II.B.2.

77. Faris Bey el-KHOURI said that the draft articles must be accompanied by a questionnaire if useful comments were to be obtained.

78. Mr. AMADO considered Sir Gerald Fitzmaurice's suggestion to be a very useful one because expert opinion was certainly required concerning the kind of measures necessary for conservation. He was uncertain, however, whether FAO could provide such advice.

79. The CHAIRMAN pointed out that the draft articles only laid down the rights and duties of States with regard to the conservation of the living resources of the sea and did not specify the types of technical measure required. In submitting the text to governments the Commission would have accomplished the essential because they would inevitably consult experts before submitting their observations; those observations would be considered at the next session before final form was given to what was a purely legal text.

80. Mr. LIANG (Secretary to the Commission) said that the Rome Conference had taught him there were two kinds of fishery expert, the scientists conversant with the theory and techniques of conservation and the officials responsible for administering fishery conservation programmes. It was the views of the latter group which it would be most useful to obtain on draft articles in which the data before the Rome Conference and its conclusions had been translated into juridical terms.

81. Mr. GARCÍA AMADOR believed that the draft should also be sent to the United Nations Educational, Scientific and Cultural Organization (UNESCO), which had evinced great interest in fisheries, to the International Council for Exploration of the Seas and to the Permanent Commission for the Exploitation of the Maritime Resources of the South Pacific.

82. Mr. LIANG (Secretary to the Commission) observed that quite a number of inter-governmental organizations had participated in the Rome Conference and the Commission should clearly decide whether all of them should be asked to comment on the draft or whether it should be submitted direct to FAO with the request that other bodies be consulted.

83. Mr. SALAMANCA considered that the technical opinion of the many interested bodies would be valuable.

84. Mr. KRYLOV proposed that the draft articles be sent for comment to FAO and to all the organizations listed in the report of the Rome Conference.

Mr. Krylov's proposal was adopted by 7 votes to 1, with 4 abstentions.

Chapter II [III]: Freedom to lay submarine cables and pipelines (articles 23-27 [34-38]) (resumed from para. 16 above)

"*Article 23*

"1. All States shall be entitled to lay telegraph or telephone cables and pipelines on the bed of the high seas.

"2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables.

"*Article 24 [35]*

"Every State shall take the necessary legislative measures to provide that the breaking or injuring of a submarine cable beneath the high seas done wilfully or through culpable negligence and resulting in the total or partial interruption or embarrassment of telegraphic or telephonic communications, or the breaking or injuring of a submarine pipeline in like circumstances, shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such break or injury.

"*Article 25 [36]*

"Every State shall take the necessary legislative measures to provide that if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost.

"*Article 26 [37]*

"Every State shall regulate trawling so as to ensure that all fishing gear shall be so constructed and maitained as to reduce to the minimum any danger of fouling submarine cables or pipelines.

"*Article 27 [38]*

"Every State shall take the necessary legislative measures to ensure that the owners of vessels who can prove that they have sacrificed an anchor, a net or any other fishing gear in order to avoid injuring a submarine cable, shall be indemnified by the owner of the cable."

Articles 23-27 were adopted without comment.

Article 8 [9]: Signals and rules for the prevention of collisions (resumed from para. 1 above)

85. Mr. ZOUREK apologized for having been unavoidably detained when article 8 had been taken up. Articles 13 and 15 of the Special Rapporteur's original draft (A/CN.4/79) had now been combined in that article, and he (Mr. Zourek) proposed that the original wording "agreed upon by the majority of maritime States" should be reinstated in the second sentence in place of the words "internationally accepted for the greater part of the tonnage of sea-going vessels". The text would then conform more closely to practice.

86. The CHAIRMAN, speaking in his personal capacity, supported that amendment because he regarded the expression "the greater part of the tonnage of sea-going vessels" as clumsy.

87. Mr. FRANÇOIS (Special Rapporteur) observed that after considerable discussion a clear body of opinion had emerged opposing the concept of a numerical majority

rather than one measured in terms of the relative importance of the interest of each State in safety regulations. Clearly the importance of that interest was very much greater where the merchant tonnage was considerable. He believed the new text to be a more equitable one.

88. The CHAIRMAN observed that if the Drafting Committee's text were to be retained it should be amended by the insertion of the words "the vessels forming" after the words "accepted for".

89. Mr. FRANÇOIS (Special Rapporteur) agreed to that modification.

90. Mr. ZOUREK pointed out in reply to Mr. François that the Commission had taken no final decision in the matter. Clearly, from the point of view of safety, a rule inconsistent with that followed by the majority of States, even if applied by one with a small merchant fleet, could be just as dangerous.

91. Mr. KRYLOV said that in the Drafting Committee he had opposed the reference to tonnages, which did not appear to him a particularly fortunate solution, but the Chairman's amendment would certainly go some way towards improving the text. The important thing was to prevent contradictory rules which might lead to collisions.

92. Mr. FRANÇOIS (Special Rapporteur) said that in fact the issue at stake was the safety of human life.

Mr. Zourek's proposal was rejected by 4 votes to 2 with 5 abstentions.

Article 2 [2]: Freedom of the high seas
(resumed from the 320th meeting)

93. Mr. GARCÍA AMADOR asked that the heading of article 2 should in the Spanish text read "Freedom of the seas".

94. Mr. SANDSTRÖM proposed, following the Secretary's remarks at the previous meeting,[8] that the titles of chapters I, II and III should not be prefaced by the words "Freedom of". The title of chapter II would require some further modification.

It was so agreed.

95. Mr. ZOUREK asked what would become of the provision concerning the contiguous zone adopted at the fifth session.

96. Mr. FRANÇOIS (Special Rapporteur) said that it would be explained in the report that the provision would come up for final review at the next session.

Vote on the draft articles as a whole

97. The CHAIRMAN then invited the Commission to vote on the draft articles as a whole.

98. Mr. ZOUREK considered that the Commission should wait for the final text of the articles before voting on the draft as a whole.

99. The CHAIRMAN suggested that the vote be taken on the whole text subject to minor drafting changes.

With that reservation, the draft articles on the régime of the high seas, in the form proposed by the Drafting Committee, were adopted unanimously, as amended in the foregoing discussion.

100. Mr. KRYLOV said that he wished a statement to be inserted in the report indicating that he had voted in favour of the draft articles although he was opposed to article 8 because of its reference to "the greater part of the tonnage of sea-going vessels", and to article 35 because it provided for obligatory jurisdiction by an arbitral tribunal.

101. Mr. ZOUREK also wished a statement of his dissenting opinion to be included in the report to the effect that after intending to abstain from voting on the draft as a whole he had finally supported it although he was opposed to articles 4, 5 and 35 for reasons he had given during the discussion.

102. The CHAIRMAN said that such statements of dissent could always be accompanied be reference to the relevant summary records.

103. Mr. ZOUREK observed that in accordance with the provisions of its Statute, the Commission's final report on each session should accurately reflect any major differences of opinion.

104. The CHAIRMAN stated that that had always been the Commission's practice in the past.

The meeting rose at 12.55 p.m.

[8] 320th meeting, para. 40.

322nd MEETING

Wednesday, 29 June 1955, at 10 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Co-operation with inter-American bodies (A/CN.4/L.60)

1. The CHAIRMAN invited the Commission to consider the draft resolution (A/CN.4/L.60)[1] submitted by Mr. García Amador.

2. Mr. LIANG (Secretary to the Commission) said that as promised he would make a brief report to the Commission. The Commission had not decided what specific action should be taken to implement the resolution concerning co-operation with inter-American bodies adopted at the previous session,[2] and the Secretariat would have welcomed precise instructions. In the meantime he would like to state what had so far been done.

3. First, ever since the Commission's establishment he had kept in touch with Professor C. G. Fenwick, Director of the Department of International Law of the Pan-American Union, and Secretary of the Inter-American Council of Jurists. They had discussed matters of common interest and had agreed on an exchange of documents, as a result of which the Office of Legal Affairs possessed a complete set of recent documents from inter-American juridical organs concerned with the codification of international law. Unfortunately, it was not possible to furnish each member of the Commission with that material because it was too voluminous, but documents could be supplied on request or could be made available at United Nations Headquarters.

4. Secondly, information on particular topics was exchanged, and in response to Professor Fenwick's request he had been able to provide material about the Commission's discussions on reservations to multilateral treaties. That kind of working co-operation, however, was not of a very far-reaching character.

5. At the beginning of the year, he had received from Professor Fenwick a letter dated 11 February 1955, in which he had expressed the hope that it would be possible for the Organization of American States (OAS) to send an observer to the Commission's seventh session for at least a few weeks. Professor Fenwick had also hoped that the Secretary to the Commission could attend the meeting of the Inter-American Council of Jurists in Mexico City on 12 September 1955, in order to assist in interpreting the work of the Commission, because it was of the highest importance that the Council should be guided by the Commission's proposals in reaching its decisions concerning territorial waters and particularly the continental shelf. Professor Fenwick had added that co-operation between the two bodies was essential for arriving at a satisfactory solution. With the approval of Mr. Sandström, Chairman of the Commission at the time, the OAS had been invited to send an observer to the present session. That invitation had subsequently been renewed on the instructions of the present Chairman, but material circumstances had unfortunately prevented Professor Fenwick from coming to Geneva.

6. Mr. GARCÍA AMADOR, observing that the resolution adopted at the previous session was in accordance with article 26 of the Commission's Statute, which recognized the desirability of consultation with organizations such as the Pan-American Union, said that on that occasion various possibilities for collaborating in the common task of the progressive development and codification of international law had been considered. The Secretary's statement revealed the need for more active collaboration. In his draft resolution he proposed that the Secretary should attend the third meeting of the Inter-American Council of Jurists to be held at Mexico City in 1956, so that he could report to the Commission on the discussions held there. He had also proposed that the Secretary of the Council should follow the Commission's next session as an observer. Collaboration was particularly important because both bodies dealt with maritime questions. He himself had been requested by the Council of the Pan-American Union to report on the programme of work drawn up by the General Assembly in its resolution 899 (IX), so that the Council could adjust its own plans to that programme. The technical, scientific, social and juridical aspects of problems connected with the régime of the high seas and the régime of the territorial sea were to be discussed both by the Inter-American Council of Jurists and by the Pan-American Union the following year. It was fitting that the views of OAS, comprising some twenty of the Member States of the United Nations, should be taken into account. Given the interconnexion between the work of the political and juridical organs of the United Nations and OAS, it was only normal that there should be a standing agreement for each to be represented at the other's meetings. The presence, for instance, of the Secretary-General of the United Nations at the tenth Inter-American Conference at Caracas had been most valuable, and the practice should be continued.

7. The expense entailed in his draft resolution should not be an obstacle to preserving and fostering a real and valuable collaboration.

8. Mr. HSU considered the draft resolution, which was a natural development of the resolution already adopted by the Commission, to be acceptable. It was certainly necessary for the International Law Commission to be represented at the third meeting of the Inter-American Council of Jurists when maritime problems were to be discussed.

9. Faris Bey el-KHOURI said that over and above the proposal which Mr. García Amador had presented, he wondered whether Mr. García Amador, who would undoubtedly be present at the third meeting of the Inter-

[1] Incorporated in A/2934, para. 36.

[2] "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 77 in *Yearbook of the International Law Commission, 1954*, vol. II.

American Council of Jurists, could undertake to inform the Commission about the discussions in the same way as he had reported on the International Technical Conference on the Conservation of the Living Resources of the Sea at the present session.

10. Mr. GARCÍA AMADOR said that since 1950 he had represented his government on the Inter-American Council of Jurists. He could not fulfil a dual role by acting also as representative of the Commission.

11. Faris Bey el-KHOURI explained that he had only suggested that Mr. García Amador, and perhaps Mr. Salamanca if he would also be attending the meeting, should report to the Commission on what had taken place.

Mr. García Amador's draft resolution (A/CN.4/L.60) was adopted unanimously.

Proposal by Mr. Krylov concerning the publication of the documents of the International Law Commission

12. Mr. KRYLOV said that he had always been astonished at the lack of publicity given to the Commission's work, with the result that the world knew practically nothing of what was being done by a highly authoritative body with a considerable range of topics on its agenda. It was absolutely incomprehensible to him why, apart from the Commission's reports on each session, its documents should be so difficult to obtain. Even some of the earlier reports were not readily available.

13. He was convinced that all the Commission's documents and the summary records of its meetings should be printed together in a yearbook, the need for which was particularly great after a session wholly devoted to subjects belonging almost entirely to the domain of international law as distinct from those where the dividing line between national and international law was not so clearly defined. The documents of all past sessions should also gradually be printed. Such yearbooks were indispensable for students of international law whether undergraduates or professors.

14. The Commission might well reinforce its request by reference to the second paragraph of the preamble to General Assembly resolution 176 (II) which stated that "one of the most effective means of furthering the development of international law consists in promoting public interests in this subject and using the media of education and publicity to familiarize the peoples with the principles and rules that govern international relations", and to General Assembly resolution 687 (VII) in which, *inter alia*, the Secretary-General was requested to report on the possibility of publishing a juridical yearbook. He believed that the Secretary-General would appreciate the need and hoped that the request would not be turned down on grounds of economy.

15. The CHAIRMAN thanked Mr. Krylov for taking the initiative in bringing up a problem which had existed since the establishment of the Commission. From the outset he himself had consistently urged that the Commission's documents and summary records should be published because, despite the fact that after the International Court it was the most important international juridical organ, its work was to all intents and purposes unknown and passed without comment in reviews of international law, except for those references which appeared in the *American Journal of International Law* as a result of the Secretary's efforts. It was most extraordinary that the deliberations and conclusions of a private body like the Institute of International Law should be given great weight whereas a public body established by the United Nations and with great responsibilities should not publish any of its documents. Students of international law could only obtain the Commission's reports or summary records by approaching individual members, which was most unsatisfactory. The Commission, as the most highly qualified organ for the codification of international law, must give its documents wide publicity and make them generally available to the public so that it could wield the influence appropriate to its status. The United Nations already published a *Yearbook on Human Rights* and there was no reason at all why an International Law Commission yearbook should not also be issued.

16. Mr. AMADO said that he had always been greatly perturbed by the lack of publicity given to the Commission's work. In his own country, for example, it was sometimes regarded merely as another of the rapidly increasing number of international organizations, and the general public was completely ignorant of the very important work done, for example, on the formulation of the Nürnberg principles, the rights and duties of States and the definition of aggression. It was distressing that private individuals should have to approach members for documents. He therefore considered an International Law Commission yearbook to be indispensable and warmly supported Mr. Krylov's proposal. Such a yearbook should indeed have been published from the outset of the Commission's work.

17. Mr. HSU thanked Mr. Krylov for his timely proposal. It was impossible to exaggerate the educational value of a juridical yearbook in view of the great need for the progressive development of international law. Wider publicity should also serve as an inspiration to the Commission.

18. Mr. SANDSTRÖM considered Mr. Krylov's proposal to be an admirable one but pointed out that if the Commission's summary records were to be printed, members must peruse them very carefully in order to ensure absolute accuracy. It was inevitable in such a complicated and specialized subject that the summary records should not always faithfully reproduce the views expressed.

19. Mr. LIANG (Secretary to the Commission) said that since the establishment of the Commission he had been convinced that its work could only be accomplished in co-operation with scientific circles and if the interest of governments was aroused. It was deplorable that the real nature and purpose of the Commission should be so little known. Many members had sought

to remedy that situation by publishing accounts of its work, but such publicity could not suffice and it was essential to provide first-hand material. He therefore had great sympathy with Mr. Krylov's proposal.

20. In pursuance of General Assembly resolution 602 (VI) adopted on 1 February 1951, the Secretariat had consulted various scientific organizations about the content of a possible United Nations juridical yearbook. Both the Institute of International Law and the American Society of International Law had emphasized the value of publishing the Commission's documents in the contemplated juridical yearbook. The latter, in its memorandum, had stated:

> "The need arises in part from the limited availability and impermanent form of much of the materials of the United Nations bearing upon international law. For example, of some fifty-odd memoranda, collections of documents, draft proposals and bibliographies contained in the series A/CN.4/, only about half a dozen have been printed and made available for purchase. None of the summary records of the International Law Commission or of its working papers are available for purchase."

21. He received innumerable requests for documents, some of which were out of print and others could neither be supplied nor purchased. Recently, after strenuous efforts, he had managed to make arrangements whereby outside subscribers could for a relatively modest sum secure the Commission's mimeographed documents, but of course documents in that form deteriorated and with time and use tended to become illegible.

22. He was therefore convinced of the need for the publication of the Commission's documents but would suggest that the proposal should be in conformity with the General Assembly's decisions concerning the publication of the documents of United Nations organs.

23. If the Commission adopted a draft resolution on the subject it would of course be taken into account by the Secretariat when preparing the report requested in General Assembly resolution 687 (VII).

24. In reply to a question by the CHAIRMAN, Mr. KRYLOV observed that the possibility of separate publications similar to those issued by the International Court of Justice might be considered. Whatever the form chosen, he was anxious to secure the publication of all the material pertaining to the various topics on the Commission's agenda.

25. He agreed with Mr. Sandström that all members would have to check the summary records carefully before they were published.

26. Mr. GARCÍA AMADOR agreed with the other members of the Commission who had expressed support for Mr. Krylov's proposal.

27. He recalled that the Organization of American States published an annual inter-American legal yearbook, for which the Legal Department of the Organization of American States was responsible. That Organization was certainly in a less favoured financial position than the United Nations.

28. The United Nations published a large number of documents, some of which were of somewhat minor interest from the point of view of scholars or, indeed, from the standpoint of the general public itself. Every year, a volume of nearly 1,000 pages was published containing the records of the General Assembly's proceedings, including matters which were certainly of little or no concern to the outside world.

29. There appeared to be a tendency to practise a policy of economy where the International Law Commission was concerned. He recalled the financial difficulties put forward in connexion with the Commission's sessions in Geneva. As an extreme instance of that policy, he referred to the practice of cross-reference in documents—i.e., the practice of not quoting material already published in mimeographed form. The documents concerned thus appeared in a truncated form, and were not so easy to use.

30. Mr. SALAMANCA agreed that the work of the Commission merited wider publicity. The Commission's functions were at times of a quasi-legislative nature and its decisions could be of exceptional importance to the world at large.

31. He recalled that proposals had been made to turn the Commission into a permanent body covering a wider field than it did at present. He wondered whether those proposals would be taken up again.

32. The CHAIRMAN said it was extremely desirable that not only the reports but also the summary records of the Commission's meetings, as well as all the relevant documents (including comments by governments), should be published collectively as an integral whole. It was essential to convince the General Assembly of the need for publishing a yearbook concerning the Commission's work.

33. Sir Gerald FITZMAURICE said there was nothing secret about the proceedings of the Commission: its meetings could be attended by everyone and its records were, to a limited degree, available to readers. In the circumstances, there could be no objection in principle to the publication proposed by Mr. Krylov.

34. It could be argued that the International Law Commission was a body which reported to the General Assembly and that the latter was interested in the Commission's conclusions rather than in the manner of arriving at them. It could also be suggested with some plausibility that if the members were conscious of the fact that their views would be published they might not perhaps express themselves so freely and the debates in the Commission would lose some of their spontaneity.

35. In spite of those reservations, publication of the Commission's proceedings recommended itself for a decisive reason. There were a number of bodies studying

the same subjects as the International Law Commission. Particular reference had been made to the Organization of American States and the Inter-American Council of Jurists; the latter would be discussing some subjects with which the Commission had been concerned. Undoubtedly, in the proceedings of those bodies, reference would be made to the work of the International Law Commission. It would create a very misleading impression if the International Law Commission's proceedings remained unpublished while the published proceedings of other bodies referred to what had occurred in the Internationnal Law Commission.

36. Mr. ZOUREK agreed with the proposal to publish the proceedings of the Commission. He pointed out, however, that such publication would make it incumbent upon the members of the Commission to examine very closely the summary records for purposes of possible corrections; no doubt more time would have to be allowed for that purpose if publicaton were intended.

37. Mr. AMADO said that time was required to lay down in concrete terms a rule of international law. The Commission was devoting great efforts in order to arrive at the formulation of certain legal principles, and its proceedings were therefore of great interest to the learned world.

38. The CHAIRMAN recalled that, in the days of the League of Nations, it had been the general view that the codification of international law could only be achieved by means of conventions.

39. That situation had now changed altogether. Under its Statute the International Law Commission could recommend the General Assembly not only to take note of or adopt the report of the Commission by resolution (paragraph 1 (*b*) of article 23) but even "to take no action, the report having already been published" (paragraph 1 (*a*) of the same article).

40. If the General Assembly raised no objection to codification in that manner by the International Law Commission, the rules codified virtually became binding upon the international community. The International Law Commission thus had an important role in the development of international law, and its functions were, at times, of a quasi-legislative nature.

41. In view of those facts, it was extremely important that not only the General Assembly, but also the learned world—and even the public at large—should know how the International Law Commission had arrived at its formulations.

42. He suggested that further discussion of Mr. Krylov's proposal be deferred until the next meeting, when a definite text of the proposal would be available.

It was so agreed.

Representation at the General Assembly

43. The CHAIRMAN asked whether the Commission wished to adopt a resolution authorizing him to represent it at the next session of the General Assembly.

44. Mr. LIANG (Secretary to the Commission) said that as that was the usual practice, it would be sufficient for a paragraph to be included in the report to the effect that the Commission had asked the Chairman to represent it at the next session of the General Assembly.

It was so agreed.

Ways and means of providing for the expression of dissenting opinions in the report of the Commission covering the work of each session (item 7 of the agenda) (A/CN.4/L.61)

45. Mr. ZOUREK introduced his proposal (A/CN.4/L.61)[3] for ways and means of providing for the expression of dissenting opinions in the Commission's reports He had intended to present that proposal at the previous session but the Commission, owing to pressure of other work, had not been able to deal with it.

46. He stressed that his proposal was concerned only with the cases where the Commission adopted draft rules of international law which were presented to the General Assembly and to governments.

47. His proposal to enable any member of the Commission to attach a statement of his dissenting opinion to any decision of the Commission had a number of advantages.

48. In the first place, the Commission was composed of experts representing several different legal systems. It was therefore important that the opinion of the representative of any one of those systems, whenever it did not find expression in the resolutions adopted by the Commission, should be made known to those bodies which were called upon to deal with the Commission's resolutions and formulations.

49. Secondly, the work of the Commission on each particular item of its agenda was spread over several years. The Commission's first draft was sent to governments for their comments, in accordance with article 21, paragraph 2, of the Commissions's Statute. Following those comments, a final draft was prepared in accordance with article 22 of the Commission's Statute; usually several years after the work had begun, the recommendations of the Commission were passed on to the General Assembly. It was clear that the work both of the governments whose comments were asked for and of the General Assembly would be greatly facilitated if they had before them the views of those members of the Commission who did not see their way to supporting the Commission's decisions.

50. Thirdly, the system at present in force allowed members of the Commission to put their dissent on record in a footnote, in which reference was made to the opinions expressed by the dissenting members, as recorded in the summary records; that system obliged members to make lengthy statements during meetings purely for the purpose of putting their opinions on record. As a particular item was usually discussed at

[3] Incorporated in A/2934, para. 37.

several sessions, members had to repeat the process at each of those sessions. A considerable saving of time and effort would therefore result from the adoption of his proposal.

51. Fourthly, to allow members to express their dissenting opinions, and give their reasons in support, would reflect their views more to their satisfaction than to rely on summary records which were prepared at considerable speed and with a brevity which was, on occasions, excessive. Besides, as matters now stood, the summary records themselves were not easily available to all those wishing to ascertain the reasons for the dissent of certain members—a dissent so laconically recorded in footnotes.

52. Fifthly, his proposal was in line with article 20 of the Commission's Statute, which required the Commission to include in its commentary conclusions relevant to divergencies and disagreements within the Commission, as well as arguments invoked in favour of one or another solution.

53. Lastly, provision was made in the Statute of the International Court of Justice for the expression of dissenting views. Yet the majority decisions of the International Court of Justice were concerned with specific cases—whereas the Commission's decisions were concerned not with one particular case, but with perhaps thousands of cases.

54. The fear which was at times expressed that the authority of the Commission's decisions might be undermined by a provision to put on record dissenting views was not well-founded. The Commission had the duty to put on record all conflicting views: it was therefore incumbent upon it to allow the recording of dissenting opinions.

55. He stressed that his proposal would merely give members the possibility or the right to put on record their dissenting views. Members would no doubt use that right sparingly and only put their dissenting views on record where the importance of the matter justified it. Furthermore, his proposal was that the arguments given in support of dissenting views be summarized very briefly, so as not to lengthen the report unduly.

56. Mr. FRANÇOIS (Rapporteur) said that Mr. Zourek's proposal raised an issue which had already been discussed a number of times within the Commission at earlier sessions. A proposal, practically similar to that now made by Mr. Zourek, had been rejected at the fifth session.[4]

57. The existing rule, adopted at the third session of the Commission, provided that detailed explanations of dissenting opinions were not inserted in the report but merely a statement to the effect that, for the reasons given in the summary records, a member was opposed to the adoption of a particular passage of the report.

58. He recalled the controversies around the question of the expression of minority views in law courts. In the case of the International Court of Justice, the system adopted in its Statute had not given general satisfaction. In fact, it had led in practice to dissident opinions almost monopolizing public attention. In the effort to obtain as broad a measure of agreement as possible in its judgements the International Court of Justice was bound to keep its reasoning extremely brief and many arguments had to be left out in order to produce as generally acceptable a text as possible. Such was not the position with regard to dissident opinions: each dissenting judge expressed his own views without any restraint and there appeared to be no limit whatsoever to the number of pages (sometimes ten or twelve) in which a dissenting opinion could be stated. That gave the dissenting judge an undoubted advantage over the International Court of Justice's actual decision, in that his very full expression of opinion received an attention from learned circles and from the general public which the somewhat incompletely motivated and very brief judgement of the Court could not possibly claim.

59. Mr. Zourek's proposal to provide for the expression of dissenting opinions in the Commission's report assumed that that report had to give full expression to the various conflicting views within the Commission. In actual fact, no report could possibly claim to do justice to all their dissenting views: any attempt to do so would place upon the Rapporteur an impossible burden. Except in cases where there was a large minority, the Rapporteur could only report on the decisions taken by the majority of the Commission. In doing so, only five or six lines of the report were usually devoted to explaining a decision. If each of five or six dissenting members were to be allowed to express in a further few lines his reasons for dissent, the majority view of the Commission would be practically lost to sight amongst the contrary views, giving the reader a totally unbalanced picture.

60. Mr. Zourek had stressed that members were not obliged to put on record the reasons for their dissent. Experience showed, however, that once members were given the right to put on record their dissenting views, they would want to do so at every turn, and put on record their reasons for doing so. The result would be that the report would no longer be homogeneous on the principal points with which it dealt.

61. For all those reasons, he did not support the proposal made by Mr. Zourek in spite of its being commended in theory by several arguments.

62. Finally, he stressed that if the records of the Commission were given much greater publicity than at present by being published as was now proposed, there would be no necessity for the adoption of a proposal along the lines suggested by Mr. Zourek. If the records were readily available, reference to them in explanation of a member's dissenting vote, in other words the present system, would be quite sufficient.

63. Mr. KRYLOV felt that both Mr. Zourek and Mr. François had gone to opposite extremes.

[4] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 163, in *Yearbook of the International Law Commission, 1953*, vol. II.

64. He did not believe that the provision made in the Statute of the International Court of Justice for the expression of dissenting opinions in any way undermined the authority of the Court. After all, what mattered was the decision of the Court, which was operative, rather than the ably drafted dissertations of dissenting judges.

65. No doubt the Rapporteur's task was primarily to set forth and explain the majority decisions of the Commission. It was an unfortunate fact, however, that many of the decisions of the Commission were taken by very small majorities and sometimes with a regrettably large number of abstentions. For his part, he had a greater interest in the Commission's reaching unanimous decisions than in the recording of dissenting views.

66. The CHAIRMAN said that experience had shown that members were tempted to express themselves at length with a view to making better known, through the records, their opinions concerning the Commission's resolutions. If members were encouraged to adopt the same system where the actual report was concerned, the result would be to deprive that document of its homogeneity.

67. Mr. ZOUREK recalled that his proposal had only been fully discussed on one occasion—namely, at the Commission's fifth session in 1953. It had been rejected following a tied vote of 6 votes for and 6 against.

68. Mr. FRANÇOIS (Rapporteur) agreed that Mr. Zourek's proposal had not been discussed in 1954, but only in 1953. Similar proposals, however, had been discussed at practically every session of the Commission prior to 1953.

69. Sir Gerald FITZMAURICE said that provision was made in the International Court of Justice for the expression not only of dissenting opinions, but also of separate opinions, by judges. That system meant that a judge who agreed with a majority decision was enabled to express fully the reasons why he concurred with that decision and thus give it the support of a detailed and carefully prepared expression of his views.

70. Mr. KRYLOV pointed out that it was the practice of the President of the International Court of Justice to draw the attention of dissenting judges to the necessity of limiting the length of their dissenting opinions.

Further discussion of Mr. Zourek's proposal was adjourned.

The meeting rose at 1.5 p.m.

323rd MEETING

Thursday, 30 June 1955, at 10 a.m.

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Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Gilberto AMADO, Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Ways and means of providing for the expression of dissenting opinions in the report of the Commission covering the work of each session (item 7 of the agenda) (A/CN.4/L.61) (*continued*)

The CHAIRMAN invited the Commission to continue its consideration of Mr. Zourek's proposal (A/CN.4/L.61).

1. Mr. SANDSTRÖM said the Commission was in quite a different position from a court of law. Where courts of law were concerned, the problem of putting dissenting opinions on record raised primarily the issue whether the general public was sufficiently mature to understand the relative character of justice. In the case of the Commission's pronouncements, the various divergent views were already given their due place both in the records and in the report. Mr. Zourek's proposal amounted to a specific procedure for setting out dissenting views.

2. The decisive question was therefore to determine for whom the Commission's work was intended. It was primarily intended for the General Assembly; but learned public opinion was also interested in the Commission's proceedings. All those who would actually have to read the Commission's publications were able to engage in the necessary research to find the reasons which motivated dissenting opinions as recorded in footnotes.

3. Moreover, whenever a question decided by the Commission came before the General Assembly, there invariably arose in that Assembly speakers to express the point of view of those members of the Commission who had not voted in favour of a particular resolution.

4. The existing system was quite sufficient in that, besides allowing dissenting votes to be recorded in footnotes, it provided for the inclusion in the general report of the various divergent views. He suggested that full use be made of the latter procedure and that members who had occasion to dissent from a resolution and desired their views incorporated in the general report co-operate with the General Rapporteur to that effect.

5. Sir Gerald FITZMAURICE said that although it was desirable to grant dissenting members the means of recording the reasons for their dissent, Mr. Zourek's proposal was not practicable.

6. Even if no abuse occurred, the reasons given by the Rapporteur were conclusive: the report had to be brief and therefore contained only a paragraph or two on each point. If that brief account of the majority decision were to be followed by a large number of well-expressed dissenting opinions, the report would contain a formidable opposition view which would upset its balance.

7. Mr. SALAMANCA expressed support for Mr. Zourek's proposal. With the present system, the report created a false impression of unanimity; the view of what was sometimes a very narrow majority appeared to be the expression of a general consensus of opinion such as did not exist. One clear example was the vote on the three-mile rule concerning the territorial sea; those members who did not approve of that rule would not be able to convey their views adequately to governments through the Commission's report.

8. As with other United Nations reports, it was important that the International Law Commission's reports to the General Assembly should reflect all the various divergent opinions expressed within the Commission.

9. Mr. GARCÍA AMADOR said that comparisons between the International Law Commission and the International Court of Justice were not valid. The Commission only made recommendations; the Court took decisions. The work, the functions and the procedure of the Commission were different from those of the International Court of Justice.

10. The only valid comparisons could be with organs having a similar purpose. The only ones in existence were the Inter-American Juridical Committee—a permanent body of 7 members sitting in Rio de Janeiro and founded in 1942—and the Inter-American Council of Jurists, which was composed of one representative for each Member State of the Organization of American States and which had first met in May/June 1950.

11. Both the Inter-American Juridical Committee and the Inter-American Council of Jurists, when faced by the same problem as the Commission was now debating, had arrived at the conclusion that dissenting opinions should be put on record in their reports. The matter had been discussed at a higher level within the political organs of the Organization of American States (the Inter-American Conference and the Council of the OAS), which had approved the practice of recording dissenting opinions.

12. Experience within the Organization of American States had demonstrated the adequacy of the system concerned. One excellent example of its good functioning had been the case of a vote in favour of a 200-mile-wide territorial sea which had been adopted in 1952 by the narrow majority of 4 votes against 3 by the 7-member permanent Rio de Janeiro Juridical Committee. That decision had been the result of an accidental majority within the permanent Inter-American Juridical Committee: the opinion of the four members voting in favour of it did not represent the generally accepted view of the American republics. The three dissenting members of the Rio Committee had duly put on record their reasons for dissenting from the majority vote. When the matter was brought before a higher body—namely, the full Inter-American Council of Jurists, at its Buenos Aires meeting in 1953, it was the "minority" opinion against the 200-mile claim which had prevailed by a majority of the 21 Member States of the OAS represented on the Inter-American Council.

13. The position of the International Law Commission was somewhat similar to that of the Inter-American Juridical Committee in that it did not consist of as many members as there were Member States of the United Nations. The Commission consisted of representatives of various juridical systems, and a majority within the Commission could well adopt a rule which would not be acceptable to the General Assembly.

14. Finally, the fear of abuse which had been expressed was not a valid reason for denying members the right to put on record the reasons for their dissenting opinions. Members of the Commission could be trusted to use their discretion and not to misuse what was undoubtedly a somewhat dangerous right.

15. Mr. AMADO said that Mr. Zourek's proposal was not acceptable to him because the report of the Commission had to be a harmonious whole. The report was the work of the Commission; it was prepared by the Rapporteur under the control of the full Commission.

16. Dissenting opinions were expressed from a purely personal point of view and their inclusion in the report could only be permitted if the Commission actually took a vote explicitly agreeing to such inclusion. Failing such a decision by the Commission, it was undesirable to allow each individual member to make a detailed statement of views for inclusion in the report.

17. Mr. HSU agreed with Mr. Sandström that the best solution of the problem was to make liberal use of the existing rule that the various divergent views concerning a problem should be explained carefully in the general report. Where a vote had been especially close and there were two radically different views, such a course was

essential because mere footnotes did not suffice to give a clear picture of the strength of the opposition to the mapority report.

18. Mr. FRANÇOIS (Rapporteur) said that the procedure suggested by Mr. Sandström was in accordance with the existing practice. He agreed that even more liberal use might be made of it.

19. Faris Bey el-KHOURI said he disapproved of Mr. Zourek's proposal because the success of the Commission's task of codification depended on gathering as much support as possible within the General Assembly. The inclusion of extensive dissenting opinions in the report would constitute a destructive element; it would undermine the efforts of the Commission and contribute nothing constructive in the place of what it would serve to destroy. The majority decision had to prevail unquestionably so that the Commission's recommendations should have the maximum authority.

20. Mr. ZOUREK said that the question of dissenting opinions recurred frequently in the Commission's discussions simply because it had not been satisfactorily settled.

21. The Rapporteur had somewhat exaggerated the practical consequences of adopting his (Mr. Zourek's) proposal.

22. He recalled that in 1951, the question of defining aggression had been dealt with in a chapter which set out the various views expressed by members of the Commission and the reasons given by each of them in support of his particular view; it even set out in detail all the individual proposals made by members. The chapter in question had not thereby become unduly long: it covered only some two pages of a report which itself was quite short.[1]

23. The adoption of his proposal would actually facilitate the Rapporteur's work rather than complicate it, in that the arguments of dissenting members would be set forth by them in their own words. Besides, such a system would have the great advantage of placing responsibility for the statement of a dissenting opinion on its author and not on the Commission.

24. To record dissenting opinions in the report would be consonant with the provisions of article 20 of the Commission's Statute, which required the Commission's commentary to include conclusions relevant to divergencies and disagreements as well as arguments in favour of one or another solution.

25. It was unlikely that the adoption of his proposal would lead to any abuse because there were only a few of the Commission's decisions which gave rise to any marked controversy. Moreover, if the Rapporteur included a reference to divergent views in the comment, those members who held such views would not insist on recording their dissenting opinions separately as well.

26. The system he proposed had one great advantage over the present one. It would separate the dissenting opinions from the body of the report. Dissenting opinions would appear in the form of annexes for which the particular members concerned would be responsible. The report of the full Commission would not be encumbered by them.

27. There was nothing unusual in attaching comparatively long annexes to a report. Annexes I and II to the International Law Commission's 1953 report covered forty-one pages whereas the report itself consisted of only thirty-one pages.[2]

28. He emphasized that his proposal provided for the right to add a *short* statement of dissenting opinion. Probably that would not give rise to any difficulty, but if a dispute occurred over the length of the text to be included, he proposed that the officers of the Commission should decide the matter, subject to appeal to the Commission itself. Control by the Chairman and officers, and eventually by the Commission itself, would be a sufficient safeguard against any possible abuse of the right to state dissenting opinions.

29. In principle, there was no disagreement between members of the Commission: they all agreed on the right of members to record their dissenting views, but as far as the procedure was concerned, the system he proposed had the great advantage of obviating the need for members to speak at length for the sake of the summary record. Under the existing system, that was the only means at their disposal to record the reasons why they had voted against a proposal—a fact which could only be mentioned in the report in the form of a footnote with a cross-reference to the summary records.

30. Mr. SANDSTRÖM said that the French text of article 20 of the Commission's Statute, by referring to *les divergences et désaccords qui subsistent,* was perhaps somewhat misleading. If read hastily, it might be construed as referring to divergences of opinion within the Commission. In actual fact, as was made clear by the English text and particularly by the whole context of the article, the reference was to any divergences of opinion which might exist in legal circles generally concerning the issues upon which the Commission was reporting.

31. The comparison with the chapter on the definition of aggression in the Commission's 1951 report was not a valid one. On that question, the Commission had been unable to reach a decision, and had therefore had no option but to record the different views which had been expressed on the subject.

32. If Mr. Zourek's proposal were to be adopted, provision would have to be made not only for dissenting opinions, but also for separate opinions: the majority which voted in favour of a resolution was not necessarily made up of members who all supported it for the same reasons.

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[1] "Report of the International Law Commission covering the work of its third session" (A/1858), paras. 35 to 53, in *Yearbook of the International Law Commission, 1951*, vol. II.

[2] "Report of the International Law Commission covering the work of its fifth session" (A/2456), in *Yearbook of the International Law Commission, 1953*, vol. II.

33. The CHAIRMAN pointed out that article 20 of the Commission's Statute referred not to the Commission's general report but rather to the commentary it attached to the drafts prepared by it.

34. Mr. SCELLE said that a member who disagreed with a majority opinion very rarely had the opportunity of giving his considered views during the course of the discussion. It was essential that a dissenting opinion should be given after the vote, when the dissenting member could formulate his opinion after due reflection on the decision adopted by the Commission. Such was the method followed in the International Court of Justice—a method which enhanced the value of the dissenting opinions attached to its judgements.

35. The majority which favoured a resolution of the Commission was not necessarily right. Moreover, there were so many abstentions in the votes of the Commission that its resolutions often had not even represented a decision of the majority of its members, and a simple footnote with a cross reference to the summary records was not sufficient to inform readers of the report of the reasons which had led certain members of the Commission to disagree with the majority view.

36. With regard to the question of avoiding excessive length in the statement of dissenting views, he favoured the system proposed by Mr. Zourek of leaving the matter under the control of the officers. They would decide whether any particular dissenting opinion could be properly left unrecorded altogether; also, whether a definite limit as to length was necessary.

37. Mr. KRYLOV agreed with Mr. Scelle's remarks. The task of checking abuses in the exercise of the right to state dissenting opinions had to rest with the Chairman. In the International Court of Justice, the President fulfilled that delicate task. It was undoubtedly a burden which would thus be thrust upon the shoulders of the Chairman, but it was consistent with the duties incumbent upon the holder of that office.

38. He therefore proposed that the words "after consultation with the Chairman" be added after the words "to add" in the operative part of Mr. Zourek's proposal, so that it would begin as follows:

> "*Decides* that any member of the International Law Commission shall have the right to add, after consultation with the Chairman, a short statement of his dissenting opinion..."

39. Mr. ZOUREK accepted Mr. Krylov's amendment.

40. Faris Bey el-KHOURI said, in explanation of his previous statement, that he did not believe the majority to be always right. He believed, however, in the democratic principle that the majority view should prevail. He had frequently voted against decisions of the Commission, but once those resolutions had been voted, he felt they should be presented in an unequivocal manner so as to ensure to the Commission the greatest possible authority in its work of codification.

41. The CHAIRMAN said that the issue under discussion was not one of vital importance. In substance, there was general agreement that all opposing views should be given due place. The issue was only one of procedure; Mr. Zourek was not satisfied with the present procedure for the recording of dissenting views.

42. If the Commission's report were submitted to the General Assembly together with the summary records, the present system of merely referring to the summary records for the reasons for dissent would produce quite satisfactory results.

43. Mr. SCELLE said that the report of the Commission was widely read, but its summary records reached only a very narrow public, consisting of a few specialists in international law.

44. Mr. GARCÍA AMADOR said that the system at present in force in the Commission acknowledged the principle of recording dissenting views. The opposition to the new procedure proposed by Mr. Zourek appeared to be that the presence of dissenting opinions in the report would create an unfavourable impression upon its readers.

45. In actual fact, the present system could produce an equally unfortunate—if not worse—impression. Thus, at its sixth session the Commission had adopted its draft Code of Offences against the Peace and Security of Mankind.[3] In doing so the following dissenting votes were put on record in a footnote:

> "Mr. Edmonds abstained from voting for reasons stated by him at the 276th meeting (A/CN.4/SR.276). Mr. Lauterpacht abstained from voting and, in particular, recorded his dissent from paragraphs 5 and 9 of article 2 and from article 4, for reasons stated at the 271st meeting (A/CN.4/SR.271). Mr. Pal abstained from voting for the reasons stated in the course of the discussions (A/CN.4/SR.276). Mr. Sandström declared that, in voting for the draft code, he wished to enter a reservation in respect of paragraph 9 of article 2 for the reasons stated at the 280th meeting (A/CN.4/SR.280)."

A footnote of that type could certainly be most damaging to the authority of a draft.

46. He thoroughly disapproved of the suggestion that the Commission itself should exercise control over the recording of dissenting views; such a system would be worse than the one at present in force. What was required was that the right of members to place their dissenting views on record should be unconditionally recognized.

47. Mr. FRANÇOIS (Rapporteur) said that some members of the Commission who had been elected in the past few years had nots een with their own eyes—as he had—the unfortunate results of the system which was embodied in Mr. Zourek's proposal. At the Commission's first session, members had been allowed to state their dissenting views and some of them had wished to

[3] "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 54, in *Yearbook of the International Law Commission, 1954*. vol. II

do so with remarkable prolixity both at that session and at the second and third sessions.

48. Efforts had been made to keep the length of those statements of dissenting opinion under control, but they had not always been successful. Proposals to entrust the Chairman with the difficult task of control had been fruitless.

49. Mr. Scelle's suggestion that dissenting members be allowed to express their considered opinions, after due reflection, following the actual decision of the Commission, appeared to him (the Rapporteur) more an argument against Mr. Zourek's proposal than anything else. It was not appropriate to place such a formidable weapon in the hands of the opposition to a resolution adopted by the Commission. Such a system would be tantamount to giving the last word—and a very strong one at that—to those members whose views had not been accepted by the Commission as a whole.

50. Mr. EDMONDS considered, for the same reasons as those given by the Rapporteur, that it would be most undesirable to accept statements of dissenting opinion prepared after the close of the discussion, particularly as they might contain views and conclusions which had never been presented in plenary meeing at all. Nor did he think it feasible to allow "short" statements because it would be impossible to decide on the proper length. The position of each member was surely adequately protected by the present practice of recording dissenting votes coupled with a reference to the relevant summary records. In future, the date of the meeting might also be added.

51. Mr. KRYLOV felt that the importance of the problem should not be exaggerated. It should be possible among reasonable people to arrange for members wishing to have a statement of a dissenting opinion inserted in the report to submit a text to the Rapporteur.

52. Mr. EDMONDS asked whether the effect of Mr. Krylov's amendment [4] would be to give the Chairman the power to veto the inclusion of any particular dissenting opinion.

53. The CHAIRMAN replied in the negative.

Mr. Zourek's draft resolution (A/CN.4/L.61), as amended, was rejected by 8 votes to 5.

54. Mr. GARCÍA AMADOR wondered nevertheless whether it might not be possible to make the present system somewhat more liberal by giving some space in the report to explanations of dissenting opinion.

55. The CHAIRMAN did not consider that that suggestion was materially different from the Commission's past practice.

56. Mr. GARCÍA AMADOR withdrew his suggestion.

57. Mr. ZOUREK observed that the summary records did not reproduce explanations of vote *in extenso,* but only in a condensed form.

58. Mr. LIANG (Secretary to the Commission) pointed out that it was open to any member, who considered that his remarks had not been adequately reported in the summary record, to submit corrections of a reasonable length.

59. The CHAIRMAN considered that such corrections should not be inordinately detailed or they would throw the record out of balance. Members had every opportunity to express their views fully during the discussion.

60. Mr. ZOUREK deplored the apparent tendency to expect that members of the Commission would abuse their rights.

61. Mr. SCELLE disagreed with the Chairman's view because members did not always expound their views at length during the discussion and sometimes opinion did not take final shape until the decision had been reached. That consideration was the main reason for admitting the inclusion of dissenting opinions, which could be of far greater importance than the views put forward during the debate.

62. Mr. SANDSTRÖM moved the closure of the discussion.

The motion was carried.

Proposal by Mr. Krylov concerning the publication of the documents of the International Law Commission (A/CN.4/L.62) (*resumed from the 322nd meeting*)

63. The CHAIRMAN called the attention of the Commission to the draft resolution (A/CN.4/L.62) [5] submitted by Mr. Krylov. The substance of the matter had been fully discussed at the previous meeting.[6]

64. Mr. LIANG (Secretary to the Commission) expressed regret for three typographical errors in the text. The title should read "Publication of the documents of the International Law Commission". In paragraph 1 of the operative part the word "printing" should be substituted for the word "including" and the words "in the juridical yearbook" should be deleted.[7]

Subject to those changes, the draft resolution submitted by Mr. Krylov (A/CN.4/L.62) was adopted unanimously.

Régime of the high seas (item 2 of the agenda) (*resumed from the 321st meeting*)

NEW DRAFT ARTICLES ON FISHERIES

(*resumed from the 306th meeting*)

Preamble

65. Mr. FRANÇOIS (Special Rapporteur) pointed out that the Commssion had not yet taken any decision on

[4] Para. 38 above.

[5] Incorporated in /A/2934, para. 35.

[6] 322nd meeting, paras. 12–42.

[7] The document was later issued in revised form as A/CN.4/L. 62/Rev.1.

[8] 296th meeting, para. 16.

the preamble to the draft articles on fisheries submitted by Mr. García Amador.[8]

66. Mr. GARCÍA AMADOR said that as he had already explained in the course of the discussion, the preamble to his draft articles had been based on the conclusions reached in the report of the International Technical Conference on the Conservation of the Living Resources of the Sea (the Rome Conference).[9] Paragraph 1 followed the Conference in recognizing the need for conservation owing to the development of modern techniques of exploitation. Paragraph 2 stipulated that conservation measures must be based on scientific evidence, and provision to that effect had been incorporated in article 33, paragraph 2 (*a*) of the final draft. Paragraphs 3 and 4 of the preamble reproduced decisions taken at the Rome Conference concerning the nature of the measures to be taken, and paragraph 5 stated the fundamental principle that conservation should be achieved through international co-operation.

Mr. García Amador's preamble was adopted unanimously.

67. In answer to Mr. SANDSTRÖM, Mr. FRANÇOIS (Special Rapporteur) explained that the preamble, together with the draft articles on fisheries already adopted for inclusion in the text concerning the régime of the high seas, would be reproduced in an annex to the Commission's report.[10]

The meeting rose at 12.40 p.m.

[9] A/CONF.10/6 (United Nations publication, Sales No.: 1955. II.B.2).

[10] See A/2934, Annex to Chapter II.

324th MEETING

Friday, 1 July 1955, at 10 a.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda)

(resumed from the 320th meeting)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the draft articles on the régime of the territorial sea as revised by the Drafting Committee.

Article 1 [1]: Juridical status of the territorial sea

2. Mr. FRANÇOIS (Special Rapporteur) said that the text of article 1 remained the same as that adopted the previous year[1] except for the substitution of the word "articles" for the word "regulations".

3. Mr. ZOUREK said that he would again abstain from voting on the article because it referred to "other rules of international law". If there were such, they should be embodied in the draft.

4. Mr. KRYLOV observed that opinion differed as to what were the rules of international law. In his opinion

[1] For text of the provisional articles adopted at the sixth session, see "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 72, in *Yearbook of the International Law Commission, 1954*, vol. II.

draft articles of the kind before the Commission should be based on general principles.

Article 1 was adopted by 11 votes to none with 1 abstention.

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

5. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 2.

Article 2 was adopted unanimously.

Article 3 [3]: Breadth of the territorial sea

"*Article 3—Breadth of the territorial sea* *

"1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles.

"2. The Commission considers that international law does not justify the extension of the territorial sea beyond twelve miles.

"3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.

"* The Commission adopted the formula inserted under article 3. Before drafting the text of an article concerning the breath of the territorial sea, the Commission wishes to have the observations of governments."

6. Mr. FRANÇOIS (Special Rapporteur) said that the Drafting Committee had made no change whatsoever in the text concerning the breadth of the territorial sea adopted by the Commission and had only discussed the problem of its presentation. As it was not in the normal form of an article, the Committee had decided to add an explanatory footnote.

7. Mr. KRYLOV observed that given the nature of the Commission's decision about the breadth of the territorial sea, at the present stage it could not vote on the text but only on the footnote.

8. Mr. SANDSTRÖM considered the phrase "without taking any decision as to the breadth of the territorial sea within that limit" to be inappropriate in a draft article and believed that it should be omitted. The remainder of paragraph 3 would then constitute a complete statement, though taking no stand as to extensions over three miles but not beyond twelve.

9. Mr. FRANÇOIS (Special Rapporteur), pointing out that the present text was the result of a hard-won compromise, said that Mr. Sandström's point was not purely a drafting one and if pursued would entail reconsideration of the text. That would require a separate decision by a two-thirds majority.

10. Mr. SANDSTRÖM still felt that the phrase to which he objected was unnecessary, because the summary record would show that the Commission had taken no decision as to the breadth of the territorial sea. However, he would not press the matter.

11. Mr. LIANG (Secretary to the Commission) thought article 3 might be reproduced in italics in the report since its form was essentially different from that of the other draft articles.

12. Mr. FRANÇOIS (Special Rapporteur) considered that the footnote sufficed to make the nature of the text perfectly clear. Its presentation had been discussed at length by the Drafting Committee, which had decided that the text should be included among the draft articles and not elsewhere in the report because paragraph 2 embodied a very important decision, albeit provisional, and one which had the force of a draft article.

13. Mr. SALAMANCA pointed out that the text adopted by the Commission did not constitute a rule of international law. In the course of the discussion he had made clear the reasons for his objection to paragraph 3. Nevertheless, at the present stage he did not consider that the Commission should amend the text.

14. Mr. GARCÍA AMADOR said that he had argued in the Drafting Committee that the form of the text adopted concerning the breadth of the territorial sea was such as to make it impossible to include it among the draft articles. However, as it had been decided to do so, he had agreed to the insertion of a footnote, but in his opinion the footnote should bring out more clearly that the Commission's decision had been a provisional one and that it might be reconsidered in the light of the observations received from governments and the review of the whole work relating to the régime of the high seas, the régime of the territorial sea and allied topics. Thus, in order to forestall criticism of the text on the ground that it was to some extent contradictory and perhaps failed to give due weight to the legitimate interests of States, he proposed that the first sentence of the footnote be re-drafted to read: "The Commission approved the formula inserted under article 3 on a provisional basis, prior to drafting the final text."

15. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. García Amador's amendment.

16. Sir Gerald FITZMAURICE, without objecting to the amendment, considered that some distinction should be drawn between the remainder of the text and paragraph 2, which represented a definitive and not a provisional conclusion reached by the Commission.

17. The CHAIRMAN, speaking in his personal capacity, agreed with the previous speaker.

18. Mr. SANDSTRÖM said that he was now uncertain of the precise meaning of the phrase "without taking any decision as to the breadth of the territorial sea within that limit" in paragraph 3. He had originally assumed that it meant that the Commission had left undecided the question whether States were obliged to recognize extensions beyond three miles but not beyond

twelve. Now it appeared, however, that even the statements made in paragraphs 1 and 2 were provisional.

19. Mr. GARCÍA AMADOR explained that his amendment, referred primarily to paragraph 3.

20. Mr. ZOUREK approved of Mr. García Amador's amendment, since all members were well aware of the imperfections of the text, which in paragraph 1 referred to international practice and in paragraph 2 to international law. The footnote, with the amendment accepted by the Special Rapporteur, would make it clear that the whole text was provisional.

21. Mr. EDMONDS said that he had understood Mr. Sandström to express a wish that the footnote refer to paragraph 3.

22. Mr. SANDSTRÖM confirmed that that was correct.

23. Mr. EDMONDS stated that, on the understanding that the footnote as amended referred primarily to paragraph 3, he could accept it as a clearer statement of the position.

24. The CHAIRMAN, speaking in his personal capacity, said that there could be no doubt that as at present drafted the footnote referred to the whole text. The question therefore arose as to whether the Commission should expressly state that paragraphs 1 and 2 embodied definite conclusions.

25. In his view the first sentence of the footnote was self-evident and should be omitted.

26. Sir Gerald FITZMAURICE suggested that the first sentence of the footnote be deleted and the words "particularly as regards paragraph 3" be added at the end of the second sentence.

The footnote to article 3, thus amended, was adopted unanimously.

27. Mr. KRYLOV announced his intention of submitting a dissenting opinion on the text of article 3, for inclusion in the final report.

Article 4 [4]: Normal base line

"Subject to the provisions of article 5 and to the provisions regarding bays and islands, the breadth of 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."

28. Mr. FRANÇOIS (Special Rapporteur) observed that the text was the same as that adopted at the previous session, except that the second sentence had been deleted in accordance with the Commission's decision (316th meeting, para. 16).

Article 4 was adopted unanimously.

Article 5 [5]: Straight base lines

"1. Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, or where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the base line may be independent of the low-water mark. In these special cases, the method of straight base lines joining appropriate points on the coast may be employed. The drawing of such base lines must not depart to any appreciable extent from the general direction of the coast, and the sea area lying within these lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. Base lines shall not be drawn to and from drying rocks and drying shoals.

"2. The coastal State shall give due publicity to the straight base lines drawn by it."

29. Mr. FRANÇOIS (Special Rapporteur) said that in accordance with the decision of the Commission the words "As an exception" in paragraph 1 of the original text of article 5 had been deleted (316th meeting, paras. 19 and 70). As a result of the adoption of Mr. García Amador's amendment the words "where this is justified for historical reasons" had also been replaced by the words "where this is justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage", which were taken verbatim from the judgement of the International Court in the Fisheries Case.[2]

30. Mr. GARCÍA AMADOR said that when he had originally submitted his amendment to article 5 he had thought that the expression "the reality and importance of which are clearly evidenced by a long usage" was equivalent to the phrase "historical reasons". If that were not so, he wished to make it perfectly clear that the new text of article 5 would not in any way prejudice long-established historical rights which international law had always recognized. His sole object had been to follow the wording used by the Court as closely as possible.

31. Sir Gerald FITZMAURICE wished, without suggesting an amendment, to draw the Commission's attention to the fact that, if it were seeking to interpret the Court's conclusions, it must bear in mind the two aspects of the judgement. The Court had first considered the question whether the use of straight base lines was justified, and had decided for geographical and historical reasons that Norway was entitled to institute such a system. That decision had been correctly reflected in the original text of article 5.

32. The Court had then turned its attention to the specific base lines drawn by Norway, because it did not necessarily follow from its general conclusion that such base lines were justified in each particular instance, and in that connexion it had been guided by the four criteria enumerated in its judgement.[3] Thus, if it had been the Commission's intention to follow the Court, it

[2] *I.C.J. Reports 1951*, p. 116.

[3] *Ibid.*, p. 133.

should have retained the reference to "historical reasons" and introduced the words proposed by Mr. García Amador at the end of paragraph 1, where mention was made of the other special criteria adopted by the Court. The omission of the words "historical reasons" did not seem to him strictly consistent with the Court's views. There could be general circumstances in which, on historical grounds, base lines could be admitted without economic considerations being involved. However, for the time being the Commission might leave the text as it stood and at the next session consider whether it required revision in the light of the comments received from governments.

33. Mr. SANDSTRÖM endorsed the very cogent arguments adduced by Sir Gerald Fitzmaurice in support of his opinion, but agreed that the Commission might defer further consideration of article 5 pending the receipt of observations from governments.

34. Turning to another point he noted that the Drafting Committee had not taken into account his proposal[4] concerning the possibility of base lines being drawn between islands and a point on the coast, and suggested the insertion of the words "or between a headland and an island" after the words "appropriate points on the coast".

35. Mr. FRANÇOIS (Special Rapporteur) referring to Sir Gerald Fitzmaurice's final remark, said that there was a procedural difficulty, since the draft articles on the territorial sea adopted at the previous session had already been circulated to governments for comment. It would hardly be possible to repeat that request except when a text had been substantially changed.

36. Mr. KRYLOV pointed out that the Commission had prepared a far more complete text at the present session; it was highly probable that governments would have comments to make, particularly as the subject was of crucial importance.

37. Sir Gerald FITZMAURICE believed that governments would certainly wish to comment on the new text of article 5, which had undergone very considerable change owing to the deletion of paragraph 2.

38. Mr. FRANÇOIS (Special Rapporteur) said that according to the terms of its Statute, if the Commission wished to obtain fresh comments on any of the draft articles, it must expressly ask for them.

39. The CHAIRMAN, speaking in his personal capacity, said that some of the new provisions adopted at the present session would undoubtedly have an important bearing on the remainder of the text, and although governments were nog obliged to submit observations they would most probably do so.

40. Mr. KRYLOV hoped that the Special Rapporteur would not interpret the provisions of the Commission's Statute in too rigid a way. The covering letter to governments accompanying the draft articles should emphasize that the Commission would be reviewing all its work on maritime questions at its eighth session, in accordance with the instructions it had received from the General Assembly in resolution 899 (IX).

41. Mr. LIANG (Secretary to the Commission) agreed with the Chairman's reasons for thinking that governments would probably wish to comment on the new text. The procedural difficulty mentioned by the Special Rapporteur could be overcome by drawing their attention to specific articles.

42. Mr. GARCÍA AMADOR said that Mr. Sandström's point was already covered, because the reference to islands in the immediate vicinity of the coast in the first sentence of paragraph 1 made it clear that they could be used as terminal points for drawing base lines. However, he would have no objection to the amendment, which might serve to clarify the text.

43. Mr. SCELLE said that Mr. Sandström's point would be fully met by the deletion of the words "on the coast" in the second sentence of paragraph 1.

44. Mr. SANDSTRÖM accepted Mr. Scelle's amendment in place of his own.

45. Sir Gerald FITZMAURICE was uncertain whether he could accept Mr. Scelle's amendment, lest it obscure the important requirement that base lines must be drawn between points on land whether on the coast or on an island. Perhaps Mr. Sandström would be satisfied if the question were elucidated in the comment.

46. Mr. FRANÇOIS (Special Rapporteur) pointed out that at the previous session the Commission had, in paragraph 2, laid down certain spatial restrictions on drawing base lines. If Mr. Scelle's suggestion was adopted, then, according to the present text, base lines might be drawn from islands lying at a considerable distance from the coast, which had certainly not been the intention before and might well not have been the intention of the Court.

47. Mr. GARCÍA AMADOR considered that if article 5 were read as a whole it would not be interpreted as Sir Gerald Fitzmaurice feared it might be, even if the words "on the coast" were deleted from the second sentence, for the reference in the last sentence to drying rocks and shoals made it clear that the terminal points of base lines must lie on land.

48. Referring to the Special Rapporteur's remarks he said that the Commission had expressly decided to remove the restrictions originally laid down in paragraph 2, so as to conform with the findings of the Court.

49. Sir Gerald FITZMARUICE agreed that Mr. García Amador was correct in arguing that article 5, read as a whole, could not be interpreted as implying that base lines could have their terminal points in the water. Nevertheless the text would be much more acceptable to him if it were made clear in the comment that terminal points must be on land, so that there could be no possibility of doubt about how base lines should be

[4] 316th meeting, para. 30.

drawn, particularly in the minds of persons who were not experts in maritime law.

50. Mr. ZOUREK did not think there was any danger in Mr. Scelle's amendment, which, in the same way as the Commission's rejection of the spatial criteria in paragraph 2 of the former text, left open the question where the appropriate terminal points of base lines should lie.

51. He had some doubts about the word "deeply" in the first sentence of paragraph 1 because the Court had also admitted that base lines could be drawn in cases when there were minor curvatures of the coast.

52. Mr. FRANÇOIS (Special Rapporteur), speaking subject to correction, thought that the words "deeply indented" had been borrowed from the Court's judgement.

53. Sir Gerald FITZMAURICE said that the wording used by the Court certainly implied that it had had in mind deeply indented coasts as justifying the use of straight base lines.

54. Mr. EDMONDS said that he would ask for a statement to be included in the report to the effect that he had opposed article 5 owing to the inclusion of the words "to any appreciable extent"; as he had pointed out during the discussion, those words were very imprecise.

55. Mr. FRANÇOIS (Special Rapporteur) considered the clarification in the comment suggested by Sir Gerald Fitzmaurice to be unnecessary. It was self-evident that the terminal points of base lines could not lie in the sea. However, he would have no objection to such an addition if it would make the article more acceptable to Sir Gerald Fitzmaurice.

56. He remained disturbed by the implication of Mr. Scelle's amendment that islands far distant from the coast could be used for drawing base lines.

57. Sir Gerald FITZMAURICE observed that the safeguard against that possibility was contained in the provision that base lines must not depart to any appreciable extent from the general direction of the coast.

58. Mr. FRANÇOIS (Special Rapporteur) said that in the light of Sir Gerald Fitzmaurice's assurance he would not oppose the amendment though it weakened the text.

59. Mr. SCELLE said he would have preferred the text to have contained some explicit statement to the effect that islands could be used as terminal points for base lines only if they were in the immediate vicinity of the coast. However, the third sentence of paragraph 1 provided criteria which would enable the international juridical body dealing with the settlement of disputes to decide whether any particular base lines were acceptable.

60. He agreed that Sir Gerald Fitzmaurice's point should be clarified in the comment, particularly as the Court had not enunciated a rule of international law in its judgement but had only decided on a specific case.

Mr. Scelle's suggestion for deletion of the words "on the coast" in the second sentence of paragraph 1 was adopted by 8 votes to 4.

61. Mr. GARCÍA AMADOR said that on further examination of the Court's judgement, he found that it specifically recognized the use of straight base lines in order to simplify the delimitation of the territorial sea in cases of minor curvature of the coast. He therefore proposed that no reference should be made in article 5 to deep indentation.

62. Mr. FRANÇOIS (Special Rapporteur) said that Mr. García Amador had introduced an entirely new proposal which would call for considerable discussion.

63. Mr. GARCÍA AMADOR said that in view of the problems involved he would be prepared to withdraw his proposal.

Article 5 as amended was adopted by 7 votes to 1, with 2 abstentions.

Article 6 [6]: Outer limit of the territorial sea

64. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 6, which the Commission had already adopted at its previous session.

Article 7 [7]: Bays

"1. For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large or larger than that of the semicircle drawn on the entrance of that indentation.

"2. The waters within a bay the coasts of which belong to a single State shall be considered inland waters if the line drawn across the opening does not exceed twenty five miles measured from the low-water line.

"3. If a bay has more than one entrance, this semicircle shall be drawn on a line as long as the sum total of the length of the different entrances. Islands within a bay shall be included as if they were part of the water area of the bay.

"4. Where the entrance of a bay exceeds twenty-five miles, a closing line of such length shall be drawn within the bay. When different lines of such length can be drawn, that line shall be chosen which encloses the maximum water area within the bay.

"5. The provision laid down in paragraph 4 shall not apply to so-called 'historical' bays or in cases where the straight-baseline system provided for in article 5 is applicable."

Article 7 was adopted by 6 votes to none, with 4 abstentions.

Article 8 [8]: Ports

65. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 8, which the Commission had already adopted at its previous session.

Article 9 [9]: Roadsteads

"Roadsteads which are normally used for the loading, unloading and anchoring of vessels and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea are included in the territorial sea. The coastal State must give due publicity to the limits of such roadsteads."

Article 9 was adopted unanimously.

Article 10 [10]: Islands

66. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 10, which the Commission had already adopted at its previous session.

Article 11: Groups of islands

67. Mr. FRANÇOIS (Special Rapporteur) said the article on groups of islands had been deleted.

68. Mr. GARCÍA AMADOR said that deletion of article 11 had a provisional character. The aim had been to reconsider the article at the next session of the Commission.

69. It was undesirable therefore that the article should disappear altogether from the rules drawn up by the Commission. A better course would be to indicate that the provision on groups of islands had been left in abeyance, so as to leave the door open for government comments on the question.

70. Upon such comments being received, the Commission could reconsider the drafting of the article.

71. Mr. FRANÇOIS (Special Rapporteur) said that in view of the fact that a number of articles on the territorial sea had already been shown as postponed in the Commission's 1954 draft, it was undesirable to show one of the same articles as again postponed in the 1955 report.

72. The CHAIRMAN suggested that the article be shown in the report as "provisionally deleted" instead of "deleted".

73. Mr. FRANÇOIS (Special Rapporteur) and Mr. GARCÍA AMADOR accepted that solution.

The Commission agreed to insert the reference "Provisionally deleted" under the heading of article 11.

Article 12 [11]: Drying rocks and [drying] shoals

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for further extending the territorial sea."

74. Mr. SCELLE said that, in the French text at least the final words[5] of the article suggested that the territorial sea was to be extended and that for that purpose the means referred to in the text could be used. It would appear more accurate to say that drying rocks and drying shoals could be used as a basis for the delimitation of the territorial sea.

75. Mr. LIANG (Secretary to the Commission) said the English text made it clear, by using the words "further extending the territorial sea", that drying rocks and drying shoals could enable the outer limit of the territorial sea to be carried further outwards than would be normally the case.

76. A mere statement that drying rocks and drying shoals could be used for the delimitation of the territorial sea would cast doubts upon the main proposition of article 12, to wit, that drying rocks and shoals could only be taken as points of departure for a further extension of the territorial sea if they were wholly or partly within the territorial sea as measured from the mainland or an island.

77. Mr. SANDSTRÖM said the English text appeared to be very clear; perhaps the French text would have to be brought into line with it.

78. Sir Gerald FITZMAURICE said that the basis principle was that drying rocks and drying shoals were not points of departure for measuring the territorial sea. However, if a drying rock or a drying shoal were to be found within the territorial sea (such territorial sea being measured as if the drying rock or shoal were not there at all), then the drying rock or shoal in question could be used in order to extend the territorial sea and project seaward its outer limit.

79. The process of extension by the use of drying rocks and shoals could be done only once; it was not permissible to jump from one drying rock to another and extend the territorial sea unduly in that manner.

80. Mr. SCELLE said that, on the understanding that the article was to be construed in the manner indicated by Sir Gerald, he would not press his point.

Article 12 was adopted unanimously.

Article 13 [12]: Delimitation of the territorial sea in straits

81. Mr. FRANÇOIS (Special Rapporteur) said there was no change in article 13, which the Commission had already adopted at its previous session.

Article 14 [13]: Delimitation of the territorial sea at the mouth of a river

"1. If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river.

"2. If the river flows into an estuary the coasts of which belong to a single State, article 7 shall apply."

82. Mr. FRANÇOIS (Special Rapporteur) said that in transmitting the draft articles to governments, the attention of the latter would be drawn to the fact that the Commission had not had at its disposal sufficient factual information on the question of estuaries and that it therefore invited comments by governments on practical

[5] They read as follows: ... *pourront servir de points de départ pour l'extension de la mer territoriale.*

instances of existing estuaries and the regulations applied to them.

83. The communication would add that one of the members of the Commission had drawn attention to the case of the River Plate estuary.

Article 14 was adopted unanimously.

Article 15 [14]: Delimitation of the territorial sea of two States the coasts of which are opposite each other

"1. The boundary of the territorial sea between two States the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts is, in the absence of agreement of these States, or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the nearest points on the base lines from which the width of the territorial sea of each country is measured.

"2. The line shall be marked on the largest-scale charts available which are officially recognized."

Article 15 was adopted unanimously.

Article 16 [15]: Delimitation of the territorial sea of two adjacent States

"1. The boundary of the territorial sea between two adjacent States is drawn, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, by application of the principle of equidistance from the nearest points on the base lines from which the width of the territorial sea of each of the two countries is measured.

"2. The line shall be marked on the largest-scale charts available which are officially recognized."

Article 16 was adopted unanimously.

Article 17 [16]: Meaning of the right of innocent passage

84. Mr. FRANÇOIS (Special Rapporteur) drew attention to the fact that Chapter III, on the Right of Innocent Passage, had been sub-divided, following the suggestion made by the United Kingdom Government (A/2934, Annex, No. 16), into four sections:

Section A—General Rules (Articles 17 - 21 [16 - 19])

Section B—Merchant Vessels (Articles 22-23 [20 - 22])

Section C—Government Vessels other than Warships (Articles 24 - 25 [23 - 24])

Section D—Warships (Articles 26 - 27 [25 - 26])

85. Article 17 itself had been re-drafted as follows to take account of the comments made by the United Kingdom Government:

"1. Vessels of all States shall enjoy the right of innocent passage through the territorial sea.

"2. 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.

"3. Passage is innocent so long as the vessel uses the territorial sea without committing any act contrary to the present rules.

"4. 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."

86. Mr. ZOUREK said the text of paragraph 1 of article 17 was not in conformity with the Commission's decision that only merchant vessels had the right of passage.[6] As to warships, their passage had been specifically made subject to previous authorization or notification under the provisions of article 26, paragraph 1.

87. The system followed in the 1954 draft articles (A/2693) had been more accurate in that the right of innocent passage had been laid down in section A of that draft, entitled "Vessels other than Warships".

88. Mr. FRANÇOIS (Special Rapporteur) said Mr. Zourek's objection could be met by amending the paragraph to read: "Subject to the provisions of article 26, paragraph 1, vessels of all States shall enjoy the right of innocent passage through the territorial sea."

89. Sir Gerald FITZMAURICE said a better drafting would be "Subject to the present regulations, vessels of all States shall enjoy..." The Special Rapporteur's text suggested that passage by vessels other than warships was not subject to any restrictions—whereas in fact the draft articles laid down a number of conditions for innocent passage in respect of other types of vessel besides warships.

90. Mr. KRYLOV accepted Sir Gerald Fitzmaurice's suggestion.

91. Mr ZOUREK said that although he would have preferred article 17, paragraph 1 to appear under section B on merchant vessels rather than under section A (General Rules), he would not press the matter, and also accepted Sir Gerald's suggestion.

Sir Gerald Fitzmaurice's suggestion was adopted.

92. Mr. ZOUREK pointed out that paragraph 3 of article 17 did not define innocent passage. In that respect, paragraph 2 in the 1954 text was preferable and he suggested that the Commission should revert to it and state explicitly that passage was not innocent whenever a vessel used the territorial sea to commit acts prejudicial to the security of the coastal State or to such other of the interests of that State as the territorial sea was intended to protect.

93. Mr. FRANÇOIS (Special Rapporteur) said that article 17, paragraph 2 of the 1954 draft had been strongly criticized by governments in their comments

[6] See *supra*, 299th meeting, paras. 2–11.

(A/2934, Annex). One criticism had been its being drafted in a negative form ("Passage is not innocent if..."). A more serious objection had been its reference to the "public policy" of the coastal State, which left the door open to abuse. Finally, the expression "such other of its interests as the territorial sea is intended to protect" had been criticized as inappropriate.

94. Mr. SCELLE said he would agree to Mr. Zourek's proposal if it were amended so as to refer to any acts which violated international law. It was not enough to make provision for the security of the coastal State. The case had also to be covered of warships using the territorial waters of the coastal State in order to carry out an act of aggression against another State.

95. Mr. SANDSTRÖM said that, in its opening words at least, the 1954 draft had been more explicit than the one at present before the Commission.

96. Sir Gerald FITZMAURICE said that Mr. Scelle's difficulties only arose in respect of Mr. Zourek's proposal, not in respect of the text proposed by the Drafting Committee.

97. With regard to the possibility of aggression against a third State, in practice the coastal State was not in any position to know what a foreign warship was going to do after exercising its right of passage.

98. Mr. ZOUREK said that article 19, which laid down that a coastal State could take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to its other interests, was not sufficient. Some act contrary to the security of the coastal State could well take place before it had an opportunity to enact any regulations for the protection of its security.

99. Mr. KRYLOV recalled that the International Court of Justice had dealt with the Corfu Channel case[7] on the basis of the fact that the Albanian Government had not issued any regulations for the protection of its security.

100. Mr. SANDSTRÖM proposed that paragraph 3 of article 17 be amended to read:

> "Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law."

101. Mr. FRANÇOIS (Special Rapporteur) pointed out that, in substance, article 19 already covered Mr. Sandström's amendment.

102. Mr. SCELLE said there was no harm in emphasizing the point by adopting Mr. Sandström's amendment.

Mr. Sandström's amendment to article 17, paragraph 3, was adopted.[8]

103. The CHAIRMAN then put article 17 as amended to the vote.

The text read as follows:

> "1. Subject to the present regulations, vessels of all State shall enjoy the right of innocent passage through the territorial sea.
>
> "2. 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.
>
> "3. Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law.
>
> "4. 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."

Article 17 was adopted in that form by 7 votes to none, with 3 abstentions.

Article 18 [17]: Duties of the coastal State

> "1. The coastal State must not hamper innocent passage through the territorial sea. It is bound to use the means aft its disposal to ensure respect in the territorial sea for the principle of the freedom of communication and not to allow the said sea to be used for acts contrary to the rights of other States.
>
> "2. The coastal State is bound to give due publicity to any dangers to navigation of which it had knowledge."

104. Mr. ZOUREK criticized the second sentence of paragraph 1. It imposed on the coastal State duties which were outside the scope of the existing rule of international law.

105. Mr. KRYLOV said the passage had been inspired by the majority decision of the International Court of Justice in the Corfu Channel case.[9] He recalled his dissenting opinion attached to that judgement.

Article 18 was adopted by 8 votes to none with 2 abstentions.

Article 19 [18]: Rights of protection of the coastal State

> "1. The coastal State may take the necessary steps in its territorial sea to protect itself against any act prejudicial to its security or to such other of its interests as it is authorized to protect under the present rules.
>
> "2. In the case of vessels proceeding to inland waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which the admission of those vessels to those waters is subject.

[7] *I.C.J. Reports 1949*, p. 4.

[8] See 329th meeting, paras. 17–24.

[9] *Ibid.*

"3. The coastal State may suspend temporarily and in definite areas of its territorial sea the exercise of the right of passage if it should deem such suspension essential for the protection of the rights referred to in paragraph 1. Should it take such action, it is bound to give due publicity to the suspension.

"4. There must be no suspension of the innocent passage of foreign vessels through straits used for international navigation between two parts of the high seas."

106. Mr. FRANÇOIS (Special Rapporteur) said that article 19 had been re-drafted so as to omit the reference to public policy or "*ordre public*". Paragraph 4 of the article was new; through inadvertence, the corresponding provision had appeared in the 1954 draft in the section referring only to warships whereas, in fact, it applied to all vessels.

107. Sir Gerald FITZMAURICE said he would abstain from voting on article 19 for reasons which he would give later.

108. Mr. ZOUREK said he also would abstain from voting on article 19, because he had understood the Commission at its previous session (246th meeting, paras. 1 and 31) to have adopted the principle that the coastal State had the right to suspend right of passage altogether.

Article 19 was adopted by 8 votes to none, with 2 abstentions.

Article 20 [19]: Duties of foreign vessels during their passage

"Foreign vessels exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with those rules and other rules of international law 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 conservation of the living resources of the sea;

"(*d*) The rights of fishing, hunting and analogous rights belonging to the coastal State;

"(*e*) Any hydrographical survey."

109. Mr. FRANÇOIS (Special Rapporteur) explained that sub-paragraph (*e*), referring to "any hydropgraphical survey", was intended to give the coastal State the exclusive right of mapping its seas.

Article 20 was adopted unanimously.

Further consideration of the revised draft articles submitted by the Drafting Committee was deferred till the next meeting.

The meeting rose at 1.15 p.m.

325th MEETING

Friday, 1 July 1955, at 4 p.m.

CONTENTS

* The number within brackets indicates the article number in the draft contained in Chapter III of the Report of the Commission (A/2934).

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Régime of the territorial sea (item 3 of the agenda) (*continued*)

REVISED DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles on the régime of the territorial sea as revised by the Drafting Committee.

Article 21 [20]: Charges to be levied upon foreign vessels

2. Mr. FRANÇOIS (Special Rapporteur) said that the text of article 21 in the draft adopted at the previous session[1] had been retained unchanged.

3. Mr. SANDSTRÖM proposed that the two sentences

[1] For text of the provisional articles adopted at the sixth session, see "Report of the International Law Commission covering the work of its sixth session" (A/2693), para. 72, in *Yearbook of the International Law Commission, 1954*, vol. II.

of which the article was composed should form a single paragraph because the second stated an exception to the general rule laid down in the first.

It was so agreed.

Article 21, as amended, was adopted unanimously.

Article 22 [21]: Arrest on board a foreign vessel

"1. A coastal State may not take any steps on board a foreign merchant 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. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation."

4. Mr. FRANÇOIS (Special Rapporteur) explained that paragraph 3 had been modified in order to make it even more plain that the coastal State should only take steps to make an arrest when the case was genuinely urgent.

5. Mr. ZOUREK failed to understand why outward- and inward-bound vessels should be treated on a different footing.

6. Mr. SANDSTRÖM said that he had asked himself the same question whether it was in fact reasonable to make a distinction in cases when a crime had been committed in the inland waters or on the territory of the coastal State by a passenger on a ship heading for the high seas.

7. Mr. FRANÇOIS (Special Rapporteur) pointed out that if the vessel was merely passing through the territorial sea its connexion with the coastal State was too tenuous to allow the latter to make arrests on board except in the cases laid down in paragraph 1. On the other hand, if the coastal State discovered that a passenger on a vessel lying in one of its ports or passing through the territorial sea after leaving inland waters had committed a crime it seemed reasonable to allow it to make an arrest provided the vessel had not left the territorial sea.

8. Mr. SANDSTRÖM said that the Special Rapporteur had perhaps not fully understood his doubts, which he would illustrate by way of the following example. If a theft had been committed on board a vessel coming from the high seas and traversing the territorial sea in order to enter a port or inland waters the coastal State had no right of arrest, but if the vessel were leaving inland water in order to reach the high seas the arrest could be carried out provided the vessel had not left the territorial sea.

9. Mr. FRANÇOIS (Special Rapporteur) said that the reason for the difference was simple: in the first case the arrest could be made when the vessel reached port; in the second the vessel was leaving the area where the coastal State exercised jurisdiction and the right of arrest in the territorial sea must therefore be allowed. However, he must repeat that there was no right of arrest if the vessel did not touch the shore of the coastal State but merely passed through its territorial sea.

10. The CHAIRMAN observed that the view taken at the 1930 Conference for the Codification of International Law was that just expounded by the Special Rapporteur.[2]

11. Mr. SANDSTRÖM said that he now understood the distinction between the two cases but wondered whether it was very logical.

12. The CHAIRMAN pointed out that the Commission would in any case be able to re-examine the article at the following session.

Article 22 was adopted unanimously.

Article 23 [22]: Arrest of vessels for the purpose of exercising civil jurisdiction

"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.

"2. A vessel may be arrested only in respect of a maritime claim arising from one of the causes listed in article 1 of the International Convention relating to the Arrest of Sea-going Ships concluded at Brussels on 10 May 1952.

"3. A claimant may arrest either the particular vessel in respect of which the maritime claim arose, or any other vessel owned by the person who at the time when the maritime claim arose was the owner of the particular vessel; but no vessel, other than the particular vessel in respect of which the claim arose, may be arrested in connexion with any maritime claim relating to:

"(*a*) disputes as to the title to or ownership of any vessel;

"(*b*) disputes between co-owners of any vessel as to the ownership, possession, employment or earnings of that vessel;

"(*c*) the mortgage or hypothecation of any vessel.

[2] See League of Nations publication, *V. Legal, 1930.V.16* (document C.351(b).M.145(b).1930.V.), p. 215.

"4. 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 lying in the territorial sea, or passing through the territorial sea after leaving the inland waters for the purpose of any civil proceedings."

13. Mr. FRANÇOIS (Special Rapporteur) said that article 23 had been substantially modified following the Commission's decision to bring it into line with article 1 of the International Convention relating to the Arrest of Sea-going Ships, concluded at Brussels on 10 May 1952.[3] That decision had been taken because the Commission had found that its former article 24, based as it had been on the system endorsed at the Conference for the Codification of International Law, was not fully in accord with the Convention, which had been the result of a very careful examination of the problem by experts in maritime law.

14. The task of harmonization had not been easy because article 1 of the Convention was of great length and enumerated sixteen cases in which the right to arrest vessels for the purpose of exercising civil jurisdiction was recognized. To enumerate those sixteen cases would have made article 23 inordinately long and quite out of proportion to the remainder of the draft. It had accordingly been decided to insert a bare reference to article 1 of the Convention in paragraph 2. Of course that reference in no way implied acceptance of the Convention as a whole or of any of its specific provisions other than the list included in article 1.

15. One feature of the Convention was that it allowed a claimant to arrest any other vessel belonging to the owner of the particular vessel in respect of which the maritime claim had arisen. That rule, together with the three exceptions to it contained in the Convention, had been reproduced in paragraph 3. Paragraph 4 was the same as paragraph 2 in article 24 of the Commission's previous draft.

16. Mr. KRYLOV confessed that the Convention of 1952 was of such daunting complexity that he had not, as he would have wished, prepared an alternative text to that submitted by the Special Rapporteur. Nevertheless he must express his general disapproval of the practice of simply referring to other agreements or treaties in what was intended to become a legal instrument, instead of quoting the relevant passage in full. Nor could he share the Special Rapporteur's certainty that the reference in question had no binding implication as to the rest of the Convention.

17. For the foregoing reasons, and because he wished to consult Soviet experts, he would abstain from voting on the text, which he hoped might be improved at the next session.

18. Mr. ZOUREK stated that it was not easy to reconcile the interests of navigation with those of the coastal State, and the desire to bring the text of article 23 into line with the Convention of 1952 had not had a very favourable result for navigation. The original text had been based on the principle that vessels which were merely passing through the territorial sea could only be arrested for failure to abide by the obligations assumed for purposes of passage alone. According to the revised text there would be sixteen cases in which arrest was possible, and that, in his opinion, would be going very much too far. Moreover, the Convention of 1952 itself provided that the arrest could only take place after a warrant had been inssued by a tribunal. He was therefore opposed to paragraph 2 and the provision in paragraph 3 which entitled claimants to arrest other vessels owned by the same person. The Commission had surely not decided in favour of such far-reaching modifications but had simply requested the Drafting Committee to examine the possibility of bringing the text of the original article 24 into line with the Convention.

19. Sir Gerald FITZMAURICE confessed himself surprised by Mr. Zourek's opposition to article 23, seeing that Mr. Zourek's main concern throughout the discussion seemed to have been with the interests of the coastal State, rather than with the freedom of navigation.

20. Mr. KRYLOV wondered whether the Commission might not be well advised to revert to the text adopted at the previous session since the efforts to bring it into line with the Convention of 1952 had not had particularly satisfactory results. The Convention, after all, would still be binding on the signatory States.

21. The CHAIRMAN observed that if the revised text of article 23 were accepted and the draft articles were ratified, States which had not signed the Convention of 1952 might regard exercise of the rights laid down in article 23 as contrary to international law, considering that vessels could only be arrested for the purpose of exercising civil jurisdiction on the cases laid down in article 22. States might therefore be hesitant to apply article 23 lest it be challenged as contrary to general international law.

22. Mr. FRANÇOIS (Special Rapporteur) said that the Convention of 1952 had, to the detriment of the freedom of navigation, conferred greater rights on coastal States than they had enjoyed in the past. He doubted whether States which had felt that development to be necessary would be prepared to revert to the stand taken at the 1930 Codification Conference.

23. He shared Sir Gerald Fitzmaurice's surprise at Mr. Zourek's sudden defence of the freedom of navigation.

24. Mr. SANDSTRÖM asked whether the Convention of 1952 had been ratified by a significant number of States. If the number indicated that the Convention reflected a new trend of development, he would support the revised text of article 23.

[3] United Kingdom, Parliamentary Papers, 1952-53, vol. XXIX, Cmd. 8954. Also extracts in *Laws and Regulations on the Régime of the Territorial Sea* (United Nations publication, Sales No.: 1957.V.2), p. 723.

25. Mr. FRANÇOIS (Special Rapporteur) replied that to the best of his knowledge the States which had ratified the Convention numbered about ten.

26. The CHAIRMAN said that it would be illuminating to see what comments the new text gave rise to on the part of governments.

27. Mr. ZOUREK said that his remarks should have caused no surprise since he had consistently sought to reconcile the two fundamental principles of the sovereignty of the coastal State and the freedom of the high seas, being anxious not to limit the former uselessly in favour of the latter. In the present instance there was no reason to fear encroachment upon the sovereignty of the coastal State whose full right to make arrests on board vessels lying in its ports was adequately protected in article 22, paragraph 2. Obviously any vessel expecting an arrest to take place would be careful not to enter the territorial sea of the State concerned. The practical significance of article 23 therefore was not very great. However, he considered that the Commission should revert to the text adopted at the sixth session.

28. The CHAIRMAN suggested that it might be wiser for the Commission to examine the whole question further before taking a final decision.

29. Sir Gerald FITZMAURICE, referring to the concluding remark made by Mr. Zourek, who shortly before had protested against the rights conferred upon the coastal State in the new version of article 23, pointed out that under paragraph 2 of the Commission's original text the coastal State's right of arrest was unrestricted whereas in the new text it was limited to sixteen cases.

30. Mr. ZOUREK observed that in the text adopted at the previous session the useful distinction accepted by the 1930 Codification Conference between passage through the territorial sea and entry into a port had been maintained.

Article 23 was adopted by 7 votes to 1, with 3 abstentions.

Article 24 [23]: Government vessels operated for commercial purposes

"The rules contained in the preceding articles of this chapter shall also apply to government vessels operated for commercial purposes."

31. Mr. KRYLOV said that he would vote against article 24 for the reasons he had given in the course of the first reading (306th meeting, para. 50).

32. Mr. ZOUREK said he too would vote against article 24. It would have been preferable to leave that article in abeyance, as had been done with article 25.

Article 24 was adopted by 7 votes to 2, with 1 abstention.

Article 25 [24]: Government vessels operated for noncommercial purposes

33. Mr. FRANÇOIS (Special Rapporteur) said article 25 had been left in abeyance.

34. Sir Gerald FITZMAURICE recalled the proposal which he had made at the 299th meeting (paras. 85-89) for an article to safeguard the right of passage over waters behind straight base lines which had previously been territorial waters subject to the right of passage.

35. When his proposal had been presented at the 299th meeting, the Commission had decided, on the suggestion of the Special Rapporteur, that the proper time to discuss it was in connexion with article 5 on straight base lines (para. 90).

36. He had therefore reverted to his proposal at the 316th meeting (paras. 50-53). Several members had replied that the Commission was dealing exclusively with the régime of the territorial sea and not with the right of passage in internal waters. That argument was a purely technical one, and it should not have stopped the Commission from dealing with the matter.

37. He drew attention to the fact that straight base lines laid down by the Government of Iceland in March 1952 and put into effect in May 1952 had had the effect of turning into internal waters maritime areas which were as far as 30 or even 50 miles off the coast. The total area involved exceeded 5,0000 square miles and in one particular gulf (Faxaflói) the area thus technically transformed into internal waters was no less than 2,500 square miles.[4]

38. The creation of an artificial category of internal waters out of what had always been territorial waters subject to the right of passage, waters which were geographically part of the sea and not inland waters at all, created an extremely serious problem and one which the Commission ought not to refuse to discuss.

39. He had decided not to press his proposal at the present stage, but reserved the right to revert to it at the next session when he hoped the Commission would give it full and fair consideration.

40. Mr. SCELLE agreed with Sir Gerald Fitzmaurice's remarks. An artifice of procedure had added to the inland waters—those waters which were geographically inland, i.e., nearly always behind the coastline—a second category of waters placed under the exclusive control of the coastal State. Such artificial inland waters should be subject to a régime as close to that of the territorial waters as possible.

41. The CHAIRMAN said that the matter would be discussed at the next session. It would, however, be useful to insert a paragraph thereon in the report on the present session.

42. Mr. FRANÇOIS, speaking as Rapporteur, said that he would devote a paragraph of the report on the current session to the matter raised by Sir Gerald Fitzmaurice.

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[4] For a map of Iceland illustrating the effect of the base lines see "Report of the International Law Commission covering the work of its fifth session" (A/2456), Annex II, No. 8, in *Yearbook of the International Law Commission, 1952*, vol. II.

Article 26 [25]: Passage

"1. The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. It shall, in general, grant innocent passage subject to the observance of the provisions of articles 19 and 20.

"2. It may not interfere in any way with passage through straits used for international navigation between two parts of the high seas.

"3. Submarines shall navigate on the surface."

43. Mr. FRANÇOIS (Special Rapporteur) said that the text of the article on passage had been amended so as to give satisfaction to a number of comments made by governments.

44. Mr. SCELLE proposed the deletion of the words "in any way" in paragraph 2.

45. Mr. KRYLOV said the text of paragraph 2 was couched in far too general terms. It appeared to cover all straits. Some straits, such as the Dardanelles, however, were governed by special international conventions.

46. Mr. SANDSTRÖM said that the matter could be covered by the insertion of the words "except where otherwise provided by international convention".

47. The CHAIRMAN felt it went without saying that a special rule (such as that embodied in a treaty on a particular strait) derogated from a general one.

48. Mr. SCELLE said that the provisions of paragraph 2 could refer to any strait, because all of them connected two parts of the high seas. A better formulation was to specify that only straits essential to international navigation were intended.

49. Mr. SANDSTRÖM said that the terms "used for international navigation" constituted a sufficient qualification.

50. Mr. FRANÇOIS (Special Rapporteur) recalled that the Commission had agreed to adopt the criterion accepted by the International Court of Justice in the Corfu Channel Case[5] and had rejected a proposal by Mr. Zourek that the words "indispensable to international navigation" be substituted for the words "used for international navigation."[6]

51. Mr. SCELLE pointed out that Mr. Zourek's amendment had been rejected by 4 votes to 3 with 5 abstentions. Those members who disapproved of it were therefore only half as numerous as those who were not opposed to it.

52. Sir Gerald FITZMAURICE said that the first sentence of paragraph 1 did not represent existing international law. The prevailing international practice was to give notification only when warships were visiting ports. They were not at present required to advise the coastal State every time they wished merely to pass through its territorial waters.

53. The first sentence, moreover, was quite unnecessary, in that article 19 (on the rights of protection of the coastal State) applied to all ships and gave the coastal State all the rights it needed in order to protect its legitimate interests.

54. There was no reason to make innocent passage subject to notification.

55. Finally, he drew attention to the necessity of referring in paragraph 2 to "innocent passage", and not merely to "passage".

56. In reply to a question by Mr. ZOUREK, Mr. FRANÇOIS (Special Rapporteur) said that paragraph 2 only applied to straits which were actually used for international navigation. It did not apply to straits which it might be possible to use for that purpose but which were not, in fact, being so used.

57. Sir Gerald FITZMAURICE said that a term such as "essential" or "indispensable" would introduce an undesirable subjective element. The only straits that could be described as absolutely essential were straits leading to inland seas, such as the Sound leading into the Baltic and the Bosphorus leading into the Black Sea. Such vital waterways as the Suez Canal or the Panama Canal could, in strict logic, be described as non-essential because shipping could go round the Cape of Good Hope or round Cape Horn.

58. Mr. EDMONDS moved that article 26 be re-considered. He recalled that the Commission had adopted only a decision of principle regarding that article at its 307th meeting (para. 54). On that very feeble vote embodying a most indefinite statement concerning the ground which the article should cover, the Drafting Committee had prepared detailed provisions which constituted a broadening of the principle upon which the Commission had agreed.

59. He recalled his abstention from voting at the time because he had felt that the question had been put to the Commission in a manner which made it very difficult, if not impossible, to vote upon.[7]

60. Mr. FRANÇOIS (Special Rapporteur) said that the only question involved in the vote to which Mr. Edmonds referred had been whether the coastal State had the right to impose previous authorization or notification upon passing foreign warships. In the 1954 text (A/2693), that right had been denied, save for exceptional circumstances. The decision at the current session had been the reverse.

The Commission rejected Mr. Edmonds' motion to reconsider article 26 by 5 votes to 3, with 3 abstentions.

61. In reply to a question raised by Mr. SCELLE on paragraph 2, Mr. FRANÇOIS (Special Rapporteur) said

[5] *I.C.J. Reports 1949*, p. 4.

[6] 308th meeting, para. 39.

[7] 307th meeting, para. 55.

the provision was intended to forbid the closing of a strait used for international navigation.

62. Mr. SANDSTRÖM recalled the issue involved in the Corfu Channel Case.[8] That case had been pleaded on the basis of the fact that although the Corfu Channel was not essential to navigation, it was nonetheless a strait actually being used by international shipping.

63. Mr. SCELLE deplored the tendency of the Commission to turn into general principles rulings of the International Court of Justice which concerned specific instances. It did not necessarily follow that because the International Court of Justice had given a ruling in a certain sense in a particular case, that ruling could be turned into an abstract rule of law.

64. Mr. KRYLOV said a more precise formulation of paragraph 2 would be "straits normally used for international navigation".

65. He recalled that in the Corfu Channel Case the International Court of Justice had had in view the considerable number of small Greek ships which used that channel.

66. Mr. FRANÇOIS (Special Rapporteur) accepted Mr. Krylov's suggestion for the inclusion of the word "normally". The same modification should also be made in article 18.

67. With reference to Mr. Scelle's proposal to delete the words "in any way" from paragraph 2, he pointed out that the 1930 Codification Conference had stated, in the French text, that the coastal State had no right to interfere with passage *sous aucun prétexte.*

68. Mr. EDMONDS said he still felt that the vote taken at the 307th meeting "that the coastal State could, in law and as a matter of principle, forbid the passage of foreign warships through its territorial sea" did not warrant the broad and comprehensive wording proposed by the Drafting Committee.

69. He submitted that the new text was not properly before the Commission.

70. Mr. KRYLOV, in his capacity as Chairman of the Drafting Committee, rejected Mr. Edmonds' criticism. The Drafting Committee had not gone outside its competence in drafting article 26.

71. Sir Gerald FITZMAURICE, referring to his objections to article 26, said the general feeling in the Drafting Committee had been that those objections concerned points of substance which should be taken up before the full Commission. He had therefore intended to place his objections before the Commission at the present stage. He recalled that the question put to the vote at the 307th meeting had been framed in the following manner: whether there were any circumstances in which the coastal State could forbid passage to foreign warships. It was a case of laying down a right of some sort without attempting to define it.

72. In actual fact, article 19 contained all that was necessary for the protection of the coastal State; and the provisions of article 26 went far beyond that was required as a result of the Commission's vote.

73. Mr. SANDSTRÖM agreed with Mr. Krylov that the Drafting Committee had acted, in connexion with article 26, on the basis of the decision taken at the 307th meeting.

74. Mr. SCELLE proposed that the word "innocent" be inserted before the word "passage" in paragraph 2. Such an amendment would make it clear that passage with a view to aggressive action could be prevented in any case.

75. Mr. FRANÇOIS (Special Rapporteur) said that any warship wanting to pass would claim that its passage was innocent.

76. With regard to the remarks made by Sir Gerald Fitzmaurice and Mr. Edmonds, he agreed with Mr. Krylov that the Drafting Committee had acted in the only manner incumbent upon it following the vote taken at the 307th meeting.

77. Mr. ZOUREK asked for the various paragraphs of article 26 to be voted separately.

78. Mr. EDMONDS enquired from the Chairman whether he would be in order in proposing the adoption of article 26, paragraph 1 of the 1954 draft (A/2963) in place of the text proposed by the Drafting Committee.

79. The CHAIRMAN said that such a proposal would not be in order because it would be tantamount to a proposal to reconsider the decision taken at the 307th meeting, and a proposal along the latter lines had already been rejected at the present meeting (para. 60 above).

Article 26, paragraph 1, was adopted by 8 votes to 2.

Mr. Scelle's proposal to delete the words "in any way" from paragraph 2 was rejected, 4 votes being cast in favour and 4 against, with two abstentions.

Mr. Scelle's proposal to add the word "innocent" before the word "passage" in paragraph 2 was adopted by 5 votes to 3 with 2 abstentions.

Paragraph 2 as amended was adopted by 9 votes to none with 1 abstention.

Paragraph 3 was adopted by 10 votes to none with 1 abstention.

80. The CHAIRMAN then put to the vote article 26 as a whole. As amended, the text read as follows:

"1. The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 19 and 20.

"2. It may not interfere in any way with innocent passage through straits normally used for international navigation between two parts of the high seas.

[8] *I.C.J. Reports 1949*, p. 4.

"3. Submarines shall navigate on the surface."

In that form, article 26 was adopted by 8 votes to 2 with 1 abstention.

Article 27 [26]: Non-observance of the regulations

"If any warship 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."

81. Sir Gerald FITZMAURICE drew attention to the futility of the provision in question. The coastal State, it was therein stated, could require a warship concerned to leave the territorial sea. But a foreign warship which was passing through the territorial sea was *ipso facto* in process of leaving it.

Article 27 was adopted by 6 votes to 2, with 3 abstentions.

82. The CHAIRMAN said that the vote on the draft articles as a whole would be taken at a later stage.

83. Replying to a question by Sir Gerald FITZMAURICE, Mr. FRANÇOIS (Rapporteur and Special Rapporteur) said that the proper time for the expression of dissenting opinions would be when the Commission came to discuss its report.

The meeting rose at 6.30 p.m.

326th MEETING

Monday, 4 July 1955, at 3 p.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1)

CHAPTER I: INTRODUCTION (A/CN.4/L.59)

1. Mr. FRANÇOIS (Rapporteur) said Faris Bey el-Khouri had drawn his attention to the fact that the report was subdivided into chapters and that the draft provisional articles concerning the high seas were themselves divided into chapters.

2. Mr. KRYLOV said there was no inconsistency in the term "chapter" being used in both connexions. In the one case the term referred to sub-divisions of the report; in the other, it referred to subdivisions of a quasi-legislative text.

3. Mr. SANDSTRÖM said the term "chapter" had been used in both contexts in previous reports without giving rise to any objection.

4. Mr. FRANÇOIS (Rapporteur) said the term would therefore be retained.

Paragraph 1 [1]: Introduction*

5. Mr. LIANG (Secretary to the Commission) said chapter I had been prepared by the Secretariat. The last sentence of paragraph 1, in its reference to those chapters submitted to the General Assembly for information and those submitted for decision, would naturally be put in final form in accordance with the actual decisions of the Commission.

Paragraph 1 was adopted subject to final drafting of the last sentence.

Paragraphs 2-4 [5-7]: Officers
Paragraph 5 [3]: Seats to be filled as a result of vacancies arising since the sixth session*

Paragraphs 6-7 [2 and 4]: Membership and attendance*

6. Mr. SANDSTRÖM proposed that the section on membership and attendance, appearing as paragraphs 6 and 7, be made to precede the paragraphs concerning officers, as had been done in previous reports of the Commission.

7. Mr. EDMONDS pointed out that there were two material errors in the draft report. The final sentence of paragraph 5 spoke of the term of office of members of the Commission as expiring on 31 December 1957, whereas the correct date was 31 December 1956. In paragraph 7, the final sentence, stating that he (Mr. Edmonds) had attended meetings from 2 May to 25 June inclusive, was an obvious mistake.

8. Mr. LIANG (Secretary to the Commission) agreed with Mr. Sandström's proposal. He further suggested that the last sentence of paragraph 5, dealing with the term of office, and the last two sentences of paragraph 7, which referred to the exact dates between which certain members attended the Commission's meetings, be deleted as unnecessary. That would also eliminate the errors noted by Mr. Edmonds.

* The numbers within brackets indicate the paragraph numbers in the "Report" of the Commission.

9. Mr. FRANÇOIS (Rapporteur) accepted the alterations suggested by the Secretary to the Commission.

10. In reply to a question by Mr. KRYLOV, Mr. FRANÇOIS stressed that the reference to the total absence of two members of the Commission, as it appeared in the first sentence of paragraph 7, would not be deleted.

11. Mr. GARCÍA AMADOR said that the absence of Mr. Padilla Nervo was due to health reasons and to the call of his official duties, and not to "professional and health reasons" as somewhat inaccurately stated in paragraph 7.

12. Mr. LIANG (Secretary to the Commission) said an appropriate expression would be used to meet Mr. García Amador's remark.

13. The CHAIRMAN proposed that paragraphs 2 to 7 of the report be re-drafted by the Secretariat, taking into account the suggestions made by Mr. Sandström, Mr. García Amador and the Secretary to the Commission, which had been accepted by the Rapporteur.

It was so agreed.[1]

Paragraphs 8-10 [8-10]: Agenda

14. Mr. GARCÍA AMADOR recalled that the subject of the responsibility of States had been included in the agenda by a decision taken at the Commission's two hundred and eighty-sccond meeting.[2] That item should therefore appear as item 6 of the agenda in paragraph 8 of the report; the items shown as 6, 7, 8 and 9 would then have to be renumbered 7, 8, 9 and 10.

15. Mr. FRANÇOIS (Rapporteur) said the correction would be made.

Subject to this amendment, paragraph 8 was adopted.

16. Mr. LIANG (Secretary to the Commission) suggested that the words "documents submitted in connexion with" and the reference to the two reports on the law of treaties, be deleted from paragraph 9 so that the second sentence thereof would read:

> "The Commission decided to adjourn to its next session the consideration of item 4—namely, the law of treaties—and the examiniation of the report on diplomatic intercourse and immunities submitted by Mr. A. E. F. Sandström, Special Rapporteur."

17. Mr. FRANÇOIS (Rapporteur) accepted that suggestion.

Thus amended, paragraph 9 was adopted.

Paragraph 10 was adopted without comment subject to final drafting.

Chapter II: Régime of the high seas (A/CN.4/L.59/Add.1)

Introduction

Paragraphs 1-5 [11-15]

Paragraphs 1-5 were adopted without comment.[3]

18. Mr. ZOUREK called for the inclusion in the introductory chapter to the Commission's report on the régime of the high seas of a reference to the memorandum submitted by the Government of the Polish People's Republic concerning freedom of navigation on the high seas (A/CN.4/L.53).

19. Mr. FRANÇOIS (Rapporteur) suggested that such a reference be included in the general part of the report.

20. Mr. LIANG (Secretary to the Commission) said the memorandum of the Government of the Polish People's Republic had been referred to the Commission because it had on its agenda an item on the régime of the high seas. The logical place for a reference to it was indeed the chapter on the high seas.

21. Mr. KRYLOV said the relevant paragraph could be placed immediately after paragraph 5 and numbered 6. The present paragraph 6 would therefore be re-numbered 7.

22. Mr. FRANÇOIS (Rapporteur) agreed.

The CHAIRMAN asked whether it was the Commission's wish that a praragraph be drafted by the Rapporteur along the lines proposed.

It was so agreed.

Mr. SANDSTRÖM pointed out the necessity of a reference to the memorandum by the Government of Ecuador (A/CN.4/L.63).

Mr. FRANÇOIS (Rapporteur) said the memorandum by the Government of Ecuador primarily concerned the régime of the territorial sea. He therefore proposed to insert a reference to it in the chapter of the report dealing with the régime of the territorial sea.

It was so agreed.

Paragraph 6 [17][4]

Mr. SALAMANCA proposed insertion of the words "pursuant to resolution 899 (IX) of the General Assembly" after the opening words of paragraph 6, "The Commission proposes at its eighth session". That would make it clear that the Commission, in grouping together systematically in a single report all the rules adopted by it in respect of the high seas, the territorial sea and all related questions, would be acting in ac-

[1] The document was later issued in revised for (A/CN.4/L.59/Rev.1).

[2] 282nd meeting, para. 10.

[3] In document A/CN.4/L.59/Add.1, para. 5 read as follows: "At its seventh session, the Commission studied the new report (A/CN.4/79) submitted by the special rapporteur. His findings are given below." (See *infra*, 327th meeting, para. 22).

[4] For paragraph 16, see *infra*, 329th meeting, para. 63.

cordance with its terms of reference under the above-mentioned resolution.

Mr. FRANÇOIS (Rapporteur) agreed.

Subject to this amendment, paragraph 6 (now paragraph 7) was adopted.

DRAFT ARTICLES CONCERNING THE HIGH SEAS

Article 1 : Definition of the high seas

23. Sir Gerald FITZMAURICE pointed out that the term "inland waters", used both in article 1 and in the comment thereto, was not adequate. The term "internal waters" was preferable and would correspond exactly to *eaux intérieures* used in the French original.

24. The waters concerned were hardly ever inland waters in the geographical sense. The adjective "inland" suggested lakes or rivers, and the term "inland waters", as used at the time of the 1930 Conference of Codification, was intended to cover waters which were geographically inland—i.e., actually behind the coast line.

25. The problem of artificial "internal waters" which were behind straight base lines but were geographically part of the sea had only appeared in 1951, after the International Court of Justice's judgement in the Fisheries Case.

26. Mr. SANDSTRÖM supported Sir Gerald Fitzmaurice's proposal to substitute "internal" for "inland" in the English text; the French and Spanish texts used words which corresponded to "internal".

27. Mr. GARCÍA AMADOR said the difficulty raised by Sir Gerald Fitzmaurice involved matters of substance and could best be dealt with at the following session.

28. He recalled that as long ago as the 1930 Conference of Codification, the Governments of Norway and Sweden had submitted a proposal in which reference was made to "inland" waters which were not actually behind the coast line but were enclosed by archipelagos.[5]

29. He agreed, however, that the term "internal waters" appeared to correspond to the Spanish text more nearly than the term "inland waters".

30. The CHAIRMAN said that perhaps the difficulty could have been avoided altogether if the article had been framed to state that the term "high seas" meant all parts of the sea which were beyond the territorial sea of a State.

31. Mr. FRANÇOIS (Rapporteur) agreed to the substitution of the word "internal" for the word "inland" in the English text of article 1 and the comment thereto.

Subject to this amendment, the comment to article 1 was adopted.

[5] See League of Nations publication, *V.Legal, 1930.V.16* (document C.351(b).M.145(b).1930.V), pp. 190 and 194.

Article 2 : Freedom of the high seas

32. Mr. EDMONDS pointed out that sub-paragraph 4, which referred to freedom to fly over the high seas, ran counter to a decision by the Commission not to deal with rights in the air.

33. He suggested the deletion of that sub-paragraph.

34. Mr. FRANÇOIS (Rapporteur) said that Mr. Edmonds' objection could be met quite satisfactorily by means of a statement in the comment to the effect that the Commission had not examined the question of freedom to fly over the high seas because that matter would be dealt with when the Commission came to codify air law.

35. Mr. KRYLOV said that Mr. Edmonds' proposal was tantamount to a proposal for reconsideration of an article voted by the Commission. A two-thirds majority would therefore be required before it could be discussed.

36. Mr. EDMONDS said he did not want to change a decision of the Commission. He wanted the text of article 2 to agree with a decision of the Commission.

37. Mr. ZOUREK said that the reference to the four freedoms in article 2 had been the subject of a specific decision by the Commission.

38. Mr. SCELLE said he agreed in principle with Mr. Edmonds' proposal to delete sub-paragraph 4.

39. If it were not possible at that late stage to delete the sub-paragraph in question, the comment to the article should, he proposed, make it clear that the Commission did not deal with freedom to fly over the high seas in the draft articles, any more than it dealt with several other important freedoms connected with the high seas. There was the freedom to carry out scientific research on the high seas; more important still was the freedom to extract mineral wealth from the high seas. The Commission, in its draft articles on the continental shelf, had granted to the coastal State the right to exploit the mineral wealth of the soil and sub-soil of the high seas wherever the depth of the sea did not exceed 200 metres. It would be the height of absurdity if the coastal State, which might well not have a continental shelf, was not allowed to extract mineral wealth from the high seas themselves—as distinct from exploiting their living resources.

40. If his proposal were not adopted by the Commission, he requested that his dissenting opinion be put on record.

41. Mr. SANDSTRÖM pointed out that the four numbered sub-paragraphs of article 2 were preceded by the words "Freedom of the high seas comprises, *inter alia*:" It was clear that the four freedoms mentioned in the numbered sub-paragraphs were not the only ones.

42. He recalled that article 2 of the draft articles on the territorial sea gave the coastal State sovereignty over the air space above its territorial waters. It was

therefore logical to make reference to freedom to fly over the high seas in the corresponding article of the draft concerning the régime of the high seas.

43. Mr. KRYLOV pointed out that the question of the continental shelf would be re-examined by the Commission at its next session. He suggested that the comment to article 2 should contain a reference to the fact that the freedom to fly over the high seas had not been fully examined by the Commission.

44. Sir Gerald FITZMAURICE said that even when with the words "*inter alia*" the list given in article 2 entailed considerable danger. Such lists always tended to be regarded as exclusive.

45. Mr. HSU agreed with Sir Gerald Fitzmaurice in his misgivings concerning the enumeration.

46. Mr. ZOUREK, on a point of order, pointed out that the Commission was discussing the comments to the articles and not the articles themselves.

47. The CHAIRMAN confirmed that the Commission was voting only the comments to the articles.

48. Any member could, if he wished, ask at any stage for the reconsideration of an article already voted. But any such proposal would require a two-thirds majority.

49. Mr. SCELLE said that he, for his part, did not propose reconsideration of the article itself. He only proposed that the comment to the article should contain a reference to the fact that the Commission had reserved for later discussion not only the question of freedom to fly over the high seas but also such freedoms as freedom of scientific research and freedom to extract mineral wealth from the high seas.

50. Mr. FRANÇOIS (Rapporteur) said it would be very difficult to include a paragraph in the comment along the lines suggested by Mr. Scelle. There was, for instance, the question of atomic tests carried out on the high seas: any reference by the Commission to the freedom of scientific research on the high seas might be construed as the expression of its views on that extremely delicate problem.

51. He would endeavour to draft a passage which would give some satisfaction to the objections of Mr. Scelle and certain other members, but if his solution were not approved by Mr. Scelle, he did not think that a footnote recording dissent would be appropriate. The best way of solving the problem would be to make reference in the body of the report to the fact that "certain members" had drawn attention to the point in question, without actually mentioning them by name.

52. The CHAIRMAN proposed that the comment to article 2 be reserved until the Rapporteur had had an opportunity of preparing the promised passage.[6]

It was so agreed.

Article 3: Right of navigation

53. Mr. GARCÍA AMADOR proposed that the final paragraph of the comment to article 4, which referred to ships flying the United Nations flag, be placed under article 3, where it properly belonged.

54. Mr. FRANÇOIS (Rapporteur) said that a note would be placed under article 3 containing a cross reference to the paragraph in question, which he proposed should be left where it stood.

The comment to article 3 was adopted, subject to inclusion of the note proposed by the Rapporteur.

Article 4: Status of ships

55. Mr. FRANÇOIS (Rapporteur) said the last line of the first paragraph of the French text of the comment to article 4 contained a typographical error; the reference was to articles 18, 21 and 22 (and not to articles 16, 21 and 22).

The comment to article 4 was adopted, subject to correction of the typographical error in the French text.

Article 5: Right to a flag

56. Mr. FRANÇOIS (Rapporteur) drew attention to the following typographical errors in the French text:

(i) Sub-paragraph 2 (*b*) of article 5 should read:

(b) d'une société en nom collectif ou en commandite, dont la majorité des membres personnellement responsables sont...

(ii) The following words should be added to the second sentence of the comment, after the words *naviguant à son service:*

par exemple, un navire appartenant à une société nationalisée; and the corresponding words should be deleted from sub-paragraph 2 (*b*).

57. Mr. KRYLOV questioned the validity of the suggestion contained in sub-paragraph 1 that it was suffi-

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[6] See *infra*, 329th meeting, para. 46.
In document A/CN.4/L.59/Add.1, the comment to article 2 read as follows:

"The principle generally adopted in international law that the high seas are open to all nations governs all regulations on the subject. No State may subject the high seas to its jurisdiction, the term "jurisdiction" being used here in a broad sense, including not merely the judicial function but any kind of sovereignty or authority. States are bound to refrain from any acts which might adversely affect the use of the high seas by nationals of other States. Freedom of the seas includes freedom of navigation, freedom to lay submarine cables, and freedom to fly through the superjacent air-space. But any freedom that is to be exercised in the high seas contains certain rules, most of them already recognized in positive international law, which aie designed not to limit or restrict the freedom of the high seas but to safeguard its exercise in the interests of the entire international community. Among the points covered by these rules are: 1. The right of States to exercise their sovereignty on board ships flying their flag; 2. The exercise of certain policing rights; 3. The right of States concerning the conservation of the living resources of the high seas; 4. The institution by coastal States of zones contiguous to their shores for the purpose of exercising certain well-defined rights; 5. The rights of coastal States with regard to the continental shelf. Points 1, 2 and 3 are the subject of the present regulations; points 4 and 5 were dealt with by the Commission in the report covering the work of its fifth session (A/2456)."

[7] Document A/CN.4/L.59/Add. 1 contained no comment to article 3.

cient for a ship to sail in the service of a State for it to be entitled to fly the flag of that State.

58. Sir Gerald FITZMAURICE agreed that the mere fact of a ship's sailing in the service of a State did not necessarily warrant its use of the flag of that State. A State might well charter a ship actually belonging to another State. The nationality of a ship was a much more fundamental question and rested on its ownership by nationals of a particular State or by a nationalized company of that State.

59. He proposed that the words "or sail in its service" after the words "be the property of the State concerned" be deleted from sub-paragraph 1 of article 5 and that the second sentence of the comment be amended to read as follows: "Obviously the State enjoys complete liberty in the case of ships owned by it or ships which are the property of a nationalized company."[8] To speak of "its own ships", as had been done in the original text of the comment, would beg the question, for the words "its own ships" might be taken to describe ships that flew the flag of that particular State.

60. Mr. ZOUREK thought that the domestic legislation of certain States enabled their flag to be flown by ships which were chartered by their nationals.

61. Mr. FRANÇOIS (Rapporteur) said that his search for countries having such legislation had yielded Switzerland and Yugoslavia as the only examples.

62. He accepted the amendments proposed by Sir Gerald Fitzmaurice.

Subject to those amendments and to correction of the typographical errors in the French text of article 5, sub-paragraph 2 (b), the comment was adopted.

63. Mr. ZOUREK recalled that the United Nations Secretariat was preparing a compilation of the laws of various countries on the nationality of ships.[9] He hoped the volume would cover the question of the right of ships chartered by nationals of a State to fly the flag of that State.

64. Mr. LIANG (Secretary to the Commission) said that the point mentioned by Mr. Zourek would be looked into.

Article 6: Ships sailing under two flags

The comment to article 6 was adopted.

Article 7: Immunity of warships

The comment to article 7 was adopted.

Article 8: Immunity of other state ships

65. Mr. SANDSTRÖM said he could not understand the significance of the two underlined words "in general", which appeared after the words "ships used on government service" in the second sentence of the comment.

66. Mr. KRYLOV agreed with Mr. Sandström's remarks. The words in question appeared to restrict the scope of a decision adopted by the Commission on his (Mr. Krylov's) proposal.

67. Mr. FRANÇOIS (Rapporteur) agreed to deletion of the underlined words "in general".

The comment to article 8 was adopted subject to deletion of the underlined words "in general".

Article 9: Signals and rules for the prevention of collisions

68. Mr. FRANÇOIS (Rapporteur) said that the English text of article 9 should be brought into line with the French by inserting the words "the vessels forming" after the words "accepted for".

69. Mr. KRYLOV reiterated his preference for using the expression "the majority of maritime States" in article 9.

70. Mr. SANDSTRÖM proposed the deletion of the words "e.g., in areas not used for international navigation" after the words "danger of confusion" in the first paragraph of the comment because the example chosen was inappropriate.

The amendment was accepted.

71. Mr. ZOUREK asked whether it might not be made clearer in the second paragraph of the comment that some members had favoured the expression "the majority of maritime States" because a small vessel could do a considerable amount of damage and reference to tonnages was out of place.

72. Mr. FRANÇOIS (Rapporteur) undertook to modify the text in the sense suggested by Mr. Zourek.[10]

On that understanding, the comment to article 9 was adopted as amended.

Article 10: Penal jurisdiction in matters of collision

73. Mr. FRANÇOIS (Rapporteur) said that the first paragraph of the comment should refer to the Permanent Court of International Justice and not the International Court of Justice.

74. Mr. SANDSTRÖM proposed deletion of the words "has long been almost universally observed and" after

[8] Instead of ". . . in the case of its own ships or ships sailing in its service, e.g.,a ship which is the property of a nationalized company."

[9] *Laws concerning the nationality of ships*, United Nations publication, Sales No.: 1956.V.1; and Supplement, United Nations publication, Sales No.: 59.V.2.

[10] In document A/CN.4/L.59/Add.1, paragraph 2 of the comment to article 9 read as follows:

"The Commission used the expression "the greater part of the tonnage of seagoing vessels' in preference to others which it considered, such as 'the majority of maritime States' or 'the majority of vessels'. It was of the opinion that, in the matter of safety of human life at sea, the interest of each State may be judged by the number of persons on board its ships. Hence, the tonnage of the vessels appears to be the best criterion."

the words "confirms a rule" in the last paragraph of the comment.[11]

It was so agreed.

75. Mr. LIANG (Secretary to the Commission) considered that the meaning of the third sentence in the first paragraph would be better rendered if the words "international maritime circles" were substituted for the words "merchant service" since the latter suggested that the judgement in the *Lotus* case had caused disquiet in one particular country.

The Secretary's suggestion was adopted.

76. Mr. ZOUREK pointed out, without wishing to make any formal proposal, that article 10 dealt with several matters though its title referred to collision only.

The comment to article 10 was adopted as amended.

Article 11 : Duty to render assitance

The comment to article 11 was adopted.

Article 12 : Slave trade

The comment to article 12 was adopted.

Articles 13 - 20 : Piracy

Article 13

77. Sir Gerald FITZMAURICE considered that the first sentence in the second paragraph of the comment to article 13 was too categorical : strong arguments could be adduced against the principle laid down in article 13. International law allowed States to take action against pirates irrespective of their nationality and others were required to refrain from interfering. It was a perfectly defensible point of view, endorsed by many authorities, to hold that international law went no further and enunciated no obligation whereby States must suppress piracy. He therefore proposed that that sentence be modified and that the words "laid upon it by international law" be deleted from the second sentence.

78. Mr. FRANÇOIS (Rapporteur) said that he did not altogether agree with the preceding speaker since the Commission had definitely decided that States should co-operate to the fullest possible extent in the repression of piracy.

79. Mr. ZOUREK said that since the Commission had upheld the view that piracy was an international crime something must be said on those lines in the comment.

80. The CHAIRMAN, speaking in his personal capacity, agreed with Sir Gerald Fitzmaurice that failure to suppress piracy was not a violation of international law.

81. Mr. KRYLOV said that the declaration made at the Congress of Vienna in 1815 about the scourge of piracy reinforced the view that it was the duty of States to repress it.

It was agreed to re-draft the first sentence of the second paragraph to read: "Article 13 lays down a sound principle" instead of "Article 13 lays down a principle which cannot be challenged".

The comment to article 13 was adopted as amended.

Article 14

82. Mr. SANDSTRÖM observed that sub-paragraph 3 in the first paragraph of the comment was at present in conflict with article 15 and therefore required some modification.

83. Mr. FRANÇOIS (Rapporteur) said that he would be prepared to meet Mr. Sandström's point by inserting some such wording as "Save in the case provided for in article 15" at the beginning of sub-paragraph 3.

84. Mr. HSU considered the distinction drawn in sub-paragraph 3 to be a false one since acts of piracy could be committed by any kind of vessel and not only by merchantmen.

85. It would be remembered that the Nyon Arrangement had been based on the International Treaty for the Limitation and Reduction of Naval Armamemt signed in London in 1930 which in its turn had been inspired by the Treaty relating to the Use of Submarines and Noxious Gases in Warfare drawn up at Washington in 1922 ; the purpose of all three had been to outlaw submarine warfare against merchant vessels, and had little connexion with civil war. He therefore felt that the first two sentences of the second paragraph were somewhat irrelevant and should be amended by substituting the words "brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts" for the words "are inconsistent with the viewpoint adopted by the Commission" and by deleting the words "which in any case are few in number and concerned with the settlement of very special cases", after the words "that such treaties".

86. Mr. FRANÇOIS (Rapporteur) accepted Mr. Hsu's amendments.

87. Mr. KRYLOV proposed deletion of the words "Acts committed for political ends cannot be regarded as piratical acts" after the first sentence in sub-paragraph 2 on the ground that it was impossible to establish a criterion to distinguish between acts committed for private ends and acts committed for political ends.

88. Mr. FRANÇOIS (Rapporteur) said that the controversial question whether a political act could be regarded as piracy had been discussed at great length in the past and had been raised in the Harvard Draft. He would personally prefer the second sentence of sub-paragraph 2 to be retained. On the other hand it might be desirable to explain a little more fully what was meant by acts committed for private ends.

89. Mr. SANDSTRÖM was opposed to modifying sub-paragraph 2 because it drew an important distinction.

90. Mr. ZOUREK considered Mr. Krylov's proposal to be well-founded. Moreover article 15 implicitly recognized that political acts might be assimilated to acts of piracy.

[11] An additional paragraph was later added to the comment.

91. He suggested that the French text of sub-paragraph 2 might be examined with a view to deciding whether the words *dans un but personnel* was an exact rendering of the words "for private ends".

92. Sir Gerald FITZMAURICE said that he could accept Mr. Krylov's proposal, but thought that the Commission should at its next session reconsider the wording of the first sentence in sub-paragraph 2 so as to find some better expression than "for private ends". The real antithesis which needed to be brought out was between authorized and unauthorized acts and acts committed in a public or in a private capacity. An act committed in a private capacity could have a political purpose but be unauthorized—as, for example, the seizure of a vessel by the member of an opposition party.

93. Mr. HSU supported Mr. Krylov's proposal.

Mr. Krylov's proposal to delete the second sentence in sub-paragraph 2 of the first paragraph of the comment was adopted by 5 votes to 3, with 3 abstentions.

94. Faris Bey el-KHOURI criticized the confusing manner in which sub-paragraphs 3, 4 and 5 had been drafted; it could be inferred from the present text that piracy was legal but only on the high seas.

95. The CHAIRMAN felt that the meaning was quite clear. Moreover, the form was customary in legal usage.

96. Mr. FRANÇOIS (Rapporteur) said that he would be unwilling to modify the text for the reasons given by the Chairman.

97. Mr. LIANG (Secretary to the Commission) suggested that sub-paragraph 3 required amendment since piracy could be committed only by individuals and not by vessels. It would be noted that the article itself referred to acts committed by the crew or passengers.

The comment to article 14 was adopted as amended.[12]

Article 15

The comment to article 15 was adopted.

Article 16

The comment to article 16 was adopted.

Article 17

The comment to article 17 was adopted.

Article 18

The comment to article 18 was adopted.

Article 19

The comment to article 19 was adopted.

Article 20

The comment to article 20 was adopted.

Article 21: Right of inspection

98. Mr. FRANÇOIS (Rapporteur) said that the words "right of visit" should be substituted for the words "right of inspection" in the title of article 21 and in the comment.

99. Sir Gerald FITZMAURICE considered that, in the third paragraph of the comment, the first sentence, in which reference was made to severe penalties, did not accurately reflect the provision contained in the article itself and should be deleted. The article merely stated that if the suspicions proved unfounded, and provided the vessel boarded had not committed any acts to justify them, compensation would be made.

100. In the last sentence of the same paragraph the word "and" should be substituted for the words "or where" after the words "where suspicion proves unfounded".

101. Mr. EDMONDS observed that the comment should bring out that compensation must be adequate.

102. Mr. FRANÇOIS (Rapporteur) accepted Sir Gerald Fitzmaurice's second amendment. The word "or" was due to an error.

Sir Gerald Fitzmaurice's proposal for the deletion of the first sentence[13] *in the third paragraph of the comment was accepted.*

In the same paragraph, it was also decided to replace the full stop after the word "action" by a comma and to delete the words "This applies".

103. Mr. ZOUREK considered that the last sentence in the comment should end at the words "to include such a provision" because other arguments in addition to that mentioned in the remainder of the sentence had been put forward.

104. Mr. FRANÇOIS (Rapporteur) considered that omission to be unnecessary because of the presence of the word "mainly".

The comment to article 21 was adopted as amended.

Further consideration of the Commission's draft report was adjourned.

The meeting rose at 6.10 p.m.

[12] See *infra*, 330th meeting, para. 1.

[13] It read as follows: "If the suspicions prove to be unfounded, the penalties must be severe."

327th MEETING

Tuesday, 5 July 1955, at 9.30 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1) (*continued*)

CHAPTER II: RÉGIME OF THE HIGH SEAS A/CN.4/L.59/Add.1) (*continued*)

DRAFT ARTICLES CONCERNING THE HIGH SEAS (*continued*)

Article 22: Right of pursuit

1. Sir Gerald FITZMAURICE said that at the appropriate moment he would ask for the insertion of a dissenting opinion concerning the question of the right of pursuit in the contiguous zone.

The comment to article 22 was adopted.

Article 23: Pollution of the high seas

The comment to article 23 was adopted.

Article 24: Right to fish

2. Mr. FRANÇOIS (Rapporteur) stated that the English of the article would have to be brought into line with the French, which had been modified in accordance with the Commission's decision at the second reading.[1]

3. Sir Gerald FITZMAURICE suggested that the opening words might read: "All States have a right to claim..."

4. Mr. SANDSTRÖM observed that the repetition of the word "right" in one line would be inelegant and suggested that the English text might remain unchanged.

5. Mr. EDMONDS said it was unnecessary to use the word "claim" since the right to fish on the high seas was uncontested. He proposed that the article begin with the words: "Nationals of every State have the right to engage in fishing".

6. Mr. LIANG (Secretary to the Commission) observed that that was more or less the wording he had proposed during the discussion. The function of the State to protect its nationals against interference in the exercise of that right would be implicit. If Mr. Edmonds' wording were accepted, the words "subject to their treaty obligations" would also have to be changed.

7. Mr. KRYLOV said that although the question was purely a drafting one, the Commission should be consistent and should word article 24 in the same way as it had worded the other articles, in terms of the rights of States.

8. Mr. SALAMANCA observed that the Spanish text was very close to that proposed by Mr. Edmonds. Perhaps the French text could be regarded as the authentic one and the English modified accordingly.

9. Mr. EDMONDS hoped that the text submitted to governments would be as clear and precise as possible. The fact that the articles would be reviewed at the following session was no excuse for slipshod drafting.

10. Mr. FRANÇOIS (Rapporteur) said that although in his opinion the French text was not particularly satisfactory he believed that an exact equivalent must be found in English.

11. Sir Gerald FITZMAURICE wondered whether it was really necessary for the Commission to word article 24 in terms of the rights of States, as suggested by Mr. Krylov. That had not been done, for example, in article 6.

12. The CHAIRMAN, speaking in his personal capacity, said that although he agreed with Sir Gerald Fitzmaurice in principle, international treaties usually laid down the obligations of States from which the rights of individuals flowed indirectly.

13. Faris Bey el-KHOURI pointed out that individuals could not be parties to international litigation.

14. Mr. ZOUREK did not think Mr. Edmond's proposal was entirely a matter of drafting.

15. Mr. KRYLOV said that Mr. Edmonds' proposal would not entail reconsideration of the substance and would only affect the English text.

16. Mr. LIANG (Secretary to the Commission) felt that Mr. Edmonds' proposal would call for modification in the French and Spanish texts.

Mr. Edmonds' proposal was rejected by 8 votes to 4.

17. Mr. FRANÇOIS (Rapporteur) pointed out that the reference to the section dealing with conservation of the living resources of the high seas, both in the comment to article 24 and in the last paragraph of the introductory comment to that section, should be to articles 25 to 33.

The comment to article 24 was adopted as amended.

Articles 25-33: Conservation of the living resources of the high seas

Introductory Comment

18. Mr. GARCÍA AMADOR proposed the insertion of the words "waste and" before the word "extermination" in the third paragraph of the introductory comment, so as to bring it into line with the wording used

[1] 321st meeting, paras. 17-48.

in the draft articles on fisheries adopted by the Commission at its fifth session.[2]

It was so agreed.

19. Replying to a point raised by Mr. EDMONDS, Mr. FRANÇOIS (Rapporteur) said that for the sake of clarity the words "as amended" should be inserted after the words "The draft articles" in the last paragraph of the introductory comment.

20. Mr. EDMONDS said that it was surely unnecessary to reproduce the draft articles on the conservation of the living resources of the high seas in an annex as well as in chapter II of the report itself. On the other hand it had been the Commission's understanding that Mr. García Amador's preamble to those draft articles would be reproduced in an annex.[3]

21. Mr. LIANG (Secretary to the Commission) said that in order to avoid confusion it was undesirable to annex the preamble and the draft articles to the report because it was the usual practice to reproduce the comments of governments in that manner. Moreover, as the draft articles apart from the preamble already appeared in chapter II, he agreed it would perhaps be an unnecessary waste of space in a report of relatively modest length to print them twice. A simple cross-reference might suffice. The draft report did not mention the Commission's decision to submit the draft articles on the conservation of the living resources of the high seas to the Food and Agriculture Organization of the United Nations (FAO) and all the bodies which had attended the International Technical Conference on the Conservation of the Living Resources of the Sea ("the Rome Conference"), inviting their comments.[4] He suggested that a reference to that decision might be inserted in the introduction to chapter II.

22. Mr. FRANÇOIS (Rapporteur) agreed, but felt that it would be the Commission's wish to submit Mr. García Amador's preamble as well to FAO and the other organizations which had attended the Rome Conference for comment.

It was so agreed, and the Commission also decided to insert in the introduction to chapter II a statement to the effect that the whole set of new draft articles on the régime of the high seas was at the same time being submitted to governments for comment.[5]

23. Mr. GARCÍA AMADOR considered that the preamble and text of the draft articles on conservation of the living resources of the high seas must be printed together in the report. Clarity should not be sacrified to the negligible saving made by not reproducing the text of the draft articles twice.

24. Mr. LIANG (Secretary to the Commission) said that if the draft articles were to be reproduced twice on the ground that the preamble could hardly stand alone, they should, for the reason he had already given, form an appendix to chapter II, not an annex to the report as a whole.

It was so agreed.

25. Mr. GARCÍA AMADOR considered that it should be made clear in the introductory comment to articles 25-33 that the Rome Conference had been convened in accordance with General Assembly resolution 900 (IX) to study the scientific aspect of conservation alone and had not dealt with the juridical problems involved.

The introductory comment to articles 25-33 was adopted as amended.

Article 25

26. Mr. EDMONDS considered that article 25 should be included among those listed in article 31 because any differences arising under article 25 should also be submitted to arbitration. Article 28 should also be mentioned in article 31.

27. Mr. FRANÇOIS (Rapporteur) said that Mr. Edmonds had raised a point of substance. The Commission had rejected Mr. Scelle's view[6] that States should always have the right to challenge conservation measures even if they had been promulgated unilaterally in an area being fished by the nationals of one State alone, and had agreed that recourse should only be had to arbitration when the nationals of more than one State were fishing in the area concerned. Even if the Commission decided to reopen the question, he would not support Mr. Edmonds.

28. Mr. SANDSTRÖM, agreeing with the Rapporteur, pointed out that article 27 dealt with differences concerning unilateral measures affecting nationals of other States.

29. Mr. EDMONDS observed in passing that disagreement might arise about whether the nationals of a second State were in fact engaged in fishing in a particular area.

30. Mr. KRYLOV agreed with Mr. Sandström as far as article 25 was concerned but supported Mr. Edmonds in thinking that article 28 should be added to the list in article 31.

31. Mr. FRANÇOIS (Rapporteur) said that reference to article 28 in article 31 had been omitted by an oversight. The text would be corrected.

32. Mr. ZOUREK asked whether he was to conclude from the Rapporteur's remarks that measures instituted under article 25 could not be challenged by another State even if they had not been based on appropriate scientific findings.

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[2] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 94, in *Yearbook of the International Law Commission, 1953*, vol. II.

[3] 323rd meeting, para. 67.

[4] 321st meeting, para. 24.

[5] It was inserted in para. 15 of the "Report" of the Commission.

[6] See *supra*, 300th meeting, paras. 87–88; 301st meeting; 302nd meeting, paras. 1–2.

33. Mr. FRANÇOIS (Rapporteur) replied that that conclusion was correct provided that article 30 was not applicable.

The comment to article 25 was adopted.

Article 26

34. Mr. EDMONDS said that there was an obvious inconsistency between the proviso "within a reasonable period of time" contained in articles 26, 27, 28 and 30 and the time-limit of three months laid down in article 31. That inconsistency might give rise to great procedural difficulties since a State might seek to delay arbitral proceedings on the ground that a reasonable period of time for reaching agreement had not elapsed.

35. Mr. FRANÇOIS (Rapporteur) observed that Mr. Edmonds had again raised an issue of substance which could not be discussed unless a motion for reconsideration were adopted by a two-thirds majority.

36. Mr. SANDSTRÖM contended that there was a very real difference between the two cases. It was perfectly reasonable to set a definite time-limit for the beginning of the arbitral proceedings but it was impossible to foresee how long negotiations would take between two States endeavouring to reach agreement.

37. Mr. KRYLOV said that at the next session he would support Mr. Edmonds in trying to persuade the Commission to extend the time-limit contained in article 31.

38. Mr. SALAMANCA considered that for the reasons given by Mr. Sandström the two provisions were not incompatible.

The comment to article 26 was adopted.

Article 27

39. Mr. EDMONDS observed that the article mentioned in the last sentence of the text of the article should be article 32.

40. Mr. FRANÇOIS (Rapporteur) undertook to rectify the error.

The comment to article 27 was adopted.

Article 28

41. In reply to a question raised by Mr. EDMONDS, Mr. LIANG (Secretary to the Commission) suggested that the word "claim" should be substituted for the word "pretend" in the last sentence of the English text of the comment.

It was so agreed.

The comment to article 28, as amended in the English text only, was adopted.

Article 29

42. Mr. EDMONDS pointed out that the last sentence of the text of the article itself should refer to article 32 and not article 31.

The comment to article 29 was adopted.

Article 30

The comment to article 30 was adopted.

Article 31

43. Mr. KRYLOV reaffirmed his whole-hearted opposition to article 31 because of the structure and functions of the arbitral commission.

44. Mr. ZOUREK said that he was unable to accept either article 31 or the comment thereto because he was opposed to the compulsory arbitration clause.

45. Mr. LIANG (Secretary to the Commission) suggested that the word "chose" should be substituted for the words "felt obliged to choose" in the penultimate sentence of the first paragraph of the comment.

It was so agreed.

46. Mr. EDMONDS, noting that article 28 had now been included in the list contained in article 31,[7] said that he would not press for a similar reference to article 25 in view of the Special Rapporteur's remarks, though he still felt that there was no objection to submitting differences connected with the application of article 25 to arbitration.

47. Passing to the comment, he suggested that the expressions "too dilatory" and "unduly protracted" in the second and third paragraphs were not only imprecise; they actually held out a temptation to the parties to prolong the proceedings.

48. Mr. LIANG (Secretary to the Commission) suggested the deletion of the word "too" and the word "unduly" in the two instances.

The Secretary's suggestion was accepted.

The comment to article 31 was adopted as amended.

Article 32

49. In reply to a question by Mr. EDMONDS, Mr. LIANG (Secretary to the Commission) explained that the English text of article 32 had not been corrected in conformity with the decision reached by the Commission during the second reading of the draft articles.[8] That mistake would be rectified in the final text.

50. Mr. GARCÍA AMADOR said that he had not reproduced the words "In arriving at its decisions" in the Spanish text of article 32 because they were entirely redundant.

The comment to article 32 was adopted.

Article 33

51. Mr. ZOUREK said that he had the same objections to article 33 as to article 31, with which it was closely linked.

The comment to article 33 was adopted.

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[7] See para. 31 above.

[8] 321st meeting, paras. 52–54.

Articles 34-38: Submarine cables and pipelines

The comments to articles 34-38 were adopted.

Consideration of further chapters in the draft report was deferred.

Proposal by Mr. Krylov for the appointment of a special rapporteur on consular intercourse and immunities

52. Mr. KRYLOV, observing that at its next session the Commission would not require a great deal of time to complete its work on the régime of the high seas, the régime of the territorial sea and related topics, said that discussion of Mr. Sandström's report (A/CN.4/91) on Diplomatic Intercourse and Immunities and Mr. García Amador's report on State responsibility might not take up the remainder of the session. He therefore suggested that Mr. Zourek be appointed Special Rapporteur on consular intercourse and immunities—a topic closely related to that already covered by Mr. Sandström. If his suggestion met with approval, he would make a formal proposal in that sense.

53. Mr. LIANG (Secretary to the Commission) reminded the Commission that the subject of consular intercourse and immunities had been among the fourteen topics selected for codification at its first session. There was in existence a Harvard Research Draft on the legal position and functions of consuls.

54. The CHAIRMAN considered the title of the Harvard Research Draft a little restrictive and preferred the one chosen by the Commission in 1949. A model convention might assist States in unifying their law and regulations on the subject.

55. Mr. LIANG (Secretary to the Commission) said that judging from the observations emanating from scholars and learned bodies dealing with the development of international law, the Commission might well start preparing for the study of other topics on its programme, even though they would not necessarily be taken up at the next session.

56. Mr. SALAMANCA welcomed Mr. Krylov's suggestion, which was particularly interesting because it offered a possibility of the Commission's adopting a new method of work. Clearly, a study on consular intercourse and immunities must be based on the internal regulations of States and there would accordingly be no need first to prepare a draft and then to submit it to governments for comment. Their observations would only be required on the controversial issues and there perhaps the Commission might do well to follow the practice of the League of Nations and send out questionnaires.

57. Mr. GARCÍA AMADOR supported Mr. Krylov's suggestion, firstly because the Commission might find itself short of subjects to discuss at the following session if, as he estimated, it needed a maximum of five weeks if not less for completing its work on maritime questions, and also because the study would complement Mr. Sandström's report.

58. Mr. SANDSTRÖM considered Mr. Krylov's suggestion to be a valuable one. The Commission would indeed be well advised to appoint a special rapporteur at the present session, but it should not expect his report to be ready for the eighth session; for judging from his own experience, the special rapporteur would probably have to rely very considerably upon the help that could be given by the Secretariat and the necessary studies might take some time to complete.

59. Mr. SALAMANCA asked what kind of assistance the Secretariat would be able to provide.

60. He entirely agreed with Mr. Sandström that the report on consular intercourse and immunities might not be ready for discussion by the eighth session.

61. The CHAIRMAN pointed out that the Commission's mandate expired in 1956 and it seemed hardly fitting to appoint a special rapporteur for a topic which would not be taken up until 1957. As there was a great deal of material on the subject, perhaps Mr. Zourek could be appointed special rapporteur on the assumption that he would be able to finish his report for the next session.

62. Mr. LIANG (Secretary to the Commission) said that the nature of the co-operation between the Secretariat and special rapporteurs was a matter which it was difficult to formalize.

63. The pattern of such co-operation had been set more or less from the outset of the Commission's work. It had always been the practice for the Secretariat to supply a survey of a topic to the special rapporteur on a particular subject if the rapporteur expressed a desire for secretariat help. In appropriate cases of necessity, the Secretariat invited experts outside its staff to prepare such surveys.

64. Another form of assistance which the Secretariat gave was to prepare a compilation of the relevant national legislative texts in the way it had done in the case of nationality laws (A/CN.4/56 and Add.1, A/CN.4/66, E/1112 and Add.1).

65. A *Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*[9] had been edited in 1933 under the auspices of the Harvard Law School by Mr. A. H. Feller and Mr. Manley O. Hudson in connexion with the research involved in the preparation of draft conventions with a view to the codification of those subjects.[10] That collection was now, of course, very much out of date.

66. The preparation of a volume of that type by the Secretariat took not months, but years. The necessary texts had to be obtained from governments or sought

[9] A. H. Feller and M. O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington, Carnegie Endowment for International Peace, 1933), 2 vol.

[10] Harvard Law School, *Research in International Law*. II, *Diplomatic Privileges and Immunities* and *The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), p. 15 and p. 189.

out in libraries; even in the latter case the government concerned had still to be asked whether the text in question was still the law in force.

67. The Secretariat submitted its surveys and compilations to the special rapporteur for his use before publication.

68. In the case of the topic of diplomatic intercourse and immunities, a survey of the subject had been prepared in a very short time by the Secretariat. It was not yet in its final form

69. He stressed that the special rapporteur on a particular topic could make such use as he considered appropriate of the material contained in a survey by the Secretariat. The rapporteur could decide to make a different survey of his own giving his approach to the question; or he could embark simply on the preparation of a draft convention or draft regulations.

70. With regard to the problem which arose when the special rapporteur was not re-elected as a member of the Commission by the General Assembly, he recalled the decision taken at the Commission's 1953 session on that issue:

> "A special rapporteur who had not been re-elected as a member of the Commission by the General Assembly would have to cease work on that date. However, the special rapporteur who had been re-elected should continue his work unless and until the Commission as newly constituted decides otherwise." [11]

71. Should the General Assembly decide to make the term of office of members of the Commission five years instead of three, the risk of a special rapporteur's being unable to continue his work would thereby be considerably lessened.

72. Mr. SALAMANCA said the topic of diplomatic intercourse and immunities, and also the question of the status of consuls, were matters which could not be dealt with adequately merely in the light of academic research of the type conducted under the auspices of the Harvard Law School. The primary source for the study of questions concerning diplomats and consuls was the laws and regulations applied to diplomatic and consular representatives by the various States. International conventions and agreements—which were few and, in any case, only applicable to the signatory States—were only a secondary source. As to the opinions of writers and research work of the type carried out under the auspices of the Harvard Law School, such material was of little value to the Commission's work since it tended to present the practices of a particular State as general principles of international law—in the case of the Harvard Research, the emphasis was on the practice of the United States State Department.

73. He did not suggest that the Secretariat should prepare a very voluminous survey of national legislation on the subject of diplomats and consuls. He did feel, however, that the Secretariat was in a good position to prepare an adequate and concise survey of such legislation, which would be of very great assistance to the special rapporteur. If the special rapporteur were to base his work on all the common ground that he would certainly find in the respective national legislative texts, there would be every chance that the work of the Commission would prove acceptable to governments. The matter of consular representation, in particular, was one in which discrepancies between the practices of various States existed only on minor points—as would appear clearly from the survey which the Secretariat would prepare.

74. It was essential that the Secretariat's survey be ready in time for the next session as it was possible that the Commission might deal with the topics of diplomatic immunities and the status of consuls at that session.

75. Mr. LIANG (Secretary to the Commission) said that the Secretariat had only very recently begun the preparation of a collection of national legislative texts concerning the position and immunities of diplomats and of consuls.

76. He emphasized that much time was required to complete work of that type. Patience and discretion were necessary in obtaining information from governments: a government might delay six or eight months before replying to a letter, and the Secretariat could not press for an answer by writing repeated reminders.

77. The Secretariat gave every possible help to special rapporteurs in the task of gathering material for their work. As the special rapporteur and the Commission had necessarily to rely on the authenticity of the material it supplied, the Secretariat had to check it carefully by making enquiries from the governments concerned or by other means at its disposal.

78. In connexion with the research on the question of the status of consuls carried out under the auspices of the Harvard Law School, there was no doubt that it presented the point of view of American scholars on the topics in question.

79. Mr. SALAMANCA said he had never doubted the excellent co-operation which had always existed between special rapporteurs and the Secretariat.

80. His purpose had been to stress two facts: firstly, that the matter of consular intercourse and immunities was one on which national legislation was comparatively uniform; secondly, that national legislative texts were the essential source of material for study of the question, and that any work which was not primarily based on that material—or which had a theoretical orientation—would not prove fruitful.

81. The CHAIRMAN, speaking in his personal capacity, said he warmly approved of Mr. Krylov's proposal for the appointment of Mr. Zourek as Special Rappor-

[11] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para 172, in *Yearbook of the International Law Commission, 1953*, vol. II.

teur on the topic of consular intercourse and immunities.

Mr. Zourek was unanimously elected Special Rapporteur on the topic of consular intercourse and immunities.

82. The CHAIRMAN said that consuls had very few privileges and immunities. The subject to be covered would therefore have to be of wider scope than those words suggested; it might entail the drafting of a model consular convention.

83. Mr. KRYLOV said he had had in mind not only the few privileges and immunities enjoyed by consuls, but, more broadly, their role as representative organs of a State.

84. It was highly desirable that the two branches of State representation abroad be dealt with concurrently, namely, the question of diplomatic intercourse and immunities on the one hand and, on the other, the wider but somewhat less controversial question of the status and role of consuls.

85. Mr. ZOUREK thanked the Commission for his appointment as Special Rapporteur on the topic of consular intercourse and immunities, and accepted the honour done to him.

86. The subject, as he saw it, covered the whole field of consular relations and consular representation, as well as those few privileges enjoyed by consuls.

87. At a later meeting of the Commission and before the end of the sesssion, he would give a brief outline of the topic as he (Mr. Zourek) construed it, with a view to obtaining the general views of his fellow members of the Commission. Those views would prove of very great value in the preparation of his report.

The meeting rose at 12.40 p.m.

328th MEETING

Wednesday, 6 July 1955, at 10 a.m.

CONTENTS

Chairman: Mr. Jean SPIROPOULOS

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. S. B. KRYLOV, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1-2) (*resumed from the 327th meeting*)

CHAPTER III: RÉGIME OF THE TERRITORIAL SEA
A/CN.4/L.59/Add.2)

INTRODUCTION

*Paragraphs 1-3 [19-21] **

Paragraphs 1-3 were adopted without comment.

*Paragraph 4 [22] **

1. Mr. FRANÇOIS (Rapporteur) said that in the French text the words *assortis de commentaires qui* should be placed after instead of before the words *pour autant qu'il s'agisse de modifications quant au fond.*

Paragraph 4 was adopted subject to the above correction of the French text.

*Paragraph 5 [23] **

2. Mr. GARCÍA AMADOR proposed that the final sentence of the paragraph be amended to read:

> "The Commission submits them to governments so that they may send it any comments they may see fit to make on these or any other articles of the draft before they are adopted at its eighth session and included in the final report to be submitted in accordance with resolution 899 (IX) of the General Assembly." [1]

3. Mr. FRANÇOIS (Rapporteur) accepted Mr. García Amador's proposal.

Paragraph 5 was adopted with the amendment proposed by Mr. García Amador.

Paragraph 6 [2]

4. Mr. GARCÍA AMADOR proposed the deletion of paragraph 6, which laid undue emphasis on the technical character of the articles. In actual fact, only a few really dealt with subjects of a technical nature. Even if paragraph 6 was deleted, governments would still send their comments on all the relevant articles, and clarify any technical points that might arise in connexion with some of them.

* The numbers within brackets indicate the paragraph numbers in the "Report" of the Commission.

[1] In document A/CN.4/L.59/Add.2, para. 5 read as follows: ". . . before they are adopted on second reading at its eighth session."

[2] In document A/CN.4/L.59/Add.2, para. 6 read as follows: "In view of the technical nature of the subjects governed by these articles, the Commission expresses the hope that governments will provide clarifications of technical points calculated to simplify its task."

5. Mr. FRANÇOIS (Rapporteur) said that paragraph 6 referred only to those articles concerning the breadth of the territorial sea, bays, groups of islands and the delimitation of the territorial sea at the mouths of rivers —namely, the articles referred to in paragraph 5. A specific reference to those subjects might be made in paragraph 5, so that its scope would be clearly limited to them.

6. He recalled that the reference to the need for information from governments on technical points had been inserted following a suggestion made by Sir Gerald Fitzmaurice that a committee of experts be set up to advise the Commission on technical issues.

7. Mr. GARCÍA AMADOR pointed out that Sir Gerald Fitzmaurice's proposal had been concerned with technical issues involved in problems of fisheries conservation, and not with the subject of the breadth of the territorial sea and other questions mentioned in paragraph 5.

8. Mr. KRYLOV supported Mr. García Amador's proposal for the deletion of paragraph 6.

Mr. García Amador's proposal was adopted.

Draft articles on the régime of the territorial sea

9. Mr. FRANÇOIS (Rapporteur) proposed deletion of the word "provisional". That term could properly only be applied to a few articles, such as that on the breadth of the territorial sea. The others had already been adopted by the Commission on second reading.

10. Mr. SALAMANCA agreed to deletion of the term "provisional" from the title of the draft articles, provided the provisional character of article 3 on the breadth of the territorial sea was made clear.

11. Mr. ZOUREK said that governments would submit their comments on all the articles, even those adopted by the Commission on second reading. He was therefore inclined to favour retention of the term "provisional".

12. Mr. KRYLOV said it was preferable to omit the term "provisional". The use of that term in the very title of the draft articles could lead to the competent government departments paying less attention than they might otherwise do to the Commission's work.

13. Mr. EDMONDS said that the footnote to article 3 made it clear that the text adopted by the Commission did not constitute a final one; that satisfied Mr. Salamanca's requirements.

14. Mr. SCELLE said that it was undesirable to describe as provisional a set of articles which represented what the Commission sincerely believed to be the expression of scientific truth.

15. Mr. GARCÍA AMADOR said paragraph 5 made the position clear, particularly with regard to the provisional character of certain articles. In view of that fact, and also of the very explicit note attached to article 3, it was totally unnecessary to weaken the draft articles by using the term "provisional" in their title.

16. Faris Bey el-KHOURI said that the articles were indeed provisional inasmuch as they did not constitute the Commission's last word on the subject of the territorial sea. But he agreed that it was undesirable to use the term "provisional" in the very title of the draft articles, as that term tended to lower the prestige of the whole draft.

17. Mr. LIANG (Secretary to the Commission) drew attention to the desirability of adopting a single term throughout the comments to the articles instead of using occasionally the term "amend" (see comment to article 2) and sometimes the term "change" (see comment to article 1).

18. The comments in question were indeed too laconic, and a statement such as "The change does not affect the substance of the article", which appeared by way of a comment under article 1, would not be easily understood by a reader other than a member of the Commission.

19. Mr. FRANÇOIS (Rapporteur) agreed to making the comments to the articles more explicit by specifying that whenever a change or an amendment was referred to, the amendment was in relation to the 1954 text.

The Commission agreed, by 11 votes to none, with 1 abstention, to delete the term "provisional" from the title of the draft articles.

Article 1 : Juridical status of the territorial sea

20. Mr. KRYLOV drew attention to the necessity of making the comment more explicit in the manner just agreed to by the Rapporteur.

The comment to article 1 was adopted subject to the necessary modification.

Article 2 : Juridical status of the air space over the territorial sea and of its bed and sub-soil

21. Mr. FRANÇOIS (Rapporteur) said the comment to article 2 would be re-drafted along the same lines as the comment to article 1.

On that understanding, the comment to article 2 was adopted.

Article 3 : Breadth of the territorial sea

22. Mr. FRANÇOIS (Rapporteur) said that in the English text the sixth sentence of the third paragraph of the comment should read: "The claim to a territorial sea *up to* twelve miles..." (instead of *over* twelve miles).

23. Mr. HSU proposed that the third sentence of the third paragraph of the comment be amended to read: "This view was not supported by the majority of the members of the Commission although they did not propose any other line of demarcation" instead of "... although they could not agree on the adoption of

any other line of demarcation". In the text submitted by the Rapporteur, the term "they" seemed to refer to the majority of the members of the Commission and not to the Commission itself.

24. He further proposed that the seventh sentence of the third paragraph be amended to read: "But subject to such cases, the Commission, by a vote of 7 against 6, declined to question the right of other States not to recognize..." instead of "...the Commission did not see fit to question the right of other States..."

25. Mr. EDMONDS said that the term "delimitation" should be substituted for the inaccurate one "demarcation" in the third sentence of the third paragraph.

26. With regard to the seventh sentence of the same paragraph, he did not think it at all necessary to mention the number of members who had voted in favour of and against the decision in question.

27. Mr. FRANÇOIS (Rapporteur) agreed to Mr. Edmonds' proposal to substitute the word "delimitation" for the word "demarcation". In the same sentence he proposed that the words "the Commission" be used instead of the pronoun "they" and hoped that amendment would satisfy Mr. Hsu.

28. With regard to the seventh sentence of the same paragraph, he proposed that it be amended to read "But subject to such cases, the majority of the Commission did not see fit..."

29. Mr. HSU recalled that in certain exceptional cases the Commission had noted in its report the actual votes cast for and against a resolution. The question of the breadth of the territorial sea was of such exceptional character as to justify such a reference.

30. Mr. GARCÍA AMADOR proposed that the comment to article 3 be deleted.

31. The text proposed contained a number of statements which could give rise to contradictory interpretations. According to the second paragraph, the Commission wished to state explicitly that in its opinion extensions of the territorial sea beyond twelve miles were contrary to international law. Yet the third paragraph suggested that the Commission had not taken a decision on the actual extent of the territorial sea. The fourth paragraph contained a different idea altogether when it stated: "With regard to the zone between the three and the twelve-mile limits, the Commission is not at present in a position to formulate any resolution."

Finally, it was suggested in the fourth sentence of the same paragraph that a diplomatic conference be entrusted with the task of harmonizing the different views on the breadth of the territorial sea. That suggestion was not based on any decision by the Commission.

32. The Commission had not been able to adopt a final text for article 3 and it was impossible to draft a satisfactory comment to the text which had been provisionally inserted. The best course was to delete the comment and to leave in its place simply the note explaining that before drafting the final text of an article on the breadth of the territorial sea, the Commission wished to have the comments of governments, particularly on paragraph 3 of the text provisionally inserted.

33. Sir Gerald FITZMAURICE, with reference to Mr. Hsu's proposals, made the following two suggestions:

(i) That the third sentence of the third paragraph of the comment be amended to read: "This view was not supported by the majority of the members of the Commission, although the Commission did not reach agreement on the adoption of any other line of delimitation."

(ii) That the words "by a small majority" be inserted in the seventh sentence of the third paragraph after the words "But subject to such cases, the Commission".

34. He did not agree with Mr. García Amador's proposal to delete the comment. The article on the breadth of the territorial sea was an extremely important one and a comment thereto was necessary. Governments would expect an explanatory comment from the Commission on the vital question of the breadth of the territorial sea.

35. There was no contradiction between the various paragraphs of the proposed text. The second paragraph dealt solely with the question of extensions beyond twelve miles—which were declared contrary to international law. The third paragraph dealt exclusively with claims to a territorial sea of more than three, but less than twelve, miles: it was only with regard to such claims that it was stated that the Commission had taken no decision.

36. Nor was there any contradiction between the third and fourth paragraphs. The third stated that a claim to a territorial sea of more than three miles (but less than twelve miles) could in certain circumstances be made by the coastal State, but that other States were not obliged to recognize such extensions. The fourth paragraph quite correctly said that the Commission was not in a position to formulate any solution with regard to the zone between the three- and the twelve-mile limits.

37. Mr. HSU accepted the amendments which Sir Gerald Fitzmaurice had suggested to the third and seventh sentences of the third paragraph, and in favour of which he withdrew his own.

38. Mr. SALAMANCA said that the third paragraph of the comment as drafted by the Rapporteur set out very clearly the opinion of those members who favoured the three-mile rule, but did not adequately reflect the contrary view, which was held by so many of the Commission's members.

39. The second sentence of the second paragraph of the comment, which stated that the extension of the territorial sea beyond twelve miles was contrary to international law, did not reflect the decision of the Com-

mission. He therefore proposed that that sentence be deleted.

40. Mr. FRANÇOIS (Rapporteur) said that the third paragraph referred to the three-mile rule as being advocated by some members of the Commission only; the paragraph went on to state that that view "was not supported by the majority of the members of the Commission". Nothing could be more satisfactory to the opponents of the three-mile rule.

41. With regard to the second question raised by Mr. Salamanca, he pointed out that paragraph 2 of the text voted by the Commission clearly stated:

> "The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles."

42. He could not agree to Mr. García Amador's proposal to delete the comment to article 3. The provisional character of the text adopted did not make an explanatory comment any less necessary, particularly in view of the fact that it had already given rise to divergent interpretations, both within and without the Commission.

43. Nor could he agree that the last two sentences of the third paragraph of the comment contradicted the statement that the Commission had not adopted the three-mile rule. It was quite common to acknowledge to a State a right in international law, while recognizing the right of other States not to acknowledge the first State's claims.

44. Mr. SANDSTRÖM agreed with the Rapporteur on the necessity for a comment. The various statements made in the comment contained no contradictions.

45. He suggested two amendments to the English text which would bring it nearer to the meaning of the French:

(i) In the second sentence of the third paragraph, to substitute the words "applicable to all States" for the words "binding on all States";

(ii) In the fourth sentence of the same paragraph, to substitute the word "characterized" for the word "regarded".

46. Mr. FRANÇOIS (Rapporteur) accepted Mr. Sandström's amendments.

47. Mr. KRYLOV said it was impossible to omit the comment.

48. He agreed with Sir Gerald Fitzmaurice's proposal to qualify by means of the words "by a small majority" the statement that the Commission did not see fit to question the rights of States other than the coastal State not to recognize an extension of the territorial sea beyond the three-mile limit.

49. Mr. ZOUREK agreed with Mr. Salamanca that the views of members who opposed the three-mile rule had not been given much prominence. The comment should be amplified in that respect so as to make it clear that several members had expressed the view that the twelve-mile rule was just as valid in international law as the three-mile rule. Article 20 of the Commission's Statute required comments to contain reference to divergencies and disagreements which existed in legal opinion. The various divergent viewpoints expressed in the Commission gave concrete form to such doctrinal differences.

50. The last two sentences of the third paragraph of the comment[3] were also unsatisfactory, particularly in view of the vital importance of the subject with which they were concerned.

51. Mr. SALAMANCA repeated his proposal that the second sentence in the second paragraph of the comment be omitted altogether because it was in conflict with paragraph 3 of the text inserted under article 3. In making that proposal he was not, of course, taking any stand on the substance of the question but was only anxious that the comment should accurately reflect the course of the discussion and should not belie the deliberately vague formulation of the text inserted under article 3.

52. The CHAIRMAN, speaking in his personal capacity, pointed out that the Commission had, in fact, taken a firm decision as to extensions beyond twelve miles and that, after considerable discussion, it had been finally decided to substitute the words "international law" for the words "international practice" in paragraph 2 of the text adopted.

53. Mr. SALAMANCA explained that his proposal had been prompted by the fact that to the best of his knowledge the Commission had never stated explicitly that extensions beyond twelve miles infringed the principle of the freedom of the seas and were therefore contrary to international law. His amendment, which was quite innocuous, would render the comment more accurate. In any event governments would interpret the text inserted under article 3 in their own way.

Mr. Salamanca's amendment was rejected by 4 votes to 3 with 4 abstentions.

54. Mr. GARCÍA AMADOR withdrew his proposal to delete the whole comment.

The first paragraph of the comment was adopted without change.

The second paragraph of the comment was adopted without change by 8 votes to 1 with 2 abstentions.

Sir Gerald Fitzmaurice's suggestion for substitution of the words "the Commission did not reach agreement" for the words "they could not agree" in the third sentence of the third paragraph was adopted by 8 votes to none with 4 abstentions.

55. Sir Gerald FITZMAURICE considered the fourth

[3] They read as follows: "But subject to such cases, the Commission did not see fit to question the right of other States not to recognize an extension of the territorial sea beyond the three-mile limit, since by doing so it would implicitly grant all States the right to extend the breadth of their territorial sea to twelve miles. Although some members claimed this right for States, the Commission could not accept their view."

sentence in the third paragraph to be somewhat misleading because it was followed by a statement about the cases when an extension of the territorial sea to between three and twelve miles would not be a violation of international law. He therefore proposed the insertion of the words "being in itself" after the words "is not characterized by the Commission as".

56. Mr. FRANÇOIS (Rapporteur) said that such an amendment would require some explanation in the text. He would therefore be reluctant to accept it.

57. He added that in the interests of style the word "Hence" should be deleted from the beginning of the fourth sentence.

58. Sir Gerald FITZMAURICE said that he would not press his point concerning the fourth sentence.

59. Mr. ZOUREK proposed that a new sentence be inserted reading:

> "Some members of the Commission upheld the view that the breadth of six or twelve nautical miles fixed by certain States for their territorial sea had the same juridical validity from the point of view of international law as the breadth of three miles applied by other States."

60. Mr. FRANÇOIS (Rapporteur) said that he would have no objection to that addition, which was an accurate statement of fact.

61. Mr. EDMONDS said that he could not accept the amendment unless the word "claimed" were substituted for the word "fixed".

62. Mr. ZOUREK said that he could not agree to such a change, which would entirely alter the purport of his amendment. As the amendment was designed to explain the attitude taken by certain members, they should have a decisive say about the way in which it should be drafted.

Mr. Zourek's amendment was accepted.

63. Mr. GARCÍA AMADOR, referring to the mention of historical rights in the sixth sentence of the third paragraph, pointed out that the Commission had taken no decision about historical rights as a criterion to justify extensions of the territorial sea beyond three miles and that the text referring to historical rights had been withdrawn. The criterion which the Commission had endorsed was the legitimate interests of States.

64. Sir Gerald FITZMAURICE said that to the best of his recollection, although Faris Bey el-Khouri's amendment, which had spoken of "national necessities" had been adopted, the amended text as a whole had finally been rejected[4] and it would, therefore, be untrue to say that the Commission had endorsed the highly controversial criterion to which Mr. García Amador had referred. The cases in which a claim to an extension could be justified were enumerated in the fifth sentence of the third paragraph.

[4] 314th meeting, para. 100.

65. Mr. SANDSTRÖM did not think that there was any need to modify the sixth sentence in the third paragraph since extensions of the territorial sea on the basis of historical rights had never been contested in the Commission.

66. Mr. GARCÍA AMADOR pointed out that in fact the Commission had taken no decision, whether explicit or implicit, about the validity of historical rights in that domain. He was not objecting to the criterion itself, but to the inaccurate account of the Commission's proceedings.

67. Mr. FRANÇOIS (Rapporteur) said that the Commission's general rapporteurs would be unnecessarily restricted if they were not allowed to record agreement on certain issues even when it had not been expressed by a formal vote.

68. Mr. GARCÍA AMADOR said that he was aware of the need to give the General Rapporteur some latitude but other members of the Commission might have their own ideas about the points which should be brought out in the report and in the present instance he wondered what the reaction would be of those governments which claimed a wider belt than three miles on other than historical grounds. He personally proposed to abstain on the whole paragraph, but hoped that the Rapporteur would agree either to delete the sentence in question or to amend it.

Sir Gerald Fitzmaurice's suggestion for insertion of the words "by a small majority" after the words "But subject so such cases, the Commission" in the seventh sentence was adopted.

The third paragraph of the comment as amended was adopted by 9 votes to none, with 3 abstentions.

69. Mr. GARCÍA AMADOR considered the fourth sentence in the fourth paragraph to be misleading since the Commission had made no recommendation concerning the convening of a diplomatic conference, a recommendation which could only be put forward after careful study of all the implications.

70. Mr. FRANÇOIS (Rapporteur) observed that the idea had been mooted in the discussion and appeared to have won general approval.

71. Mr. SALAMANCA agreed with Mr. François.

The fourth paragraph of the comment was adopted without change by 8 votes to none, with 4 abstentions.

The fifth paragraph of the comment was adopted by 11 votes to none, with 1 abstention.

Article 4: Normal base line

72. Mr. KRYLOV suggested that the last sentence of the comment was unnecessary. It would be enough to say that the Commission had deleted the final sentence of the article adopted at the previous session.

73. Mr. FRANÇOIS (Rapporteur) pointed out that it was true that the Commission had suppressed the final sentence of the article because it might be misleading and also because it was of no great importance. He

would, however, be prepared to meet Mr. Krylov's point by changing the last sentence of the comment to read "The Commission therefore decided to delete it" instead of "Since it did not attach much importance to this provision, the Commission deleted it".

The comment to article 4 was adopted as amended.

Article 5: Straight base lines

74. Mr. KRYLOV suggested that it was unnecessary to refer in the comment to paragraph 2 of the original text of the article since it had now been deleted. He particularly disliked the second sentence in the second paragraph of the comment which seemed to criticize the judgement of the International Court in the Fisheries Case.[5]

75. Mr. FRANÇOIS (Rapporteur) pointed out that the suppression of paragraph 2 in the original text of the article on straight base lines had given rise to very considerable discussion and criticism which must be somehow reflected in the comment.

76. He did not feel that there was any implied criticism of the Court, which had not enunciated a general rule about base lines but had simply rendered a decision in a special case.

77. Mr. KRYLOV withdrew his objection in the light of Mr. François' arguments.

78. Sir Gerald FITZMAURICE suggested that Mr. Krylov might be given satisfaction by amending the second sentence in the second paragraph of the comment so as to show that it expressed the view only of certain members of the Commission.[6]

It was so agreed.

The comment to article 5 was adopted as amended.

Article 6: Outer limit of the territorial sea

79. Mr. FRANÇOIS (Rapporteur) pointed out that as the text of the article had been left unchanged, it was unnecessary to insert a comment to it.

Article 7: Bays

80. Mr. KRYLOV suggested that the quotation from the report of Sub-Committee II of the 1930 Conference for the Cofification of International Law was somewhat extensive and perhaps a little out of proportion to the length of the remainder of the comment. He suggested that it be replaced by a brief summary.

81. Mr. FRANÇOIS (Rapporteur)[1] agreeing with Mr. Krylov, explained that he had inserted the passage verbatim because it seemed to him an excellent statement which could not be improved upon. He would, however, be prepared to delete the whole paragraph.

82. Mr. ZOUREK, referring to the last paragraph of the comment, said that as all governments might not submit comments on the article it would be useful if the Secretariat could prepare a survey of the present regulations of individual States in time for the next session.

83. Mr. GARCÍA AMADOR said that the comment should make some mention of the view held by certain members that there should be no limitation in terms of length on the closing line of bays. The attention of governments should also be drawn to the Court's categorical rejection of the ten-mile limit as a rule of international law.

Further discussion on the comment to article 7 was deferred.

Statement by the chairman

84. The CHAIRMAN expressed his great regret at having to leave before the end of the session. He did so with a quiet conscience knowing that his duties would be admirably carried out by the First Vice-Chairman.

85. The Commission had again done good work, having dealt with the régime of the high seas, the conservation of the living resources of the sea, the régime of the territorial sea and its breadth, which was a separate problem in itself. The draft articles on the conservation of the living resources of the sea were of great practical importance and had been adopted by a considerable majority. He hoped that when the final text was submitted to the General Assembly it would have a favourable reception. Sir Gerald Fitzmaurice had made a distinguished contribution to the Commission's work and he looked forward to the other new members finding it possible to attend the next session.

86. In conclusion, he thanked the two Vice-Presidents, the General and Special Rapporteur, the Secretary and members of the Secretariat for their help and support.

87. Mr. EDMONDS, extending the Commission's good wishes to the Chairman, expressed appreciation of the way in which he had conducted the often difficult and arduous discussions.

88. Mr. KRYLOV said that the Commission had been fortunate in having so eminent and able a Chairman, who had done much to advance its work. He had been proud to serve under Mr. Spiropoulos and looked forward to the day when they would again be working together.

89. The CHAIRMAN thanked the Vice-Chairman and Mr. Edmonds for their kind remarks.

The meeting rose at 1.10 p.m.

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[5] *I.C.J. Reports 1951.*

[6] Instead of "Against this it might be contended that the Commission had drafted . . ."

329th MEETING

Thursday, 7 July 1955, at 10 a.m.

CONTENTS

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman of the Commission

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. Carlos SALAMANCA, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jaroslav ZOUREK.

Secretariat: Mr. LIANG, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1-3) (*resumed from the 328th meeting*)

CHAPTER III: RÉGIME OF THE TERRITORIAL SEA A/CN.4/L.59/Add.2) (*resumed from the 328th meeting*)

DRAFT ARTICLES ON THE RÉGIME OF THE TERRITORIAL SEA (*resumed from the 328th meeting*)

Article 7: (resumed from the 328th meeting)

1. Sir Gerald FITZMAURICE said that he would not have opposed deletion of the fourth paragraph of the comment, although it contained a very clear statement on bays by Sub-Committee II of the 1930 Conference for the Codification of International Law,[1] but if Mr. García Amador's subsequent proposal to make some reference to the statement of the International Court of Justice concerning the ten-mile limit for the closing line of a bay were adopted, the passage quoted in the fourth paragraph should be retained, or at least summarized. He took that view because, as he had already pointed out during the discussion, the Court's pronouncement had been in the nature of an *obiter dictum* since the length of closing lines had never been an issue in the Fisheries Case.[2] Moreover, the pronouncement had not been accompanied by any explanation which might lend it authority. At the 1930 Codification Conference there had been a very considerable measure of agreement between States on a maximum limit of ten miles for the closing line of bays. Indeed, some States had not even been prepared to go that far, except in the case of historic bays. The position had not materially changed since that date and as the whole question was still very much in doubt, some mention of the stand adopted at the Codification Conference was essential if there was to be a reference to the statement made by the Court.

2. Mr. FRANÇOIS (Rapporteur) wondered whether Mr. García Amador might be prepared to withdraw his proposal in the light of Sir Gerald Fitzmaurice's remarks. The passage quoted in the fourth paragraph could then be briefly summarized.

3. Mr. GARCÍA AMADOR wished to take the opportunity of renewing his regret at the way in which his intentions in submitting an alternative text to the original draft of article 7 had been misinterpreted. In taking over certain elements contained in the conclusions put forward by the United Kingdom in the Fisheries Case, he had been guided solely by the desire to be consistent with existing international law. He had not taken wording from the judgement itself because the Court had not in fact put forward any definite proposition on the subject and had simply stated that the ten-mile limit had not acquired the authority of a rule of international law. The Commission was bound to pay due regard to such authoritative sources of international law as the judgements of the Court. Moreover, in the present instance, the Court's judgement was of very much more recent date than the conclusions reached by the Codification Conference. Though the Court had in fact applied very imprecise criteria, it had allowed the drawing of closing lines between points separated by a considerably greater distance than ten miles.

4. As he did not wish to provoke a lengthy discussion, he would not press his proposal, though he believed that the comment should make clear that the stand taken at the Codification Conference had now been superseded.

5. Sir Gerald FITZMAURICE still felt that the passages deriving from the United Kingdom's conclusions in the Fisheries Case which Mr. García Amador had inserted in his text for article 7 were altogether misplaced, because the conclusions in question had been put forward for entirely different reasons.

6. Mr. FRANÇOIS (Rapporteur) proposed that the fourth paragraph of the comment be deleted altogether and that no mention be made of the Court's judgement in the Fisheries Case.

It was so agreed.

7. Mr. HSU proposed deletion of the words "not only because it denies the existence of a relationship between the width of the territorial sea and the length of the

[1] The text of paragraph 4 was identical to the observations contained in the report of Sub-Committee II under the heading "Bays". League of Nations publication, *V.Legal, 1930.V.14* (document C.351.M.145.1930.V), pp. 131–132.

[2] *I.C.J. Reports 1951.*

closing line" in the second sentence of the sixth paragraph, because it had already been made clear in the preceding paragraph that some members of the Commission formally denied any such relationship. There was no need to give undue emphasis to that point by repetition.

8. Mr. FRANÇOIS (Rapporteur) accepted Mr. HSU's amendment.

The comment to article 7 was adopted, as amended.

Article 8: Ports

9. Mr. FRANÇOIS (Rapporteur) pointed out that as the text of article 8 remained unchanged, no comment thereto was required.

Article 9: Roadsteads

The comment to article 9 was adopted.

Article 10: Islands

10. Mr. GARCÍA AMADOR proposed deletion of the words "at least" after the words "to abandon" in the third sentence of the second paragraph of the comment and substitution of the words "may be applicable" for the words "will sometimes apply" in the last sentence. The purpose of his second amendment was to eliminate any element of uncertainty in the comment about the applicability of the article.

Mr. García Amador's amendments were adopted.
The comment to article 10 was adopted, as amended.

Article 11: Drying rocks and shoals

11. Mr. ZOUREK suggested that it might be advisable to explain in the comment that the words "which are wholly or partly within the territorial sea" referred both to drying rocks and drying shoals.

12. Mr. EDMONDS suggested that it was not appropriate to talk of "amendments" to the draft articles adopted the previous year; the process had been rather one of revision.

13. Mr. FRANÇOIS (Rapporteur) said that he would be prepared to substitute the word "modifications" for the word "amendments" in the comment to article 11 and throughout the text.

On this understanding, and subject to the addition suggested by Mr. Zourek, the comment to article 11 was adopted.

Article 12: Delimitation of the territorial sea in straits

14. Mr. FRANÇOIS (Rapporteur) pointed out that as article 12 was also unchanged, no comment thereto was again required.

Article 13: Delimitation of the territorial sea at the mouth of a river

15. The CHAIRMAN suggested in the interests of clarity that the words "next session" be substituted for the words "second reading" at the end of the comment to article 13.

It was so agreed.

The comment to article 13 was adopted as amended.

Article 14: Delimitation of the territorial sea of two States, the coasts of which are opposite each other

The comment to article 14 was adopted.

Article 15: Delimitation of the territorial sea of two adjacent States

The comment to article 15 was adopted.

Introductory comment to articles 16-26

16. Mr. LIANG (Secretary to the Commission) suggested that the words "in the former draft" be inserted before the words "method of grouping" in the first paragraph.

It was so agreed.

The introductory comment to articles 16-26 was adopted as amended.

Article 16: Meaning of the right of innocent passage

17. Mr. ZOUREK pointed out that Mr. Sandström's amendment whereby paragraph 3 of article 16 was to read: "Passage is innocent so long as the vessel does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules or to other rules of international law", and which had been adopted at the 324th meeting,[3] had not been incorporated in the final text.

18. Mr. SANDSTRÖM said that although no formal vote on his amendment had been taken the Chairman, as was his frequent practice, had interpreted the absence of any objection as approval.

19. Mr. SALAMANCA said that according to his recollection the Commission's intention had been to refer Mr. Sandström's amendment, together with certain others, to the Drafting Committee for possible incorporation in a revised text. Certainly, Mr. Sandström's amendment had not been discussed at length.

20. The CHAIRMAN, speaking in his personal capacity, said that he had gained the impression that Mr. Sandström's text had met with general support; the Special Rapporteur had specifically pointed out that it met Mr. Zourek's criticism of article 19 on the ground that that article failed to safeguard the security interests of the coastal State. He feared that the failure to incorporate Mr. Sandström's amendment was due to an oversight on the part of the Drafting Committee.

21. Mr. FRANÇOIS (Rapporteur) said that he did not remember the amendment having been referred to the Drafting Committee but would personally have no objection to it.

22. Mr. SALAMANCA expressed a preference for the present text of paragraph 3[4] because Mr. Sandström's wording would require the coastal State to interpret the rules of international law and because of the impreci-

[3] 324th meeting, paras. 100–102.

sion of the expression "other rules of international law". Surely the Commission's main preoccupation had been to protect the right of innocent passage, and if it wished to substitute for paragraph 3 something on more general lines, as proposed by Mr. Sandström, that would be more than a mere drafting change.

23. Mr. ZOUREK did not think there could be any doubt that the Commission had adopted Mr. Sandström's amendment at the 324th meeting.

24. The CHAIRMAN ruled that Mr. Sandström's amendment to paragraph 3 should be incorporated in article 16, in accordance with the decision taken at the 324th meeting. In view of Mr. Salamanca's remarks, however, he would put his ruling to the vote.

The Chairman's ruling was upheld by 9 votes in favour.

The comment to article 16 was adopted.

Article 17 : Duties of the coastal State

The comment to article 17 was adopted.

Article 18 : Rights of protection of the coastal State

The comment to article 18 was adopted.

Article 19 : Duties of foreign vessels during their passage

25. Mr. EDMONDS felt that the last part of the comment was drafted in a misleading manner.

26. Mr. FRANÇOIS (Rapporteur) proposed that Mr. Edmonds' point be met by the substitution of the words "the rules concerning" for the words "ban on conducting".

It was so agreed.

The comment to article 19 was adopted as amended.

Article 20 : Charges to be levied upon foreign vessels

27. Mr. FRANÇOIS (Rapporteur) pointed out that as article 20 remained unchanged, no comment was necessary to that article either.

Article 21 : Arrest on board a foreign vessel

The comment to article 21 was adopted.

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

The comment to article 22 was adopted.

Article 23 : Government vessels operated for commercial purposes

28. Mr. FRANÇOIS (Rapporteur) pointed out that no comment was required to article 23, which also remained unchanged.

Article 24 : Government vessels operated for non-commercial purposes.

The comment to article 24 was adopted.

Article 25 : Passage

29. Mr. FRANÇOIS (Rapporteur) said that the word "subject" should be inserted after the words "the territorial sea" in the first sentence of the English text of the comment to article 25.

30. Mr. ZOUREK considered that the last paragraph of the comment should be deleted because some States might adopt general regulations concerning the right of passage once and for all whereas others might follow another system of granting authorizations.

31. Sir Gerald FITZMAURICE hoped that the last paragraph of the comment would be retained because it would go far towards making article 25, and particularly paragraph 1, more acceptable to those States which did not consider that the passage of warships should be subject to prior authorization. Their opposition was not due to their wish to deny to coastal States the right to require such authorization but to their belief that such a provision might be interpreted to mean that no warship cold traverse even a short distance of territorial sea without having gone through the long and vexatious process of seeking authorization. Naturally the coastal State was always free to require special authorization in a particular case but the whole article would be less unpalatable to certain States if a general authorization were the normal practice.

32. The CHAIRMAN, speaking in his personal capacity, considered that the paragraph could be retained because it obviously expressed the view of the majority.

33. Mr. ZOUREK contended that the paragraph weakened the force of the article. If not deleted it should at least be modified so as to indicate that the view therein expressed was only held by some members of the Commission.

34. The CHAIRMAN pointed out that the words "the Commission takes the view" and similar passages elsewhere in the report referred to the majority of members.

35. Mr. FRANÇOIS (Rapporteur) agreed with the Chairman but pointed out that in other parts of the commentary the words "the majority of members" had been used. In the particular case under discussion, however, the majority had been so considerable that it seemed appropriate to refer to the Commission as such. However, Mr. Zourek's point might perhaps be met by substituting the words "expresses the hope" for the words "takes the view".

36. Mr. ZOUREK said that he would be satisfied with that amendment.

37. Faris Bey el-KHOURI was opposed to any mention of a majority because it implied that, where the report referred simply to "the Commission", decisions had been unanimous.

38. Mr. SCELLE wished to record his regret that the Commission had not accepted his concept of innocent passage as passage which was innocent not only as far

[4] It read as follows: "Passage is innocent so long as the vessel uses the territorial sea without committing any act contrary to the present rules."

as the coastal State was concerned but also from the point of view of international law. He did not wish to press his point of view too emphatically because the interests of other States had not been entirely overlooked in articles 16 to 26 but nevertheless felt it necessary to point out that to define innocent passage purely in terms of its relationship to the coastal State was an unduly narrow approach.

The comment to article 25 was adopted as amended by the General Rapporteur.

Article 26 : Non-observance of the regulations

39. Mr. FRANÇOIS (Rapporteur) said that the opening words of the comment to article 26 should be corrected to read: "Paragraph 1 of the article adopted at the previous session has become superfluous", instead of "Paragraph 1 of this article is superfluous".

With that correction, the comment to article 26 was adopted.

40. The CHAIRMAN called for a vote on Chapter III as a whole and as amended.

41. Mr. EDMONDS said he would vote for the chapter with a reservation which he would express when the report as a whole was voted.

42. Sir Gerald FITZMAURICE said he had also reservations to make when the report as a whole came to be voted.

43. Mr. ZOUREK also gave notice of his intention to put reservations on record.

44. The CHAIRMAN said that the vote on Chapter III as a whole would be taken on the understanding that members wishing to put their reservations on record would do so at the next meeting.

45. The Commission would deal beforehand, *inter alia*, with the question of dissenting opinions.

On that understanding, Chapter III of the draft report was adopted unanimously, as amended.

CHAPTER II: RÉGIME OF THE HIGH SEAS (A/CN.4/L.59/Add.1) (*resumed from the 327th meeting*)

DRAFT ARTICLES CONCERNING THE HIGH SEAS (*resumed from the 327th meeting*)

Article 2 : Freedom of the high seas (resumed from the 326th meeting)

46. The CHAIRMAN invited the Commission to consider the addition to the comment on article 2 proposed by the Rapporteur in order to give satisfaction to Mr. Scelle.[5] The new text, which was to follow the fourth sentence of the comment, read as follows:

"Freedom to fly over the high seas is mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea.The Commission had refrained from formulating rules on air navigation, however, since the task it set itself for this phase of its work is confined to the codification of maritime law proper.

"The list of freedoms of the high seas contained in this article is not restrictive; the Commission has merely specified the four main freedoms. It is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein. It is evident that the latter freedoms can only be exercised in the high seas covering a continental shelf subject to any rights over that shelf which the coastal State can invoke. The Commission did not study this problem in detail at the present session."

47. Mr. SCELLE declared himself satisfied with the addition proposed by the Rapporteur.

48. Mr. HSU believed that the Commission should be more noncommittal in the latter part of the first sentence in the second paragraph of the proposed addition, so as not to over-emphasize the four freedoms listed in article 2.

49. Mr. FRANÇOIS (Rapporteur) believed it was correct to refer to "the four main freedoms" in view of the content of article 2.

50. Mr. SANDSTRÖM doubted whether it would be advisable to retain the penultimate sentence in the second paragraph of the text proposed, since that sentence spoke only of safeguarding the rights of the coastal State over the continental shelf and did not mention other rights which might be exercised on the high seas.

51. Mr. LIANG (Secretary to the Commission) wondered whether the last two sentences of the text might be deleted, since they did not appear to have any close connexion with the rest.

52. Mr. FRANÇOIS (Rapporteur) felt that the last sentence at any rate should be retained.

53. Mr. SCELLE agreed.

54. Mr. SALAMANCA said that he would not favour the deletion of the last two sentences since the text would then be inconsistent with the Commission's decisions on the continental shelf.[6] He therefore supported the text as proposed by the Rapporteur.

55. Mr. ZOUREK proposed deletion of the words "or exploit" in the second sentence of the second paragraph because the question of exploitation of the subsoil of the high seas had not been discussed at the present session and furthermore no such right existed in international law.

56. Mr. SCELLE said that he knew of no rule prohibiting the exploration and the exploitation, where possible, of the subsoil of the high seas. Such exploration

[5] 326th meeting, paras. 32–52.

[6] "Report of the International Law Commission covering the work of its fifth session" (A/2456), paras. 64–91, in *Yearbook of the International Law Commission, 1953*, vol. II.

and exploitation were simply not yet possible, but in view of technical progress it was improbable that they would remain so. The text seemed, therefore, perfectly acceptable.

57. Mr. ZOUREK maintained that it was premature to include such a statement when the question had never been discussed.

58. Sir Gerald FITZMAURICE endorsed Mr. Scelle's remarks concerning the point raised by Mr. Zourek. An additional reason for retaining the words "or exploit" was that the greater part of the continental shelf lay under the high seas.

59. Expressing sympathy with the objection made by Mr. Hsu, he suggested that it be met by re-drafting the latter part of the first sentence in the second paragraph to read: "the Commission has merely specified four of the main freedoms."

60. Mr. FRANÇOIS (Rapporteur) accepted Sir Gerald Fitzmaurice's amendment.

61. He could not agree on the other hand to deletion of the words "or exploit" and hoped that the whole of the second paragraph would be accepted unchanged.

62. Mr. ZOUREK withdrew his amendment, stating that he would vote against the whole text.

The Rapporteur's text, as amended by Sir Gerald Fitzmaurice, was adopted by 9 votes to 1 with 1 abstention.

Proposed addition to the introduction

63. Mr. FRANÇOIS (Rapporteur) proposed that the following text be added at the end of the introduction to Chapter II:

"In accordance with General Assembly resolution 821 (IX) of 17 December 1954, the Commission had before it the records and other documents of the meetings of the *ad hoc* Political Committee at which the complaint of violation of the freedom of navigation in the China seas was considered. The documents referred to in the above-mentioned General Assembly resolution were issued to the members of the Commission. The Commission also had before it a memorandum concerning freedom of navigation of the high seas, submitted on behalf of the Government of the People's Republic of Poland by Mr. Jan Balicki, official Polish observer at the seventh session of the Commission. After an exchange of views, the Commission decided that it was not competent to examine the facts set forth in the documents transmitted by the General Assembly and referred to in the memorandum submitted on behalf of the Government of the People's Republic of Poland (A/CN.4/L.53).

"On the general question whether acts committed by warships can be regarded as acts of piracy, the Commission has stated its position in article 14 of the present draft."

64. Mr. Zourek had proposed the first paragraph of that addition. He (Mr. François), however, had added the second paragraph because he felt that a reference was necessary to the fact that the Commission had dealt with the general question as to whether acts committed by warships could be regarded as acts of piracy; in doing so, the Commission had taken into consideration the facts adduced in the Polish memorandum.

65. Mr. SANDSTRÖM said it was perhaps not essential to insert a reference to the matter in the Commission's report.

66. Mr. FRANÇOIS (Rapporteur) said that the Commission had taken a formal decision on the question; that decision had gone on record,[7] and it was therefore necessary to include a reference in the report to it.

67. Mr. ZOUREK said the discussion on the Polish memorandum was very closely bound up with the discussion on the general question whether warships could commit acts of piracy.

68. Mr. HSU proposed that the word "charges" be substituted for the word "facts" in the fourth sentence of the first paragraph. To speak of "facts set forth" in the Polish memorandum would imply that those facts were not disputed as such.

69. Mr. SANDSTRÖM said that the term "facts" appeared in the relevant summary record.

70. The CHAIRMAN pointed out that the record was only a provisional one and that, in any case, it was always open to the Commission to adopt a different wording.

71. Mr. ZOUREK said he could not accept Mr. Hsu's proposal.

The Commission, by 6 votes to 2, with 2 abstentions, adopted Mr. Hsu's proposal to substitute the word "charges" for "facts" in the fourth sentence of the first paragraph of the proposed addition.

72. Mr. HSU also proposed that the beginning of the second paragraph of the proposed addition be amended to read:

"On the general question whether warships can commit acts of piracy".

73. Mr. FRANÇOIS (Rapporteur) accepted Mr. Hsu's proposal.

The proposed addition to the introduction to Chapter II was adopted as amended.[8]

CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.59/Add.3)

74. Mr. FRANÇOIS (Rapporteur) said that Chapter IV was mainly the work of the Secretariat; the Secretary to the Commission would introduce the discussion on its various paragraphs.

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[7] 290th meeting, *ad* para. 25.

[8] It became para. 16 of the "Report" of the Commission.

I. *Amendments to the Statute of the Commission Transfer of the Commission's headquarters from New York to Geneva (paragraphs 1 - 2)*

Paragraph 1 [25] *

75. Mr. LIANG (Secretary to the Commission) said that the last sentence of the paragraph before the quotation should read: "The text of the amended article *would be* as follows" instead of: "... *is* as follows".

Paragraph 1 was adopted as amended.

Paragraph 2 [26]

76. Mr. LIANG (Secretary to the Commission) said that in the fourth line the words "called upon" should be substituted for the inadequate term "required".

77. The Secretariat would welcome any other suggestions for improving the text of paragraph 2.

78. Mr. EDMONDS said that the description of New York as one of the great political centres of the world was not altogether satisfactory. Perhaps a better word would be "governmental centre".

79. After further discussion, the CHAIRMAN suggested that the best course would be to delete the phrase "one of the great political centres of the world", which was in any case redundant.

80. Mr. LIANG (Secretary to the Commission) said that the Chairman's suggestion was all the more appropriate in that the sentence already contained reference to "the political contingencies of the moment".

The Chairman's suggestion was adopted.

Paragraph 2 was adopted as amended.

Term of office of members of the Commission (paragraph 3 [27])

81. Mr. LIANG (Secretary to the Commission) said that in the same way as in paragraph 1 the last sentence of paragraph 3 preceding the quotation should read: "the text of the amended article *would be* as follows" instead of: "... *is* as follows."

82. Sir Gerald FITZMAURICE said it was desirable to give the reason why the Commission suggested that its members be elected for five years—namely, that experience had shown that a three-year period was not sufficient to enable a special rapporteur to complete his work on a given subject.

83. Mr. FRANÇOIS (Rapporteur) agreed to the inclusion of a sentence to that effect.

84. Mr. LIANG (Secretary to the Commission) suggested that perhaps a better way of expressing the reason for the recommendation regarding a five-year period would be to say that such a period would be beneficial to the continuity of the work of the Commission, particularly as concerned the preparation of reports and their submission to the Commission by the special rapporteur in each case.

Paragraph 3 was adopted as amended and subject to the inclusion of a sentence along the lines suggested by the Secretary to the Commission.

II. Date and place of the eighth session (paragraphs 4-5)

Paragraph 4 [29]

Paragraph 4 was adopted without comment.

Paragraph 5 [30]

85. Mr. LIANG (Secretary to the Commission) suggested that paragraph 5 be amended to read:

"5. With regard to the duration of the session, the Commission wishes to emphasise that ten weeks is the indispensable minimum period it requires to carry out the work entrusted to it under General Assembly resolution 899 (IX) [namely, to complete its study of the regime of the high seas, the regime of territorial waters and of related problems and submit its final report in time for the General Assembly to consider them as a whole, in accordance with resolution 798 (VII), at its eleventh session in 1956;] and to begin consideration of the items of its agenda held over from this session." [9]

The above text of paragraph 5 was adopted.

III. Organization of the Commission's future work (paragraph 6 [31])

86. Mr. LIANG (Secretary to the Commisson) pointed out a number of minor typographical errors in the text of paragraph 6 as appearing in document A/CN.4/L.59/Add.3. The correct text was:

"6. The Commission decided to begin the study of two topics: "State Responsibility" and "Consular Intercourse and Immunities".

Paragraph 6 was adopted in that form.

IV. Appointment of three special rapporteurs (paragraphs 7-9 [32-34])

Paragraphs 7 - 9 were adopted without comment.

V. Publication of documents of the International Law Commission (paragraph 10 [35])

87. The CHAIRMAN said that the Commission desired its documents to be published separately. If, however, that proved too difficult, they should be included in a Juridical Yearbook of the United Nations.

Paragraph 10 was adopted.

VI. Collaboration with the Inter-American bodies (paragraph 11 [36])

Paragraph 11 was adopted without comment.

VII. Question of stating dissenting opinions (paragraphs 12-13 [37-38])

88. Mr. LIANG (Secretary to the Commission) said that, in spite of some doubts, the question of stating

* The number within brackets indicates the paragraph number in the "Report" of the Commission.

[9] Drafting changes within brackets.

dissenting opinions had been included in the report as had been done on a similar occasion in the 1953 report.[10]

89. The bare statement in paragraph 13 that Mr. Zourek's proposal had been rejected was not sufficient. It was desirable to include a sentence to say that the Commission had preferred to retain its existing rule that detailed explanations of dissenting opinions should not be inserted in the report but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report.

90. That would be similar to what had been said on the subject in the 1953 report.

91. Sir Gerald FITZMAURICE approved of Mr. Liang's suggestion. In that manner, the report would indicate to some extent the reasons why the Commission had rejected Mr. Zourek's proposal; also that that rejection did not imply that there was no means of stating dissenting opinions in the report.

92. Mr. GARCÍA AMADOR said it was undesirable to make specific reference to the rejection of Mr. Zourek's proposal. It was not customary for the Commission to include in its report reference to the rejection of a particular proposal.

93. The CHAIRMAN said that the question of stating dissenting opinions had to be included in the report because it had been one of the items on the Commission's agenda.

94. He agreed with Mr. García Amador's remarks, and suggested that the words "This proposal was rejected" be deleted from paragraph 13. That paragraph would thus consist only of the statement suggested by the Secretary to the Commission.

95. Mr. SALAMANCA said that the whole of Mr. Zourek's proposal (A/CN.4/L.61) should be reproduced, and not merely the operative part.

96. Mr. ZOUREK agreed.

Paragraph 12 was adopted subject to the inclusion therein of the full text of Mr. Zourek's proposal.[11]

97. Mr. LIANG (Secretary to the Commission) suggested the following text for paragraph 13:

"13. However, the Commission reaffirmed the existing rule adopted at the third session, that detailed explanations of dissenting opinions should not be inserted in the report, but merely a statement to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report."

98. Mr. GARCÍA AMADOR formally proposed adoption of the text suggested by the Secretary.

Paragraph 13 was adopted in that form.

VIII. Representation at the General Assembly (paragraph 14 [39])

99. The CHAIRMAN said that it had not been considered appropriate to make any reference to the matters in respect of which the Commission desired its Chairman to represent it at the General Assembly.

110. Mr. SALAMANCA proposed that in the English text the words "for purposes of consultation" be substituted for the words "in a consultative capacity".

101. Mr. LIANG (Secretary to the Commission) said Mr. Salamanca's proposal corresponded to the English text adopted in previous reports. The words "in a consultative capacity" were due to a mistranslation.

102. Mr. FRANÇOIS (Rapporteur) also expressed agreement to the change.

Paragraph 14 was adopted as amended by Mr. Salamanca in the English text.

Chapter IV of the report was adopted as a whole.

Further consideration of the Commission's report was adjourned.

The meeting rose at 1.10 p.m.

330th MEETING

Friday, 8 July 1955, at 10 a.m.

CONTENTS

Chairman: Mr. S. B. KRYLOV, First Vice-Chairman of the Commission

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. Douglas L. EDMONDS, Sir Gerald FITZMAURICE, Mr. F. V. GARCÍA AMADOR, Mr. Shuhsi

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[10] "Report of the International Law Commission covering the work of its fifth session" (A/2456), para. 163, in *Yearbook of the International Law Commission, 1953*, vol. II.

[11] Original text of paras. 12–13 read as follows:

"12. The Commission considered a draft resolution submitted by Mr. Jaroslav Zourek (A/CN.4/L.61) on the question of stating dissenting opinions. The operative part of this draft reads as follows:

"Any member of the International Law Commission shall have the right to add a short statement of his dissenting opinion to any decision taken by the Commission on draft rules of international law, if the said decision does not in whole or in part express the unanimous opinion of the members of the Commission."

"13. This proposal was rejected."

Hsu, Faris Bey el-Khouri, Mr. Carlos Salamanca, Mr. A. E. F. Sandström, Mr. Georges Scelle, Mr. Jaroslav Zourek.

Secretariat: Mr. Liang, Director of Codification Division, Office of Legal Affairs, Secretary to the Commission.

Draft report of the Commission covering the work of its seventh session (A/CN.4/L.59 and Add.1-3) *(continued)*

Chapter II: Régime of the high seas (A/CN.4/L.59/Add.1) *(resumed from the 329th meeting)*

Draft articles concerning the high seas *(resumed from the 329th meeting)*

Article 14 (resumed from the 326th meeting)

1. Mr. FRANÇOIS (Rapporteur) submitted the following amended text for the second paragraph of the comment to article 14:

"With regard to point 3, the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with civil war or with acts committed by warships in the service of governments not universally recognized are too complex to make it seem necessary for the safeguarding of public order on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. The Commission was unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement endorsed a new right in the process of development."

2. He had prepared that text in order to meet a point raised by Mr. Hsu.[1] He understood, however, that Mr. Hsu was satisfied only with the first part of the proposed text and wished the remainder deleted.

3. For his part, he (Mr. François) could not agree to Mr. Hsu's proposal and submitted the whole text to the Commission.

4. Mr. HSU proposed the following text for the relevant paragraph:

"With regard to point 3, the Commission is aware that there are treaties, such as the Nyon Arrangement of 14 September 1937, which brand the sinking of merchant vessels by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private vessels. The questions arising in connexion with civil war or with acts committed by warships in the service of governments not universally recognized are too complex to make it seem necessary for the Commission to enter into them."

5. The question whether parties to a civil war constituted belligerents or not, as well as that of governments which were not universally recognized, were problems far too complex to be mentioned in the paragraph in question. They were problems which had not been discussed by the Commission, and there was no necessity to include a reference to them.

6. The Nyon Agreement did not specifically deal with either problem. Its purpose was to condemn unrestricted submarine warfare against merchantmen, as had been done by the Washington Treaty of 1922 and the London Treaty of 1930.

7. Piracy could only be committed by a warship if the crew mutinied and took over control of the ship.

8. Mr. SANDSTRÖM agreed with the text proposed by the Rapporteur. The Nyon Agreement specifically concerned the case of a civil war; there was, therefore, nothing confusing in the reference to civil war in the paragraph under discussion.

9. Sir Gerald FITZMAURICE said that Mr. Hsu's objection could be partly met if the first two sentences were separated from the rest of the text by dividing it into two paragraphs.

10. Mr. FRANÇOIS (Rapporteur) accepted Sir Gerald Fitzmaurice's suggestion.

11. The CHAIRMAN put the text proposed by Mr. Hsu to the vote.

The text proposed by Mr. Hsu was rejected by 8 votes to 2 with 1 abstention.

12. Mr. LIANG (Secretary to the Commission) suggested that the third sentence of the paragraph proposed by the Rapporteur be amended to read:

"The questions arising in connexion with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safeguarding of public order..."

That change would make the meaning of the text clearer. There was really only one problem, and not two separate problems, that of civil war and that of governments not universally recognized.

13. Mr. FRANÇOIS (Rapporteur) accepted that suggestion.

[1] 326th meeting, paras. 84–85.

14. Mr. ZOUREK proposed deletion of the penultimate sentence ("Hence the Commission feels..."), which appeared to have far too wide a scope; he recalled that in article 15 provision had been made for acts of piracy committed by a warships.

Mr. Zourek's proposal was rejected, 5 votes being cast in favour and 5 against, with 1 abstention.

The text proposed by the Rapporteur for insertion in place of the second paragraph of the comment to article 14 was adopted as amended.

15. The CHAIRMAN invited members to place their reservations on record before the report as a whole was adopted by the Commission.

16. Mr. EDMONDS requested inclusion of the following reservations in the report:

Chapter II (Régime of the high seas): A footnote to be inserted to the effect that he (Mr. Edmonds) considered articles 24-33 on fisheries a useful basis for future discussion as to proposed articles on the subject of the conservation of fisheries, but that, for the reasons stated by him in the course of the discussions, they were inadequate in several respects.

Chapter III (Régime of the territorial sea): The following footnotes to be inserted under the appropriate articles:

Article 3. "Mr. Edmonds entered a reservation to article 3 on the ground that, for the reasons explained by him at the Commission's 308th meeting (A/CN.4/SR.308), he asserts that under the traditional rule of international law, the breadth of the territorial sea is three miles."

Article 5. "Mr. Edmonds dissented from article 5 for the reasons explained by him at the Commission's 317th meeting (A/CN.4/SR.317)."

Article 7. "Mr. Edmonds dissented from article 7 for the reasons explained by him at the Commission's 318th meeting (A/CN.4/SR.318)."

Article 25. "Mr. Edmonds dissented from article 25 for the reasons explained by him at the Commission's 325th meeting (A/CN.4/SR.325)."

17. Mr. GARCÍA AMADOR pointed out that, in view of the Commission's rejection of Mr. Zourek's proposal (A/CN.4/61),[2] the previous rule was still in force whereby detailed explanations of dissenting opinions were not inserted in the report, but merely a footnote to the effect that, for reasons given in the summary records, a member was opposed to the adoption of a certain article or of a particular passage of the report.

18. In accordance with that rule, it was not permissible for members to attach to the footnotes in question any reasons: they could only refer to the reasons given by them in the summary records.

19. A more important point was that only members who had voted against a particular text, or at least abstained from voting for it, were entitled to put their dissent on record in a footnote to the general report.

20. He hoped that Mr. Edmonds would modify his proposed footnotes accordingly.

21. Mr. FRANÇOIS (Rapporteur) said that Mr. Edmonds, in describing the articles on fisheries as a useful basis for future discussion, was toning down his reservation. There did not seem, therefore, anything very objectionable in that turn of phrase.

22. Mr. ZOUREK said that under the rule in force a footnote recording dissent could only contain a reference to the summary records. A member could, however, explain his reasons for dissent at the present meeting, in which case they would appear in the summary record of the meeting.

23. The CHAIRMAN said that Mr. Edmonds' proposed footnotes did not infringe the rule at present in force in any very material way. It was undesirable that that rule should be interpreted in too strict and literal a way. He therefore ruled that the proposed footnotes could be included in the report.

24. Mr. EDMONDS recalled that, in 1954, the following statement was contained in a footnote to the Report of the Commission (A/2693):

> "Mr. Sandström declared that, in voting for the draft articles, he wished to enter a reservation in respect of the provisions of article 5 for the reasons he had stated at the 281th meeting."

25. Clearly the rule on footnotes had been interpreted by the Commission in a manner which allowed a member voting in favour of draft articles to enter a reservation in respect of the provisions of one of them.

26. With regard to Mr. García Amador's other objection, he amended his reference to the article on fisheries to read:

> "Mr. Edmonds entered a reservation to the articles on fisheries (articles 24-33) for the reasons stated by him in the course of the discussions."

27. Sir Gerald FITZMAURICE requested the following reservations to be included in the summary record of the present meeting:

In Chapter II, on the régime of the high seas, he dissented from the last section of article 22, paragraph 1, reading: "If the foreign vessel is within a zone contiguous to the territorial sea, pursuit may only be undertaken if there has been trespass against the rights for the protection of which the said zone was established." There was no right of hot pursuit in the contiguous zone; a foreign vessel could not infringe the laws of the coastal State in the contiguous zone, because the coastal State had no jurisdiction over the contiguous zone; the contiguous zone was simply an area in which the coastal State had certain limited powers;

With regard to articles 24-33 on fisheries, he wished to explain his vote in favour of them. He regarded those articles as a very useful contribution to work on the

[2] 323rd meeting, para. 53.

problem of fisheries conservation. They constituted an entirely adequate basis for future discussion, but they were still unduly weighted in favour of the coastal State. They could be interpreted in such a manner as to claim very wide powers in the matter of fisheries in the high seas for the benefit of the coastal State. With that reservation, he accepted the articles;

With regard to the articles on the régime of the territorial sea, he wished to put on record his abstention from voting on article 5. He had not voted against that article because some provision on straight base lines was necessary. Unfortunately, with the suppression of the second paragraph of the 1954 text[3] there was no longer any definition of the effect of the judgement of the International Court of Justice in the Fisheries Case.[4] Moreover, without that paragraph, article 5 no longer reflected the ruling of the International Court of Justice. The Court had not accepted economic interests peculiar to a region as a sufficient justification for adopting the straight base lines system. That system could only be adopted on the basis of valid geographical considerations; the International Court of Justice had only made reference to the economic interests of a region in connexion with the validity of certain specific base lines which were founded on geographical grounds;

He wished also to record his abstention from voting on article 7 on bays. He had not voted against it, because he believed that some limit had to be laid down for the closing line of bays, but while he would have accepted a distance of more than 10 miles, he considered the distance of 25 miles, which the Commission had adopted, unduly long;

Finally, he wished to record his dissent from article 25 on passage. As already stated in the course of the discussions, he considered that article unduly restrictive. Articles 18 and 19, which were applicable to warships as well as to every other ship, contained in them all that was necessary to protect the coastal State. It was extremely undesirable to make passage of foreign warships subject to authorization or notification;

As to the other articles on passage, he had abstained from voting on some of them and had voted in favour of the others with considerable hesitation: they were drafted somewhat restrictively and could lend themselves to an interpretation which would authorize claims by coastal States to restrict the right of passage unduly.

28. Finally, he requested the Rapporteur to include the following footnotes in the report:

Chapter II (Régime of the high seas): Sir Gerald Fitzmaurice recorded dissent from the last sentence of paragraph 1 of article 22 (hot pursuit from a contiguous zone) for the reasons given in the summary record for 8 July 1955 (330th meeting);

Chapter III (Régime of the territorial sea): Sir Gerald Fitzmaurice recorded dissent from the first sentence of paragraph 1 of article 25 (passage of warships) and abstention on article 5 (straight base lines) and article 7 (bays)—in each case for the reasons given in the summary record for 8 July 1955 (330th meeting).

29. Mr. SALAMANCA requested that a footnote be inserted in Chapter III of the report to the effect that he was opposed to article 3, and to the comment to that article with the exception of the last three sentences of the fourth paragraph of that comment, for the reasons given at the 312th and 328th meetings.

30. Mr. ZOUREK requested inclusion of the following footnotes:

Chapter II (Régime of the high seas): Mr. Zourek stated that, while voting for the draft articles on the régime of the high seas as a whole, he was opposed to articles 5, 6, 9, 31 and 33 for the reasons given in the course of the discussions. He further maintained his reservations on the subject of the definition of piracy contained in article 14; finally he was opposed to the comment to article 14.

Chapter III (Régime of the territorial sea): Mr. Zourek stated, that, while voting for the articles on the territorial sea as a whole, he did not accept, for the reasons given in the course of the discussions, article 3, the provisions concerning straits—article 12, paragraph 4, article 18, paragraph 4 and article 25, paragraph 2—article 22 and article 23, or the comments on those articles. He further maintained his reservations on article 7 on bays.

31. As explained by him in the course of the discussions on the articles in question, he did not consider them as the expression of existing international law. Article 22, on the arrest of vessels in the territorial sea, was furthermore calculated to hinder international navigation. Article 5 of the draft on the high seas did not constitute a complete text concerning the right to a flag. For the rest, he referred to the explanations already given by him at previous meetings.

32. Mr. SCELLE requested the inclusion at the beginning of Chapters II and III of the report of footnotes referring to his reservations concerning the continental shelf, the freedom of the high seas and the right of innocent passage, for the reasons indicated in the relevant summary records.

33. Mr. HSU requested that a footnote be included in the report regarding his reservations concerning the final part of the text adopted at the present meeting for inclusion in the comment to article 14 on the régime of the territorial sea.

34. The sentences in question were entirely lacking in clarity.

35. Mr. GARCÍA AMADOR requested a footnote to be inserted in Chapter III to the effect that, on the adoption of the draft articles on the territorial sea, he had formulated reservations regarding articles 3 and 7

[3] "Report of the International Law Commission covering the work of its sixth session" (A/2693), Ch. IV, in *Yearbook of the International Law Commission, 1954*, vol. II.

[4] *I.C.J. Reports 1951.*

and the comments to those articles, for the reasons given in the course of the discussions.

36. The CHAIRMAN, speaking in his capacity as a member of the Commission, requested the following reservations to be put on record:

With regard to Chapter II, on the régime of the high seas, he had abstained from voting on article 9 because he did not consider that the criterion of tonnage was a satisfactory one: the reference should have been to the great majority of maritime States. He also wished to record his reservations on article 14, on the definition of piracy, particularly with regard to the comment on that article. He had voted against article 31, because the differences between States covered by that article should, in his opinion, be submitted to a technical commission having a different composition and competence from the one laid down in the article.

With regard to Chapter III, on the régime of the territorial sea, he had voted against article 3. He had abstained from voting on article 23 and had voted against article 24 as state-owned ships should not, in his view, be treated like ships belonging to private persons. He had also abstained from voting on article 18, paragraph 4, and article 25, paragraph 2, because, in his opinion, passage through straits used for international navigation between two parts of the high seas could, in exceptional circumstances, be the subject of regulation by the coastal State.

37. Faris Bey el-KHOURI requested the insertion of a footnote under section VII of Chapter IV (Other decisions of the Commission), relating to the question of stating dissenting opinions, to the effect that he opposed not only Mr. Zourek's proposal, but even the inclusion of footnotes relating to dissenting opinions and referring to the relevant summary records, and that he did so for the reasons given at the present (330th) meeting.
38. Those reasons were that, as he had stated before, the authority of the Commission's recommendations and proposals was weakened, in the eyes of the General Assembly and of public opinion in general, by footnotes relating to dissenting opinions.

39. For his part, he had objections to a great many of the articles which had been adopted by the Commission. He was faithful, however, to his principle that a resolution, once adopted by the majority of the Commission, should receive the wholehearted support of the Commission as a whole, and that dissenting members should refrain from diminishing the prestige of the Commission's pronouncements. He therefore would not ask for any dissenting view of his to be put on record in the report, except for the statement above referred to relating to the inadvisability of inserting footnotes at all.

The Commission's draft report (A/CN.4/L.59 and Add.1 to 3) was adopted as amended.

Consular intercourse and immunities

40. Mr. ZOUREK reminded the Commission that at the 327th meeting he had undertaken to give, towards the end of the session, a brief outline of the subject on which he had been appointed Special Rapporteur.

41. Mr. SANDSTRÖM suggested that, as there was little time left to enable members to comment on Mr. Zourek's statement, it should be postponed until the following session.

42. Mr. SCELLE viewed the proposed procedure with some apprehension. Special Rapporteurs had, in the past, always enjoyed absolute freedom in preparing their reports and there was no call for them to consult the Commission before they embarked upon their work.

43. Mr. SALAMANCA pointed out that when appointing Mr. Zourek Special Rapporteur the Commission had not discussed the scope or nature of the report on consular intercourse and immunities.

44. Mr. ZOUREK said that he had only undertaken to make a brief statement in the event of the Commission completing its work on the draft report well before the end of the session. As that had proved impossible, he would be perfectly prepared to send a written statement outlining the way in which he intended to deal with the topic assigned to him, and would be grateful for comments.

Closure of the session

45. The CHAIRMAN said that he had had the greatest pleasure in working with old friends and new in the Commission.

46. On behalf of the Commission, he wished to thank Mr. François who, as Special and General Rapporteur, had worked unremittingly throughout the session. He also thanked the Secretariat for its assistance.

47. He then *declared* the seventh session of the Commission closed.

The meeting rose at 12 noon.

INDEX

ABREVIATIONS

Art., Article
Comm., Commission
Conv., Convention
Dr., Draft
GA, General Assembly
ICJ, International Court of Justice
ICL, International Law Commission
Int., International
Prov., Provisional

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